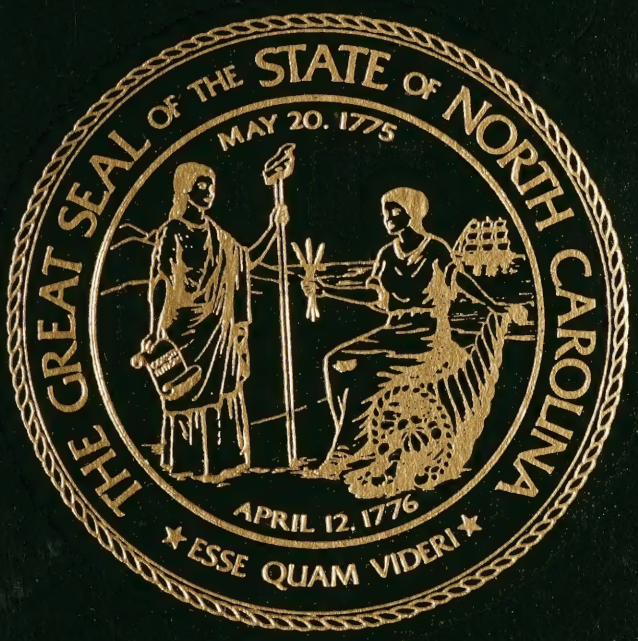
General Statutes of North Carolina

ANNOTATED



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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 13

Chapters 105A through 115B

CONTAINING GENERAL LAWS OF NORTH CAROLINA
ENACTED BY THE GENERAL ASSEMBLY

Prepared under the Supervision of
THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA
by
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Preface

This Volume contains the general laws of a permanent nature enacted by the General Assembly through the 1999 Regular Session, which are within Chapters 105A through 115B, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

A ready reference index is included in the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LEXIS Publishing, Charlottesville, Virginia.

MICHAEL F. EASLEY
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1999 Regular Session affecting Chapters 105A through 115B of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

South Eastern Reporter 2nd Series through Volume 515, p. 141.
Federal Reporter 3rd Series through Volume 175, p. 1003.
Federal Supplement 2nd Series through Volume 43, p. 268.
Federal Rules Decisions through Volume 185, p. 372.
Bankruptcy Reports through Volume 233, p. 591.
Supreme Court Reporter through Volume 119, p. 2068.
North Carolina Law Review through Volume 77, no. 4.
Wake Forest Law Review through Volume 34, no. 2.
Campbell Law Review through Volume 21, no. 2.
Duke Law Journal through Volume 48, no. 3.
North Carolina Central Law Journal through Volume 22, p. 100.
Opinions of the Attorney General.

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User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P.R. ..... Potter's Revisal (1821, 1827)
R.S. ..... Revised Statutes (1837)
R.C. ..... Revised Code (1854)
C.C.P. ..... Code of Civil Procedure (1868)
Code ..... Code (1883)
Rev. ..... Revisal of 1905
C.S. ..... Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

December 1, 1999

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1999 Replacement Code to the General Statutes of North Carolina was prepared and published by LEXIS Publishing under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

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Chapter 105A.

Setoff Debt Collection Act.

Article 1.

In General.

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Article 1.

In General.

§ 105A-1. Purposes.

The purpose of this Chapter is to establish as policy that all claimant agencies and the Department of Revenue shall cooperate in identifying debtors who owe money to the State or to a local government through their various agencies and who qualify for refunds from the Department of Revenue. It is also the intent of this Chapter that procedures be established for setting off against any refund the sum of any debt owed to the State or to a local government. Furthermore, it is the legislative intent that this Chapter be liberally construed so as to effectuate these purposes as far as legally and practically possible. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, deleted the Article I heading, which read "In General", substituted "this Chapter" for "this Article" three times, substituted "or to a local government through their various" for "through its various claimant" in the first sentence, deleted "such" preceding "refund" in the second sentence, and added "or to a local government" at the end of the second sentence.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 375.

CASE NOTES

Tax Refunds. — An individual who has paid child support according to a court order, but still owes arrears, may have his state tax refund intercepted by state agencies. Davis v. North Carolina Dep't of Human Resources, 126 N.C. App. 383, 485 S.E.2d 342 (1997), aff'd in part and rev'd in part, 349 N.C. 208, 505 S.E.2d 77 (1998).

Cited in Appeal of Willett, 306 N.C. 617, 295 S.E.2d 469 (1982).

§ 105A-2. Definitions.

The following definitions apply in this Chapter:

(1) Claimant agency. — Either of the following:

a. A State agency.

b. A local agency acting through a clearinghouse or an organization pursuant to G.S. 105A-3(b1).

(2) Debt. — Any of the following:

a. A sum owed to a claimant agency that has accrued through contract, subrogation, tort, operation of law, or any other legal theory regardless of whether there is an outstanding judgment for the sum.

b. A sum a claimant agency is authorized or required by law to collect, such as child support payments collectible under Title IV, Part D of the Social Security Act.

c. A sum owed as a result of an intentional program violation or a violation due to inadvertent household error under the Food Stamp Program enabled by Chapter 108A, Article 2, Part 5.

d. Reserved for future codification purposes.

e. A sum owed as a result of having obtained public assistance payments under any of the following programs through an intentional false statement, intentional misrepresentation, intentional failure to disclose a material fact, or inadvertent household error:

1. The Work First Program provided in Article 2 of Chapter 108A of the General Statutes.

2. The State-County Special Assistance for Adults Program enabled by Part 3 of Article 2 of Chapter 108A of the General Statutes.

3. A successor program of one of these programs.

(3) Debtor. — An individual who owes a debt.

(4) Department. — The Department of Revenue.

(5) Reserved.

(6) Local agency. — A county, to the extent it is not considered a State agency, or a municipality.

(7) Net proceeds collected. — Gross proceeds collected through setoff against a debtor's refund minus the collection assistance fee retained by the Department.

(8) Refund. — An individual's North Carolina income tax refund.

(9) State agency. — Any of the following:

a. A unit of the executive, legislative, or judicial branch of State government.

b. A county, to the extent it administers a program supervised by the Department of Health and Human Services or it operates a Child Support Enforcement Program, enabled by Chapter 110, Article 9, and Title IV, Part D of the Social Security Act. (1979, c. 801, s. 94; 1981, c. 724; 1983, c. 922, s. 21.11; 1983 (Reg. Sess., 1984), c. 1034, s. 10.2; 1985, c. 589, s. 33; c. 649, s. 6; c. 747; 1985 (Reg. Sess., 1986), c. 1014, s. 63(e), (f); 1987, c. 564, s. 18; c. 578, ss. 1, 2; c. 856, s. 12; 1989, c. 141, s. 2; c. 539, s. 1; c. 699; c. 727, s. 30; c. 770, s. 75.2; 1993 (Reg. Sess., 1994), c. 735, s. 1; 1995, c. 227, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 24.30(d); 1997-433, ss. 3.3, 11.3; 1997-443, ss. 11A.118(a), 11A.119(a), 11A.122, 12.26; 1997-490, s. 1; 1998-17, s. 1; 1998-98, s. 38(a).)

Editor's Note. — Session Laws 1987, c. 856, which deleted a reference to the Lenox Baker Children's Hospital near the end of subdivision (1)j, provided in s. 20 that ss. 1 through 19 of the act would be effective only upon agreement by Duke University to the terms of ss. 21 through 26 of the act and certification of that fact by the Secretary of the Department of Human Resources to the Governor, and that ss. 12 to 17 would then be effective on the date of the transfer. Section 20 further provided that any disputes arising out of the transfer would be resolved by the Director of the Budget. Sections 21 through 26 of the act provided

terms for the transfer of the Lenox Baker Hospital to Duke University. The letter of certification from the Secretary of the Department of Human Resources was dated October 5, 1988, but it appears that this was a typographical error and that October 5, 1987, was the correct date.

Session Laws 1996, Second Extra Session, c. 18, s. 24.30, provides that the Department of Human Resources shall immediately elect the optional Aid to Families with Dependent Children Fraud Control program pursuant to 45 C.F.R. 235.112; that this program is deemed to apply to Work First Cash Assistance, effective July 1, 1996, as well as to AFDC, pursuant to the federal waivers received by the Department on February 5, 1996; that the Department shall award incentive bonuses to counties for claims recouped; that the Department shall implement a statewide automated system to track fraud claims; and that persons charged with or suspected of AFDC fraud are not subjected to certain actions.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433. Therefore, the amendment to subdivision (1)d of this section by Session Laws 1997-433, ss. 3.3, 11.3 remains in effect.

Effect of Amendments. — Session Laws 1997-433, s. 3.3, effective October 1, 1997, deleted "arrearages" preceding "owed to an individual" in subdivision (1)d. See editor's note.

Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" throughout the section.

Session Laws 1997-443, s. 11A.119(a), effective August 28, 1997, substituted "Environment and Natural Resources" for "Environment, Health, and Natural Resources" in subdivision (1)m.

Session Laws 1997-443, s. 12.26, effective August 28, 1997, substituted "Work First Program provided in Part 2 of Article 2 of Chapter 108A of the General Statutes" for "Aid to Families with Dependent Children Program or the Aid to Families with Dependent Children — Emergency Assistance Program provided in Part 2 of Article 2 of Chapter 108A or the Work First Cash Assistance Program established pursuant to the federal waivers received by the Department on February 5, 1996" in subdivision (1)r.; and added "or" at the end of subdivision (1)t. and made punctuation changes.

Session Laws 1997-490, s. 1, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, rewrote this section.

Session Laws 1998-98, s. 38(a), effective January 1, 2000, rewrote subdivision (2)(e).

OPINIONS OF ATTORNEY GENERAL

The Attorney General's office cannot act on behalf of counties under the Setoff Debt Collection Act. See opinion of Attorney General to Mr. Lew Gary Darden, Fraud Investigator, Sampson County Department of Social Services, 52 N.C.A.G. 10 (1982).

§ 105A-3. Remedy additional; mandatory State usage; optional local usage; obtaining identifying information; registration.

(a) Remedy Additional. — The collection remedy under this Chapter is in addition to and not in substitution for any other remedy available by law.

(b) Mandatory State Usage. — A State agency must submit a debt owed to it for collection under this Chapter unless the State Controller has waived this requirement or the State agency has determined that the validity of the debt is legitimately in dispute, an alternative means of collection is pending and believed to be adequate, or such a collection attempt would result in a loss of federal funds. The State Controller may waive the requirement for a State agency, other than the Department of Health and Human Services or a county acting on behalf of that Department, to submit a debt owed to it for collection under this Chapter if the State Controller finds that collection by this means

would not be practical or cost effective. A waiver may apply to all debts owed a State agency or a type of debt owed a State agency.

(b1) Optional Local Usage. — A local agency may submit a debt owed to it for collection under this Chapter. A local agency that decides to submit a debt owed to it for collection under this Chapter must establish the debt by following the procedure set in G.S. 105A-5 and must submit the debt through one of the following:

(1) A clearinghouse that is established pursuant to an interlocal agreement adopted under Article 20 of Chapter 160A of the General Statutes and has agreed to submit debts on behalf of any requesting local agency.

(2) The North Carolina League of Municipalities.

(3) The North Carolina Association of County Commissioners.

(c) Identifying Information. — All claimant agencies shall whenever possible obtain the full name, social security number, address, and any other identifying information required by the Department from any person for whom the agencies provide any service or transact any business and who the claimant agencies can foresee may become a debtor under this Chapter.

(d) Registration and Reports. — A State agency must register with the Department and with the State Controller. Every State agency must report annually to the State Controller the amount of debts owed to the agency for which the agency did not submit a claim for setoff and the reason for not submitting the claim.

A clearinghouse or an organization that submits debts on behalf of a local agency must register with the Department. Once a clearinghouse registers with the Department under this subsection, no other clearinghouse may register to submit debts for collection under this Chapter. (1979, c. 801, s. 94; 1989 (Reg. Sess., 1990), c. 946, s. 1; 1993, c. 512, s. 4; 1997-443, s. 11A.122; 1997-490, s. 1; 1998-212, s. 12.3A(a), (b).)

Editor's Note. — Session Laws 1998-212, s. 12.3A(c) provides: "The State Controller, in consultation with the Attorney General, shall develop guidelines for State agencies to use in determining under G.S. 105A-3(b) when the validity of a debt is legitimately in dispute, when an alternative means of collection may be considered adequate, and when a collection attempt would result in a loss of federal funds."

Session Laws 1998-212, s. 12.3A(d) provides that the amendment by s. 12.3A(a) expires January 1, 2000.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1997-443, s. 1.1, provides "This act shall be known as "The Current Operations and Capital Improvements Appropriations Act of 1997.'"

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1997-490, s. 4, provides that the changes to G.S. 105A-3(d) made by the act are effective September 10, 1997, and that the remainder of the changes made to this section by the act become effective January 1, 2000, and applicable to income tax refunds determined on or after that date.

Effect of Amendments. — Session Laws 1997-490, s. 1, effective January 1, 2000, inserted "State", "optional local useage", and "registration" in the section catchline, inserted the subsection catchlines throughout the section, substituted "Chapter" for "Article" in subsections (a) and (c), rewrote the first sentence of subsection (b), added the last two sentences of subsection (b), added subsection (b1), substituted "the Department" for "rules promulgated by the Department pursuant to G.S. 105A-16" in subsection (c), split subsection (d) into two sentences by substituting "State" for "claimant" in the first sentence, inserting "with the State Controller. Every State agency must", and substituting "State Controller" for "department" in the second sentence, and added the last paragraph of subsection (d). See editor's note for effective date.

Session Laws 1997-443, s. 11A.122, effective

August 28, 1997, substituted "Health and Human Services" for "Human Resources" in subdivision (b).

The 1998 amendment by Session Laws 1998-212, s.12.3A(a), effective October 30, 1998, substituted "for which the agency determines that" for "that they are advised by the Attorney General not to submit because", and deleted "because" following "an alternative" and following "adequate, or" in subsection (b).

The 1998 amendment by Session Laws 1998-212, s.12.3A(b), effective January 1, 2000, in subsection (b) substituted "State agency has determined that" for "Attorney General has advised the State agency not to submit the debt because," and deleted "because" preceding "an alternative means" and "such a collection."

CASE NOTES

Tax Refunds. — Section (b) dictates that the North Carolina Department of Human Resources must first obtain an opinion from the Attorney General resending the propriety of collecting a child support arrearage by the interception of a state tax refund before doing so. Davis v. North Carolina Dep't of Human Resources, 349 N.C. 208, 505 S.E.2d 77 (1998).

Before a state agency could intercept the state-income tax refund of a father, the agency had the affirmative duty to seek and obtain the Attorney General's advice or opinion that the child support repayment plan established by the district court was an adequate way of collecting an arrearage, where the father was current with his court-ordered child support obligation, and the arrearage was a public assistance debt that was incurred before the father's paternity adjudication. Davis v. North Carolina Dep't of Human Resources, 349 N.C. 208, 505 S.E.2d 77 (1998).

§ 105A-4. Minimum debt and refund.

This Chapter applies only to a debt that is at least fifty dollars ($50.00) and to a refund that is at least this same amount. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, substituted "debt and refund" for "sum collectible" in the section catchline, and rewrote the section.

§ 105A-5. Local agency notice, hearing, and decision.

(a) Prerequisite. — A local agency may not submit a debt for collection under this Chapter until it has given the notice required by this section and the claim has been finally determined as provided in this section.

(b) Notice. — A local agency must send written notice to a debtor that the agency intends to submit the debt owed by the debtor for collection by setoff. The notice must explain the basis for the agency's claim to the debt and that the agency intends to apply the debtor's refund against the debt. The notice must also inform the debtor that the debtor has the right to contest the matter by filing a request for a hearing with the local agency, must state the time limits and procedure for requesting the hearing, and must state that failure to request a hearing within the required time will result in setoff of the debt.

(c) Administrative Review. — A debtor who decides to contest a proposed setoff must file a written request for a hearing with the local agency within 30 days after the date the local agency mails a notice of the proposed action to the debtor. A request for a hearing is considered to be filed when it is delivered for mailing with postage prepaid and properly addressed. The governing body of the local agency or a person designated by the governing body must hold the hearing.

If the debtor disagrees with the decision of the governing body or the person designated by the governing body, the debtor may file a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. The petition must be filed within 30 days after the debtor receives a copy of the local

decision. Notwithstanding the provisions of G.S. 150B-2, a local agency is considered an agency for purposes of contested cases and appeals under this Chapter.

In a hearing under this section, an issue that has previously been litigated in a court proceeding cannot be considered.

(d) Decision. — A decision made after a hearing under this section must determine whether a debt is owed to the local agency and the amount of the debt.

(e) Return of Amount Set Off. — If a local agency submits a debt for collection under this Chapter without sending the notice required by subsection (b) of this section, the agency must send the taxpayer the entire amount set off plus the collection assistance fee retained by the Department. Similarly, if a local agency submits a debt for collection under this Chapter after sending the required notice but before final determination of the debt and a decision finds that the local agency is not entitled to any part of the amount set off, the agency must send the taxpayer the entire amount set off plus the collection assistance fee retained by the Department. That portion of the amount returned that reflects the collection assistance fee must be paid from the local agency's funds.

If a local agency submits a debt for collection under this Chapter after sending the required notice and the net proceeds collected that are credited to the local agency for the debt exceed the amount of the debt, the local agency must send the balance to the debtor. No part of the collection assistance fee retained by the Department may be returned when a notice was sent and a debt is owed but the debt is less than the amount set off.

Interest accrues on the amount of a refund returned to a taxpayer under this subsection in accordance with G.S. 105-266. A local agency that returns a refund to a taxpayer under this subsection must pay from the local agency's funds any interest that has accrued since the fifth day after the Department mailed the notice of setoff to the taxpayer. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 1999, rewrote the section and section catchline.

§ 105A-6. Procedure Department to follow in making set-off.

(a) Notice to Department. — A claimant agency seeking to attempt collection of a debt through setoff must notify the Department in writing and supply information necessary to identify the debtor whose refund is sought to be set off. The claimant agency may include with the notification the date, if any, that the debt is expected to expire. The agency must notify the Department in writing when a debt has been paid or is no longer owed the agency.

(b) Setoff by Department. — The Department, upon receipt of notification, must determine each year whether the debtor to the claimant agency is entitled to a refund of at least fifty dollars ($50.00) from the Department. Upon determination by the Department that a debtor specified by a claimant agency qualifies for such a refund, the Department must set off the debt against the refund to which the debtor would otherwise be entitled and must refund any remaining balance to the debtor. The Department must mail the debtor written notice that the setoff has occurred and must credit the net proceeds collected to the claimant agency. If the claimant agency is a State agency, that agency must credit the amount received to a nonreverting trust account and must follow the procedure set in G.S. 105A-8. (1979, c. 801, s. 94; 1989 (Reg. Sess., 1990), c. 946, s. 2; 1997-490, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 946, which amended this section, was effective for taxable years beginning on or after January 1, 1991, and applicable to debts submitted pursuant to § 105A-6 on or after January 1, 1991.

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, substituted the present section catchline for "Procedure for setoff", inserted the subsection catchlines, and rewrote the section.

§ 105A-7: Repealed by Session Laws 1997-490, s. 1, effective January 1, 2000, and applicable to income tax refunds determined on or after that date.

§ 105A-8. State agency notice, hearing, decision, and refund of setoff.

(a) Notice. — Within 10 days after a State agency receives a refund of a debtor, the agency must send the debtor written notice that the agency has received the debtor's refund. The notice must explain the debt that is the basis for the agency's claim to the debtor's refund and that the agency intends to apply the refund against the debt. The notice must also inform the debtor that the debtor has the right to contest the matter by filing a request for a hearing, must state the time limits and procedure for requesting the hearing, and must state that failure to request a hearing within the required time will result in setoff of the debt. A State agency that does not send a debtor a notice within the time required by this subsection must refund the amount set off plus the collection assistance fee, in accordance with subsection (e) of this section.

(b) Hearing. — A hearing on a contested claim of a State agency, except a constituent institution of The University of North Carolina or the Employment Security Commission, must be conducted in accordance with Article 3 of Chapter 150B of the General Statutes. A hearing on a contested claim of a constituent institution of The University of North Carolina must be conducted in accordance with administrative procedures approved by the Attorney General. A hearing on a contested claim of the Employment Security Commission must be conducted in accordance with rules adopted by that Commission. A request for a hearing on a contested claim of any State agency must be filed within 30 days after the State agency mails the debtor notice of the proposed setoff. A request for a hearing is considered to be filed when it is delivered for mailing with postage prepaid and properly addressed. In a hearing under this section, an issue that has previously been litigated in a court proceeding cannot be considered.

(c) Decision. — A decision made after a hearing under this section must determine whether a debt is owed to the State agency and the amount of the debt.

(d) Return of Amount Set Off. — If a State agency fails to send the notice required by subsection (a) of this section within the required time or a decision finds that a State agency is not entitled to any part of an amount set off, the agency must send the taxpayer the entire amount set off plus the collection assistance fee retained by the Department. That portion of the amount returned that reflects the collection assistance fee must be paid from the State agency's funds.

If a debtor owes a debt to a State agency and the net proceeds credited to the State agency for the debt exceed the amount of the debt, the State agency must send the balance to the debtor. No part of the collection assistance fee retained by the Department may be returned when a debt is owed but it is less than the amount set off.

Interest accrues on the amount of a refund returned to a taxpayer under this subsection in accordance with G.S. 105-266. A State agency that returns a

refund to a taxpayer under this subsection must pay from the State agency's funds any interest that has accrued since the fifth day after the Department mailed the notice of setoff to the taxpayer. (1979, c. 801, s. 94; 1983, c. 419; 1987, c. 827, s. 16; 1989, c. 539, s. 2; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, rewrote the section and section catchline.

CASE NOTES

A constituent member of The University of North Carolina is not specifically exempted from the hearing procedures of the Setoff Debt Collection Act. In re Willett, 56 N.C. App. 584, 289 S.E.2d 576, cert. withdrawn as improvidently granted, 306 N.C. 617, 295 S.E.2d 469 (1982).

§ 105A-9. Appeals from hearings.

Appeals from hearings allowed under this Chapter, other than those conducted by the Employment Security Commission, shall be in accordance with the provisions of Chapter 150B of the General Statutes, the Administrative Procedure Act, except that the place of initial judicial review shall be the superior court for the county in which the debtor resides. Appeals from hearings allowed under this Chapter that are conducted by the Employment Security Commission of North Carolina shall be in accordance with the provisions of Chapter 96 of the General Statutes. (1979, c. 801, s. 94; 1989, c. 539, s. 3; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, substituted "Chapter, other than those conducted by the Employement Security Commission" for "Article" in the first sentence, and substituted "hearings" for "actions" and "Chapter that are" for "Article" in the second sentence.

§§ 105A-10, 105A-11: Repealed by Session Laws 1997-490, s. 1, effective January 1, 2000, and applicable to income tax refunds determined on or after that date.

§ 105A-12. Priorities in claims to setoff.

The Department has priority over all other claimant agencies for collection by setoff whenever it is a competing agency for a refund. State agencies have priority over local agencies for collection by setoff. When there are multiple claims by State agencies other than the Department, the claims have priority based on the date each agency registered with the Department under G.S. 105A-3. When there are multiple claims by two or more organizations submitting debts on behalf of local agencies, the claims have priority based on the date each organization registered with the Department under G.S. 105A-3. When there are multiple claims among local agencies whose debts are submitted by the same organization, the claims have priority based on the date each local agency requested the organization to submit debts on its behalf. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, rewrote this section.

§ 105A-13. Collection assistance fees.

To recover the costs incurred by the Department in collecting debts under this Chapter, a collection assistance fee of no more than fifteen dollars ($15.00) is imposed on each debt collected through setoff. The Department must collect this fee as part of the debt and retain it. The Department must set the amount of the collection assistance fee based on its actual cost of collection under this Chapter for the immediately preceding year. If the Department is able to collect only part of a debt through setoff, the collection assistance fee has priority over the remainder of the debt. The collection assistance fee shall not be added to child support debts or collected as part of child support debts. Instead, the Department shall retain from collections under Division II of Article 4 of Chapter 105 of the General Statutes the cost of collecting child support debts under this Chapter. (1979, c. 801, s. 94; 1989 (Reg. Sess., 1990), c. 946, s. 3; 1995, c. 360, s. 4(a); 1997-490, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990) c. 946, s. 3, which rewrote this section, was effective for taxable years beginning on or after January 1, 1991, and applicable to debts submitted pursuant to § 105A-6 on or after January 1, 1991.

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, deleted "Disposition of proceeds collected" at the beginning of the section catchline, and rewrote the section.

§ 105A-14. Accounting to the claimant agency; credit to debtor's obligation.

(a) Simultaneously with the transmittal of the net proceeds collected to a claimant agency, the Department must provide the agency with an accounting of the setoffs for which payment is being made. The accounting must whenever possible, include the full names of the debtors, the debtors" social security numbers, the gross proceeds collected per setoff, the net proceeds collected per setoff, and the collection assistance fee added to the debt and collected per setoff.

(b) Upon receipt by a claimant agency of net proceeds collected on the claimant agency's behalf by the Department, a final determination of the claim if it is a State agency claim, and an accounting of the proceeds as specified under this section, the claimant agency must credit the debtor's obligation with the net proceeds collected. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, rewrote this section.

§ 105A-15. Confidentiality exemption; nondisclosure.

(a) Notwithstanding G.S. 105-259 or any other provision of law prohibiting disclosure by the Department of the contents of taxpayer records or information and notwithstanding any confidentiality statute of any claimant agency, the exchange of any information among the Department, the claimant agency, the organization submitting debts on behalf of a local agency, and the debtor necessary to implement this Chapter is lawful.

(b) The information a claimant agency or an organization submitting debts on behalf of a local agency obtains from the Department in accordance with the exemption allowed by subsection (a) may be used by the agency or organization only in the pursuit of its debt collection duties and practices and may not be disclosed except as provided in G.S. 105-259, 153A-148.1, or 160A-208.1. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective January 1, 2000, and applicable to income tax refunds determined on or after that date, rewrote this section.

§ 105A-16. Rules.

The Secretary of Revenue may adopt rules to implement this Chapter. The State Controller may adopt rules to implement this Chapter. (1979, c. 801, s. 94; 1997-490, s. 1.)

Effect of Amendments. — The 1997 amendment, effective September 10, 1997, deleted "and regulations" at the end of the section catchline, substituted "may adopt rules to implement this Chapter" for "is authorized to prescribe forms and make all rules which he deems necessary in order to effectuate the intent of this Article" in the first sentence, and added the second sentence.

Chapter 105B.

Defaulted Student Loan Recovery Act.

Article 1.

Withholding of Personal Earnings.

Sec.
105B-1. Purpose and definitions.
105B-2. Remedy additional.
105B-3. Procedure.
105B-4. Prohibited conduct by payor; civil penalty.
105B-5. Termination of withholding.

Article 2.

[Reserved.]

Article 1.

Withholding of Personal Earnings.

§ 105B-1. Purpose and definitions.

(a) It is the purpose of this Article to enable the State Education Assistance Authority to seek an order of withholding of personal earnings against a debtor who owes money to the Authority through default on a student loan as a means of enforcing a judgment which requires the payment of money to the Authority.

(b) As used in this Article:

(1) "Annual federal poverty guidelines" means the annual federal poverty guidelines issued by the United States Department of Health and Human Services in effect at the time in question.

(2) "Authority" means the State Education Assistance Authority as enabled by Article 23 of Chapter 116 of the General Statutes.

(3) "Debtor" means any individual owing money to the Authority through default on a student loan made, guaranteed or owned by the Authority, which obligation has not been adjudicated satisfied by court order, set aside by court order, or discharged in bankruptcy.

(4) "Family" means a parent or parents and minor children or spouses that reside together.

(5) "Family income" means family income as set out in the annual federal poverty guidelines.

(6) "Mistake of fact" means that the debtor:

a. Is not the actual person named in the judgment that is the basis for a withholding action under this section;

b. Has satisfied the obligation represented by the judgment in full and is entitled to have the judgment cancelled; or

c. Does not have monthly disposable earnings or is not employed by the payor as stated by the Authority in its motion to the court.

d. Has family income at or below two hundred percent (200%) of the annual federal poverty guidelines.

(7) "Payor" means the person, firm, association or corporation by whom the debtor is employed.

(8) "Student loan" means a loan or loans made to eligible students or parents of students to aid in obtaining an education beyond the high school level. (1989, c. 475, s. 1.)

§ 105B-2. Remedy additional.

The collection remedy under this Article is in addition to and not in substitution for any other remedy available by law. (1989, c. 475, s. 1.)

§ 105B-3. Procedure.

(a) Notwithstanding any other provision of the law, in any case in which the Authority obtains a judgment against a debtor as defined in this Chapter, a judge of the district court in the county where the debtor resides or is found may enter an order of withholding whereby no more than ten percent (10%) of the debtor's monthly disposable earnings shall be withheld for the repayment of the debt owed to the Authority. For purposes of this section, "disposable earnings" is defined as that part of the compensation paid or payable to the debtor for personal services; whether denominated as wages, salary, commission, bonus, or otherwise (including periodic payments pursuant to a pension or retirement program) which remains after the deduction of any amounts required by law to be withheld.

(b) The Authority may move the court for an order of withholding. The motion shall be verified and shall state the name and address of the employer of the debtor, the debtor's monthly disposable earnings from said employer (which may be based upon information and belief, and the amount sought to be withheld, not to exceed ten percent (10%) of the debtor's monthly disposable earnings. The motion shall be accompanied by a letter to the debtor which includes information that the Authority will withdraw the motion if the debtor executes a sworn statement to the Authority that his family income is at or below two hundred percent (200%) of the annual federal poverty guidelines. The letter shall include the definitions of family and family income, the federal poverty guidelines in effect as of the date of the letter, and the procedure to contest the proposed garnishment. The Authority shall provide a form to the debtor for the purpose of securing his sworn statement about the level of his annual family income. The motion shall be served on both the debtor and his alleged employer either personally or by certified mail, return receipt requested as set forth in G.S. 1A-1, Rules of Civil Procedure.

(c) At any time following the filing with the district court of a motion under this section, the debtor may inspect and copy records relating to the debtor or debts at the offices of the Authority.

(d) In lieu of or in conclusion of any legal proceeding instituted under this section, the debtor may enter into a written agreement with the State Education Assistance Authority to establish a schedule for the repayment of the debt or debts by periodic payments made directly to the Authority. Upon acceptance of any such repayment agreement, the Authority shall withdraw the motion for withholding.

(e) Contested Withholding. — The debtor or the payor may contest the withholding only on the basis of mistake of fact. To contest the withholding, the debtor or the payor must, within 30 days from the date of service, request a hearing before the district court by serving a written request upon the court and the Authority which specifies the mistake of fact upon which the hearing request is based. If the asserted mistake of fact can be resolved by agreement between the Authority and the debtor or the payor, whoever has asserted the mistake of fact, no hearing shall occur. Otherwise, a hearing shall be held and a determination made within 30 days of the filing of the request by the debtor or payor. Following the hearing the court may enter an order of withholding not to exceed ten percent (10%) of the debtor's monthly disposable earnings and not to reduce the debtor's annual family income to a point at or below two hundred percent (200%) of the annual federal poverty guidelines. However, the court shall not enter an order of garnishment unless the court makes findings of fact that the family income of the debtor at the time of the hearing exceeds two hundred percent (200%) of the annual federal poverty guidelines. If an order of withholding is entered, a copy of same shall be served on the debtor and the payor either personally or be certified mail, return receipt requested.

The order shall set forth sufficient findings of fact to support the action by the court and the amount to be withheld for each pay period. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(f) Uncontested Withholding. — If neither the debtor nor the payor contests the withholding as provided in subsection (e) within the 30-day response period, the court may, without further hearing, enter an order of withholding not to exceed ten percent (10%) of the debtor's monthly disposable earnings and not to reduce the debtor's annual family income to a point at or below two hundred percent (200%) of the annual federal poverty guidelines. However, the court shall not enter an order of garnishment unless the court makes findings of fact that the family income of the debtor at the time of the hearing exceeds two hundred percent (200%) of the annual federal poverty guidelines. If an order of withholding is entered, a copy of same shall be served on the debtor and the payor either personally or by certified mail, return receipt requested. The order shall set forth sufficient findings of fact to support the action by the court and the amount to be withheld for each pay period. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(g) Upon receipt of an order of withholding, the payor shall transmit without delay the amount ordered to be withheld to the clerk of superior court who shall disburse it to the State Education Assistance Authority. The amount ordered to be withheld shall be increased by a processing fee of two dollars ($2.00) to be retained by the payor, unless waived, for each withholding under the order. (1989, c. 475, s. 1.)

§ 105B-4. Prohibited conduct by payor; civil penalty.

(a) Notwithstanding any other provision of law, when a court finds, pursuant to a motion in the cause filed by the Authority joining the payor as a third party defendant, with 30 days notice to answer the motion, that a payor has willfully refused to comply with the provisions of this section, such payor shall be ordered to commence withholding and shall be held liable to the Authority for any amount which such payor should have withheld, except that such payor shall not be required to vary his normal pay or disbursement cycles in order to comply with these provisions.

(b) A payor shall not discharge from employment, refuse to employ, or otherwise take disciplinary action against any debtor because of the withholding. When a court finds that a payor has taken any of these actions, the payor shall be liable for a civil penalty. For a first offense, the civil penalty shall be one hundred dollars ($100.00). For second and third offenses, the civil penalty shall be five hundred dollars ($500.00) and one thousand dollars ($1,000), respectively. Any payor who violates any provision of this paragraph shall be liable in a civil action for reasonable damages suffered by a debtor as a result of the violation, and a debtor discharged or demoted in violation of this paragraph shall be entitled to be reinstated to his former position. The statute of limitations for actions under this subsection shall be one year pursuant to G.S. 1-54.

The clear proceeds of civil penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(c) Any payor who withholds the sum provided in any notice or order to the payor shall not be liable for any penalties under this section. (1989, ch. 475, s. 1; 1998-215, s. 116.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, in subsection (b) near the end of the first sentence, deleted "to be paid to the county school fund", and added the last paragraph.

§ 105B-5. Termination of withholding.

A requirement that income be withheld under this section shall promptly terminate as to prospective payments when the payor receives notice from the court that the withholding order has expired or become invalid. (1989, c. 475, s. 1.)

Article 2.

Reserved for future codification purposes.

Chapter 106.

Agriculture.

Article 1.

Department of Agriculture and Consumer Services.

Part 1. Board of Agriculture.

Sec.

106-1. [Repealed.]
106-2. Department of Agriculture and Consumer Services established; Board of Agriculture, membership, terms of office, etc.
106-3. [Repealed.]
106-4. Meetings of Board.
106-5. [Repealed.]
106-6. [Repealed.]
106-6.1. Fees.
106-6.2. Create special revenue funds for certain agricultural centers.
106-7, 106-8. [Repealed.]
106-9. [Repealed.]
106-9.1. [Repealed.]

Part 1A. Collection and Refund of Fees and Taxes.

106-9.2. Records and reports required of persons paying fees or taxes to Commissioner or Department; examination of records; determination of amount due by Commissioner in case of noncompliance.
106-9.3. Procedure for assessment of fees and taxes.
106-9.4. Collection of delinquent fees and taxes.
106-9.5. Refund of overpayment.
106-9.6. Suits to prevent collection prohibited; payment under protest and recovery of fee or tax so paid.

Part 2. Commissioner of Agriculture.

106-10. Election; term; vacancy.
106-11. Salary of Commissioner of Agriculture.
106-12, 106-13. [Repealed.]
106-14. To establish regulations for transportation of livestock.

Part 3. Powers and Duties of Department and Board.

106-15 through 106-19. [Repealed.]
106-20. [Repealed.]
106-21. [Repealed.]
106-21.1. Feed Advisory Service; fee.
106-21.2. Food Bank information and referral service.
106-22. Joint duties of Commissioner and Board.

Sec.

106-22.1. State farms.
106-22.2. [Recodified.]
106-22.3. Organic Production Program.
106-22.4. Llamas as livestock.
106-22.5. Agricultural tourism signs.

Part 4. Cooperation of Federal and State Governments in Agricultural Work.

106-23. Legislative assent to Adams Act for experiment station.

Part 5. Cooperation between Department and United States Department of Agriculture, and County Commissioners.

106-24. Collection and publication of information relating to agriculture; cooperation.
106-24.1. Confidentiality of information collected and published.
106-25 through 106-26.2. [Repealed.]
106-26.3 through 106-26.6. [Reserved.]

Article 1A.

State Farm Operations Commission.

[Repealed.]

106-26.7 through 106-26.12. [Repealed.]

Article 1B.

State Farm Operations Commission.

[Repealed.]

106-26.13 through 106-26.21. [Repealed.]

Article 2.

North Carolina Fertilizer Law of 1947.

[Repealed.]

106-27 through 106-50. [Superseded.]
106-50.1 through 106-50.22. [Repealed.]
106-50.23 through 106-50.27. [Reserved.]

Article 2A.

North Carolina Soil Additives Act of 1977.

106-50.28. Short title.
106-50.29. Administration of Article.
106-50.30. Definitions.
106-50.31. Registration of additives.
106-50.32. Labeling of containers.

Sec.
106-50.33. When additive considered misbranded.
106-50.34. Records and reports of registrants.
106-50.35. Violations of Article.
106-50.36. Inspection and sampling of additives.
106-50.37. Stop sale, etc., orders.
106-50.38. Injunctions.
106-50.39. Refusal or revocation of registration.
106-50.40. Rules and regulations.
106-50.41. Penalties.

Article 3.

Fertilizer Laboratories.

[Repealed.]

106-51. [Repealed.]

Article 4.

Insecticides and Fungicides.

[Repealed.]

106-52 through 106-65. [Repealed.]

Article 4A.

Insecticide, Fungicide and Rodenticide Act of 1947.

[Repealed.]

106-65.1 through 106-65.12. [Repealed.]

Article 4B.

Aircraft Application of Pesticides.

[Repealed.]

106-65.13 through 106-65.21. [Repealed.]

Article 4C.

Structural Pest Control Act.

106-65.22. Title.
106-65.23. Structural Pest Control Division of Department of Agriculture and Consumer Services recreated; Director; powers and duties of Commissioner; Structural Pest Control Committee created; appointment; terms; powers and duties; quorum.
106-65.24. Definitions.
106-65.25. Phases of structural pest control; prohibited acts; license required; exceptions.
106-65.26. Qualifications for certified applicator and licensee; applicants for certified applicator's identification card and license.
106-65.27. Examinations of applicants; fee; license not transferable.

Sec.
106-65.28. Revocation or suspension of license or identification card.
106-65.29. Rules and regulations.
106-65.30. Inspectors; inspections and reports of violations; designation of resident agent.
106-65.31. Annual certified applicator card and license fee; registration of servicemen, salesmen, solicitors, and estimators; identification cards.
106-65.32. Administrative Procedure Act applicable.
106-65.33. Violation of Article, falsification of records, or misuse of registered pesticide a misdemeanor.
106-65.34, 106-65.35. [Repealed.]
106-65.36. Reciprocity; intergovernmental cooperation.
106-65.37. Financial responsibility.
106-65.38. Disposition of fees and charges.
106-65.39. Judicial enforcement.
106-65.40. City privilege license tax prohibited.
106-65.41. Civil penalties.

Article 4D.

North Carolina Biological Organism Act.

106-65.42. Short title.
106-65.43. Purpose.
106-65.44. Definitions.
106-65.45. Authority of the Board to adopt regulations.
106-65.46. Commissioner of Agriculture to enforce Article; further authority of Board.
106-65.47. Authority under other statutes not abrogated; memoranda of understanding.
106-65.48. Criminal penalties; violation of law or regulations.
106-65.49. Article not applicable in certain cases.
106-65.50 through 106-65.54. [Reserved.]

Article 4E.

Pest Control Compact.

106-65.55. Adoption of Compact.
106-65.56. Cooperation of State agencies with insurance fund.
106-65.57. Filing of bylaws and amendments.
106-65.58. Compact administrator.
106-65.59. Request for assistance from insurance fund.
106-65.60. Credit for expenditures.
106-65.61. "Executive head" means Governor.
106-65.62 through 106-65.66. [Reserved.]

Article 4F.

Uniform Boll Weevil Eradication Act.

106-65.67. Short title.
106-65.68. Declaration of policy.

Sec.
106-65.69. Definitions.
106-65.70. Cooperative programs authorized.
106-65.71. Entry of premises; eradication activities; inspections.
106-65.72. Reports.
106-65.73. Quarantine.
106-65.74. Authority to designate elimination zones; authority to prohibit planting of cotton and to require participation in eradication program.
106-65.75. Authority for destruction or treatment of cotton in elimination zones; when compensation payable.
106-65.76. Authority to regulate pasturage, entry, and honeybee colonies in elimination zones and other areas.
106-65.77. Rules and regulations.
106-65.78. Penalties.
106-65.79 through 106-65.83. [Reserved.]

Article 4G.

Official Cotton Growers' Organization.

106-65.84. Findings and purpose.
106-65.85. Definitions.
106-65.86. Certification by Board; requirements.
106-65.87. Certification; revocation.
106-65.88. Referendum; assessments.
106-65.89. Agreements.
106-65.90. Failure to pay assessments.
106-65.91. Regulations.

Article 5.

Seed Cotton and Peanuts.

[Repealed.]

106-66, 106-67. [Repealed.]

Article 5A.

Marketing of Farmers Stock Peanuts.

[Repealed.]

106-67.1 through 106-67.8. [Repealed.]

Article 6.

Cottonseed Meal.

[Repealed.]

106-68 through 106-78. [Repealed.]

Article 7.

Pulverized Limestone and Marl.

[Repealed.]

106-79, 106-80. [Repealed.]

Article 8.

Sale, etc., of Agricultural Liming Material, etc.

[Repealed.]

Sec.
106-81 through 106-92. [Repealed.]

Article 8A.

Sale of Agricultural Liming Materials and Landplaster.

106-92.1. Title of Article.
106-92.2. Purpose of Article.
106-92.3. Definitions of terms.
106-92.4. Enforcing official.
106-92.5. Labeling.
106-92.6. Prohibited acts.
106-92.7. Registration of brands.
106-92.8. Tonnage fees: reporting system.
106-92.9. Report of tonnage.
106-92.10. Inspection, sampling, analysis.
106-92.11. Deficiencies: refunds to consumer.
106-92.12. "Stop sale" orders.
106-92.13. Appeals from assessments and orders of Commissioner.
106-92.14. Penalties for violations of this Article.
106-92.15. Declaration of policy.
106-92.16. Authority of Board of Agriculture to make rules and regulations.
106-92.17. Lime and fertilizer mixtures.

Article 9.

Commercial Feedingstuffs.

[Repealed.]

106-93 through 106-110. [Repealed.]

Article 10.

Mixed Feed Oats.

[Repealed.]

106-111. [Repealed.]

Article 11.

Stock and Poultry Tonics.

[Repealed.]

106-112 through 106-119. [Repealed.]

Article 12.

Food, Drugs and Cosmetics.

106-120. Title of Article.
106-121. Definitions and general consideration.
106-122. Certain acts prohibited.
106-123. Injunctions restraining violations.
106-124. Violations made misdemeanor.
106-125. Detention of product or article sus-

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pected of being adulterated or misbranded.
106-126. Prosecutions of violations.
106-127. Report of minor violations in discretion of Commissioner.
106-128. Establishment of reasonable standards of quality by Board of Agriculture.
106-129. Foods deemed to be adulterated.
106-130. Foods deemed misbranded.
106-131. Permits governing manufacture of foods subject to contamination with microorganisms.
106-132. Additives, etc., deemed unsafe.
106-133. Drugs deemed to be adulterated.
106-134. Drugs deemed misbranded.
106-134.1. Prescriptions required; label requirements; removal of certain drugs from requirements of this section.
106-135. Regulations for sale of new drugs.
106-136. Cosmetics deemed adulterated.
106-137. Cosmetics deemed misbranded.
106-138. False advertising.
106-139. Regulations by Board of Agriculture.
106-139.1. Declaration of net quantity of contents.
106-140. Further powers of Commissioner of Agriculture for enforcement of Article; report by inspector to owner of establishment.
106-140.1. Registration of producers of prescription drugs and devices.
106-141. Examinations and investigations.
106-141.1. Inspections of donated food.
106-142. Publication of reports of judgments, decrees, etc.
106-143. Article construed supplementary.
106-144. Exemptions.
106-145. Effective date.

Article 12A.

Wholesale Prescription Drug Distributors.

106-145.1. Purpose and interpretation of Article.
106-145.2. Definitions.
106-145.3. Wholesale distributor must have license.
106-145.4. Application and fee for license.
106-145.5. Review of application and qualifications of applicant.
106-145.6. Denial, revocation, and suspension of license; penalties for violations.
106-145.7. Storage, handling, and records of prescription drugs.
106-145.8. Records of prescription drugs.
106-145.9. Written procedures concerning prescription drugs and lists of responsible persons.
106-145.10. Application of other laws.

Sec.
106-145.11. Wholesale Distributor Advisory Committee.
106-145.12. Enforcement and implementation of Article.

Article 13.

Canned Dog Foods.

[Repealed.]

106-146 through 106-158. [Repealed.]

Article 14.

State Inspection of Slaughterhouses.

[Repealed.]

106-159 through 106-168. [Repealed.]

Article 14A.

Licensing and Regulation of Rendering Plants and Rendering Operations.

106-168.1. Definitions.
106-168.2. License required.
106-168.3. Exemptions.
106-168.4. Application for license.
106-168.5. Duties of Commissioner upon receipt of application; inspection committee.
106-168.6. Inspection by committee; certificate of specific findings.
106-168.7. Issuance of license.
106-168.8. Minimum standards for conducting rendering operations.
106-168.9. Transportation by licensee.
106-168.10. Disposal of diseased animals.
106-168.11. Authority of agents of licensee.
106-168.12. Commissioner authorized to adopt rules and regulations.
106-168.13. Effect of failure to comply.
106-168.14. Collectors subject to certain provisions.
106-168.15. Violation a misdemeanor.
106-168.16. Civil penalties.

Article 15.

Inspection of Meat and Meat Products by Counties and Cities.

[Repealed.]

106-169 through 106-173. [Repealed.]

Article 15A.

Meat Grading Law.

[Repealed.]

106-173.1 through 106-173.16. [Repealed.]

Article 16.

Bottling Plants for Soft Drinks.

[Repealed.]

Sec.
106-174 through 106-184.1. [Repealed.]

Article 17.

Marketing and Branding Farm Products.

106-185. Scope of Article; federal-State cooperation.
106-186. Power to employ agents and assistants.
106-187. Board of Agriculture to investigate marketing of farm products.
106-188. Promulgation of standards for receptacles, etc.
106-189. Sale and receptacles of standardized products must conform to requirements.
106-189.1. [Repealed.]
106-189.2. Sale of immature apples.
106-190. Inspectors or graders authorized; revocation of license.
106-190.1. Aggregate State service credit for graders.
106-191. Appeal from classification.
106-192. Certificate of grade prima facie evidence.
106-193. Unwholesome products not classified; health officer notified.
106-194. Inspection and sampling of farm products authorized.
106-194.1. Farm Product Inspection Account.
106-195. Rules and regulations; how prescribed.
106-196. Violation of Article or regulations a misdemeanor.

Article 18.

Shipper's Name on Receptacles.

[Repealed.]

106-197. [Repealed.]

Article 19.

Trademark for Standardized Farm Products.

[Repealed.]

106-198 through 106-202 [Repealed.]
106-202.1 through 106-202.5 [Reserved.]

Article 19A.

Records of Sales of Farm Products.

106-202.6. Dated sales confirmation slips; inapplicable to consumers.
106-202.7 through 106-202.11. [Reserved.]

Article 19B.

Plant Protection and Conservation Act.

Sec.
106-202.12. Definitions.
106-202.13. Declaration of policy.
106-202.14. Creation of Board; membership; terms; chairman; quorum; board actions; compensation.
106-202.15. Powers and duties of the Board.
106-202.16. Criteria and procedures for placing plants on protected plant lists.
106-202.17. Creation of committee; membership; terms; chairman; meetings; committee action; quorum; compensation.
106-202.18. Powers and duties of the Scientific Committee.
106-202.19. Unlawful acts; penalties; enforcement.
106-202.20. Forfeiture of illegally possessed plants; disposition of plants.
106-202.21. Ginseng dealer permits.
106-202.22. Denial, suspension, or revocation of permit.

Article 20.

Standard Weight of Flour and Meal.

[Repealed.]

106-203 through 106-209. [Repealed.]

Article 21.

Artificially Bleached Flour.

[Repealed.]

106-210 through 106-219. [Repealed.]

Article 21A.

Enrichment of Flour, Bread, Cornmeal and Grits.

[Repealed.]

106-219.1 through 106-219.9. [Repealed.]

Article 22.

Inspection of Bakeries.

[Repealed.]

106-220 through 106-232. [Repealed.]

Article 23.

Oleomargarine.

[Repealed.]

106-233 to 106-238. [Repealed.]

Article 24.

Excise Tax on Certain Oleomargarines.

[Repealed.]

106-239. [Repealed.]

Article 25.

North Carolina Egg Law.

[Repealed.]

Sec.

106-240 through 106-245.12. [Repealed.]

Article 25A.

North Carolina Egg Law.

106-245.13. Short title; scope; rule of construction.
106-245.14. Definitions.
106-245.15. Designation of grade and class on containers required; conformity with designation; exemption.
106-245.16. Standards, grades and weight classes.
106-245.17. Stop-sale orders.
106-245.18. Container labeling.
106-245.19. Invoices.
106-245.20. Advertisements.
106-245.21. Rules and regulations.
106-245.22. Sanitation.
106-245.23. Power of Commissioner.
106-245.24. Penalties for violations; enjoining violations; venue.
106-245.25. Warnings in lieu of criminal prosecutions.
106-245.26. Remedies cumulative.
106-245.27. Persons punishable as principals.
106-245.28. Act of agent as that of principal.
106-245.29. [Reserved.]

Article 25B.

Egg Promotion Tax.

106-245.30. Legislative findings; purpose of Article.
106-245.31. Definitions.
106-245.32. Levy of tax; rules.
106-245.33. Report and payment of tax by handler; definition and functions of handler.
106-245.34. Exemptions.
106-245.34A. Additional exemption.
106-245.35. Records to be kept by handler.
106-245.36. Interest on tax; collection of delinquent tax.
106-245.37. North Carolina Egg Fund.
106-245.38. Violations.
106-245.39. Effect on Article 50 of Chapter 106.

Article 26.

Inspection of Ice Cream Plants, Creameries, and Cheese Factories.

106-246. Cleanliness and sanitation required; washrooms and toilets, living and sleeping rooms; animals.

Sec.

106-247. Cleaning and sterilization of vessels and utensils.
106-248. Purity of products.
106-249. Receivers of products to clean utensils before return.
106-250. Correct tests of butterfat; tests by Board of Agriculture.
106-251. Department of Agriculture and Consumer Services to enforce law; examinations.
106-252. Closure of plants for violation of Article; certificate to district attorney of district.
106-253. Standards of purity and sanitation; regulating trade or brand names of frozen or semifrozen desserts.
106-254. Inspection fees; wholesalers; retailers and cheese factories.
106-255. Violation of Article a misdemeanor; punishment.

Article 27.

Records of Purchases of Milk Products.

[Repealed.]

106-256 through 106-259. [Repealed.]

Article 28.

Records and Reports of Milk Distributors and Processors.

106-260. "Milk" defined.
106-261. Reports to Commissioner of Agriculture as to milk purchased and sold.
106-262. Powers of Commissioner of Agriculture.
106-263. Distribution of milk in classification higher than that in which purchased.
106-264. Inspections and investigations by Commissioner.
106-265. Failure to file reports, etc., made unlawful.
106-266. Violation made misdemeanor.

Article 28A.

Regulation of Milk Brought into North Carolina from Other States.

[Repealed.]

106-266.1 through 106-266.5. [Repealed.]

Article 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

106-266.6. Definitions.
106-266.7. Milk Commission continued; membership; chairman; compensation; quorum; cooperation of other

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agencies; official acts; meetings; principal office.
106-266.8. Powers of Commission.
106-266.9. Distributors to be licensed; prices and practices of distributors regulated.
106-266.10. Licenses for distributors and subdistributors.
106-266.11. Annual budget of Commission; collection of monthly assessments.
106-266.12. Milk Commission Account; deductions by distributor from funds owed to producer.
106-266.13. Injunctive relief.
106-266.14. Penalties.
106-266.15. Judicial review.
106-266.16. Saving clause.
106-266.17. Marketing agreements not to be deemed illegal or in restraint of trade; conflicting laws.
106-266.18. Limitations upon power of Commission.
106-266.19. Sale below cost to injure or destroy competition prohibited.
106-266.20, 106-266.21. [Repealed.]

Article 29.

Inspection, Grading and Testing Milk and Dairy Products.

106-267. Inspection, grading and testing dairy products; authority of State Board of Agriculture.
106-267.1. License required; fee; term of license; examination required.
106-267.2. Rules and regulations.
106-267.3. Revocation of license; hearing.
106-267.4. Representative average sample; misdemeanor, what deemed.
106-267.5. Standard Babcock testing glassware; scales and weights.
106-268. Definitions; enforcement of Article.
106-268.1. Penalties.

Article 30.

Board of Crop Seed Improvement.

106-269. Creation and purpose.
106-270. Board membership.
106-271. Powers of Board.
106-272. Cooperation of other departments with Board; rules and regulations.
106-273. North Carolina Crop Improvement Association.
106-274. Certification of crop seeds.
106-275. False certification of purebred crop seeds made misdemeanor.
106-276. Supervision of certification of crop seeds.

Article 31.

North Carolina Seed Law.

Sec.
106-277. Purpose.
106-277.1. Short title.
106-277.2. Definitions.
106-277.3. Label or tag requirements generally.
106-277.4. [Repealed.]
106-277.5. Labels for agricultural seeds.
106-277.6. Labels for vegetable seeds in containers of one pound or less.
106-277.7. Labels for vegetable seeds in containers of more than one pound.
106-277.8. Responsibility for presence of labels.
106-277.9. Prohibitions.
106-277.10. Exemptions.
106-277.11. Disclaimers, nonwarranties and limited warranties.
106-277.12. Records.
106-277.13. Tolerances to be established and used in enforcement.
106-277.14. Administration.
106-277.15. Rules, regulations and standards.
106-277.16. Seed-testing facilities.
106-277.17. Registration and variety testing.
106-277.18. Registration and licensing of dealers.
106-277.19. Revocation or refusal of license for cause; hearing; appeal.
106-277.20. Right of entry for purposes of inspection; duty of vendors.
106-277.21. Sampling, inspecting and testing; notice of violations.
106-277.22. Stop-sale orders; penalty covering expenses; appeal.
106-277.23. Notice of violations; hearings, prosecutions or warnings.
106-277.24. Penalty for violations.
106-277.25. Seizure and disposition of seeds violating Article.
106-277.26. Publication of test results and other information.
106-277.27. Cooperation with United States Department of Agriculture.
106-277.28. License and inspection fees.
106-277.29. [Repealed.]
106-277.30. Filing complaint; investigation; referral to Seed Board.
106-277.31. Notice required.
106-277.32. Seed Board created; membership; duties.
106-277.33. Duties of Seed Board.
106-277.34. Actions regarding defective seed claims; evidence.
106-278 through 106-284.4. [Reserved.]

Article 31A.

Seed Potato Law.

[Repealed.]

106-284.5 through 106-284.13. [Repealed.]

Article 31B.

Vegetable Plant Law.

Sec.

106-284.14. Title.
106-284.15. Purpose of Article.
106-284.16. Definitions.
106-284.17. Unlawful to sell plants not up to standard and not appropriately tagged or labeled.
106-284.18. Rules and regulations.
106-284.19. Inspection; interference with inspectors; "stop-sale" notice.
106-284.20. Interference with Commissioner, etc., or other violation a misdemeanor; penalties.
106-284.21. Authority to permit sale of substandard plants.
106-284.22. When Article not applicable.
106-284.23. [Not set out.]
106-284.24 through 106-284.29. [Reserved.]

Article 31C.

North Carolina Commercial Feed Law of 1973.

106-284.30. Title.
106-284.31. Purpose.
106-284.32. Enforcing official.
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[Repealed.]

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[Repealed.]

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Article 1.

Department of Agriculture and Consumer Services.

Part 1. Board of Agriculture.

§ 106-1: Repealed by Session Laws 1995, c. 509, s. 52.

§ 106-2. Department of Agriculture and Consumer Services established; Board of Agriculture, membership, terms of office, etc.

The Department of Agriculture and Consumer Services is created and established and shall be under the control of the Commissioner of Agriculture, with the consent and advice of a board to be styled "The Board of Agriculture." The Board of Agriculture shall consist of the Commissioner of Agriculture, who shall be ex officio a member and chairman thereof and shall preside at all meetings, and of 10 other members from the State at large, so distributed as to reasonably represent the different sections and agriculture of the State. In the appointment of the members of the Board the Governor shall also take into consideration the different agricultural interests of the State, and shall appoint one member who shall be a practical tobacco farmer to represent the tobacco farming interest, one who shall be a practical cotton grower to represent the cotton interest, one who shall be a practical truck farmer or general farmer to represent the truck and general farming interest, one who shall be a practical dairy farmer to represent the dairy and livestock interest of the State, one who shall be a practical poultryman to represent the poultry interest of the State, one who shall be a practical peanut grower to represent the peanut interests, one who shall be experienced in marketing to represent the marketing of products of the State. The members of such Board shall be appointed by the Governor by and with the consent of the Senate, when the terms of the incumbents respectively expire. The term of office of such members shall be six years and until their successors are duly appointed and qualified. The terms of office of the five members constituting the present Board of Agriculture shall continue for the time for which they were appointed.

In making appointments for the enlarged Board of Agriculture, the Governor shall make the appointments so that the term of three members will be for two years, three for four and four for six years. Thereafter the appointments shall be made for six years. Vacancies in such Board shall be filled by the Governor for the unexpired term. The Commissioner of Agriculture and the members of the Board of Agriculture shall be practical farmers engaged in their profession. (Code, s. 2184; 1901, c. 479, ss. 2, 4; Rev., s. 3931; 1907, c. 497, s. 1; C.S., s. 4667; 1931, c. 360, s. 1; 1937, c. 174; 1995, c. 509, s. 53; 1997-261, ss. 15, 16.)

State Government Reorganization. — The Board of Agriculture was transferred by § 143A-59, enacted by Session Laws, 1971, c. 864.

CASE NOTES

Appointment of Members. — Members of the State Board of Agriculture are not constitutional officers, but being of legislative creation, are within the power of legislative appointment. They are not exclusively, nor of necessity, within the power of executive appointment. Cunningham v. Sprinkle, 124 N.C. 638, 33 S.E. 138 (1899).

Actions Against Board. — The Board of Agriculture is a department of the State government and an action cannot be maintained against it without the consent of the State. Lord & Polk Chem. Co. v. Board of Agric., 111 N.C. 135, 15 S.E. 1032 (1892).

Cited in Turner v. Gastonia City Bd. of Educ., 250 N.C. 456, 109 S.E.2d 211 (1959).

§ 106-3: Repealed by Session Laws 1995, c. 509, s. 54.

§ 106-4. Meetings of Board.

The Board of Agriculture, herein established, hereafter called "the Board," shall meet for the transaction of business in the City of Raleigh at least twice a year, and oftener, if called by the Commissioner of Agriculture. (1901, c. 479, s. 3; Rev., s. 3935; C.S., s. 4669; 1921, c. 24; 1929, c. 252; 1931, c. 360, s. 2.)

§ 106-5: Repealed by Session Laws 1997-74, s. 1.

§ 106-6: Repealed by Session Laws 1995, c. 509, s. 54.

§ 106-6.1. Fees.

A board or commission within the Department of Agriculture and Consumer Services may establish fees or charges for the services it provides. The Board of Agriculture, subject to the provisions of Chapter 146 of the General Statutes, may establish a rate schedule for the use of facilities operated by the Department of Agriculture and Consumer Services. (1981, c. 495, s. 10; 1987, c. 827, s. 25; 1997-261, s. 109; 1999-413, s. 5.)

Effect of Amendments. — Session Laws 1999-413, s. 5, effective August 5, 1999, rewrote the section.

§ 106-6.2. Create special revenue funds for certain agricultural centers.

(a) The Eastern North Carolina Agricultural Center Fund is created within the Department of Agriculture and Consumer Services as a special revenue fund. This Fund shall consist of receipts from the sale of naming rights to any

facility located at the Eastern North Carolina Agricultural Center at Williamston, investments earnings on these moneys, and any gifts, bequests, or grants from any source for the benefit of the Eastern North Carolina Agricultural Center. All interest that accrues to this Fund shall be credited to this Fund. Any balance remaining in this Fund at the end of any fiscal year shall not revert. The Department may use this Fund only to promote, improve, repair, maintain, or operate the Eastern North Carolina Agricultural Center.

(b) The Southeastern North Carolina Agricultural Center Fund is created within the Department of Agriculture and Consumer Services as a special revenue fund. This Fund shall consist of receipts from the sale of naming rights to any facility located at the Southeastern North Carolina Agricultural Center at Lumberton, investments earnings on these moneys, and any gifts, bequests, or grants from any source for the benefit of the Southeastern North Carolina Agricultural Center. All interest that accrues to this Fund shall be credited to this Fund. Any balance remaining in this Fund at the end of any fiscal year shall not revert. The Department may use this Fund only to promote, improve, repair, maintain, or operate the Southeastern North Carolina Agricultural Center. (1998-212, s. 13.2.)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1998-212, s. 30.6, made this section effective July 1, 1998.

§§ 106-7, 106-8: Repealed by Session Laws 1995, c. 509, s. 54.

§ 106-9: Repealed by Session Laws 1997-74, s. 2.

§ 106-9.1: Repealed by Session Laws 1995, c. 509, s. 54.

Part 1A. Collection and Refund of Fees and Taxes.

§ 106-9.2. Records and reports required of persons paying fees or taxes to Commissioner or Department; examination of records; determination of amount due by Commissioner in case of noncompliance.

(a) Every person paying fees or taxes to the Commissioner of Agriculture or to the Department of Agriculture and Consumer Services under the provisions of this Chapter shall keep such records as the Commissioner may prescribe to indicate accurately the fees or taxes due to the Commissioner or Department, and such records shall be preserved for a period of three years, and shall at all times during the business hours of the day be subject to inspection by the Commissioner or his deputies or such other agents as may be duly authorized by the Commissioner. Any person failing to comply with or violating any of the provisions of this section shall be guilty of a Class 1 misdemeanor.

(b) It shall be the duty of the Commissioner of Agriculture, by competent auditors, to have the books and records of every person paying fees or taxes to the Commissioner or Department examined at least once each year to determine if such persons are keeping complete records as provided by this section, and to determine if correct reports have been made to the Commissioner or Department covering the total amount of fees or taxes due by such persons.

(c) If any person shall fail, neglect or refuse to keep such records or to make such reports or pay fees or taxes due as required, and within the time provided in this Chapter, the Commissioner shall immediately inform himself as best he may as to the matters and things required to be set forth in such records and reports, and from such information as he may be able to obtain, determine and fix the amount of fees or taxes due the State from such delinquent person for the period covering the delinquency. The Commissioner shall proceed immediately to collect the fees or taxes due the State, including any penalties and interest thereon, in the manner provided in this Article. (1963, c. 458; 1993, c. 539, s. 736; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

§ 106-9.3. Procedure for assessment of fees and taxes.

(a) If the Commissioner of Agriculture discovers from the examination of any report filed by a taxpayer or otherwise that any fee or tax or additional fee or tax is due from any taxpayer, he shall give notice to the taxpayer in writing of the kind and amount of fee or tax which is due and of his intent to assess the same, which notice shall contain advice to the effect that unless application for a rehearing is made within the time specified in subsection (c), the proposed assessment will become conclusive and final.

If the Commissioner is unable to obtain from the taxpayer adequate and reliable information upon which to base such assessment, the assessment may be made upon the basis of the best information available and, subject to the provisions hereinafter made, such assessment shall be deemed correct.

(b) The notice required to be given in subsection (a) may be delivered to the taxpayer by an agent of the Commissioner or may be sent by mail to the last known address of the taxpayer and such notice will be deemed to have been received in due course of the mail unless the taxpayer shall make an affidavit to the contrary within 90 days after such notice is mailed, in which event the taxpayer shall be heard by the Commissioner in all respects as if he had made timely application.

(c) Any taxpayer who objects to a proposed assessment of fee or tax or additional fee or tax shall be entitled to a hearing before the Commissioner of Agriculture, provided application therefor is made in writing within 30 days after the mailing or delivery of the notice required by subsection (a). If application for a hearing is made in due time, the Commissioner of Agriculture shall set a time and place for the hearing and after considering the taxpayer's objections shall give written notice of his decision to the taxpayer. The amount of fee or tax or additional fee or tax due from the taxpayer as finally determined by the Commissioner shall thereupon be assessed and upon assessment shall become immediately due and collectible.

Provided, the taxpayer may request the Commissioner at any time within 30 days of notice of such proposed assessment for a written statement, or transcript, of the information and the evidence upon which the proposed assessment is based, and the Commissioner of Agriculture shall furnish such statement, or transcript, to the taxpayer. Provided, further, after request by the taxpayer for such written statement, or transcript, the taxpayer shall have 30 days after the receipt of the same from the Commissioner of Agriculture to apply in writing for such hearing, explaining in detail his objections to such proposed assessment. If no request for such hearing is so made, such proposed assessment shall be final and conclusive.

(d) If no timely application for a hearing is made within 30 days after notice of a proposed assessment of fee or tax or additional fee or tax is given pursuant to subsection (a), such proposed fee or tax or additional fee or tax assessment shall become final without further notice and shall be immediately due and collectible.

(e) Where a proper report has been filed by a taxpayer and in the absence of fraud, the Commissioner of Agriculture shall assess any fee or tax or additional fee or tax due from the taxpayer within three years after the date upon which such report is filed or within three years after the date upon which such report was required by law to be filed, whichever is the later. If no report has been filed, and in the absence of fraud, any fee or tax or additional fee or tax due from a taxpayer may be assessed at any time within five years after the date upon which such report was required by law to be filed. In the event a false and fraudulent report has been filed or there has been an attempt in any manner to fraudulently defeat or evade a fee or tax, any fee or tax or additional fee or tax due from the taxpayer may be assessed at any time.

(f) Except as hereinafter provided in subsection (g), the Commissioner of Agriculture shall have no authority to assess any fee or tax or additional fee or tax under this section until the notice required by subsection (a) shall have been given and the period within which an application for a hearing may be filed has expired, or if a timely application for a hearing if filed, until written notice of the Commissioner's decision has been given to the taxpayer, provided, however that if the notice required by subsection (a) shall be mailed or delivered within the limitation prescribed in subsection (e), such limitation shall be deemed to have been complied with and the proceeding may be carried forward to its conclusion.

(g) Notwithstanding any other provision of this section, the Commissioner of Agriculture shall have authority at any time within the applicable period of limitations to proceed at once to assess any fee or tax or additional fee or tax which he finds is due from a taxpayer if, in his opinion, the collection of such fee or tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State, provided, however, that if an assessment is made pursuant to the authority set forth in this subsection before the notice required by subsection (a) is given, such assessment shall not be valid unless the notice required by subsection (a) shall be given within 30 days after the date of such assessment.

(h) All assessments of fees or taxes or additional fees or taxes (exclusive of penalties assessed thereon) shall bear interest at the rate of one half of one percent (0.5%) per month or fraction thereof from the time said fees or taxes or additional fees or taxes were due to have been paid until paid. (1963, c. 458.)

§ 106-9.4. Collection of delinquent fees and taxes.

(a) If any fee or tax imposed by this Chapter, or any other fee or tax levied by the State and payable to the Commissioner of Agriculture or the Department of Agriculture and Consumer Services, or any portion of such fee or tax, be not paid within 30 days after the same becomes due and payable, and after the same has been assessed, the Commissioner of Agriculture shall issue an order under his hand and official seal, directed to the sheriff of any county of the State commanding him to levy upon and sell the real and personal property of the taxpayer found within his county for the payment of the amount thereof, with the added penalties, additional taxes, interest, and cost of executing the same, and to return to the Commissioner of Agriculture the money collected by virtue thereof within a time to be therein specified, not less than 60 days from the date of the order. The said sheriff shall, thereupon, proceed upon the same in all respects with like effect and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the order, to be collected in the same manner.

(b) Bank deposits, rents, salaries, wages, and all other choses in action or property incapable of manual levy or delivery, hereinafter called the intangi-

ble, belonging, owing, or to become due to any taxpayer subject to any of the provisions of this Chapter, or which has been transferred by such taxpayer under circumstances which would permit it to be levied upon if it were tangible, shall be subject to attachment or garnishment as herein provided, and the person owing said intangible, matured or unmatured, or having same in his possession or control, hereinafter called the garnishee, shall become liable for all sums due by the taxpayer under this Chapter to the extent of the amount of the intangible belonging, owing, or to become due to the taxpayer subject to the setoff of any matured or unmatured indebtedness of the taxpayer to the garnishee. To effect such attachment or garnishment the Commissioner of Agriculture shall serve or cause to be served upon the taxpayer and the garnishee a notice as hereinafter provided, which notice may be served by any deputy or employee of the Commissioner of Agriculture or by any officer having authority to serve summonses. Said notice shall show:

(1) The name of the taxpayer and his address, if known;
(2) The nature and amount of the fee or tax, and the interest and penalties thereon, and the year or years for which the same were levied or assessed, and
(3) Shall be accompanied by a copy of this subsection, and thereupon the procedure shall be as follows:

If the garnishee has no defense to offer or no setoff against the taxpayer, he shall, within 10 days after service of said notice, answer the same by sending to the Commissioner of Agriculture by registered mail a statement to that effect, and if the amount due or belonging to the taxpayer is then due or subject to his demand, it shall be remitted to the Commissioner with said statement, but if said amount is to mature in the future, the statement shall set forth that fact and the same shall be paid to the Commissioner upon maturity, and any payment by the garnishee hereunder shall be a complete extinguishment of any liability therefor on his part to the taxpayer. If the garnishee has any defense or setoff, he shall state the same in writing under oath, and, within 10 days after service of said notice, shall send two copies of said statement to the Commissioner by registered mail; if the Commissioner admits such defense or setoff, he shall so advise the garnishee in writing within 10 days after receipt of such statement and the attachment or garnishment shall thereupon be discharged to the amount required by such defense or setoff, and any amount attached or garnished hereunder which is not affected by such defense or setoff shall be remitted to the Commissioner as above provided in cases where the garnishee has no defense or setoff, and with like effect. If the Commissioner shall not admit the defense or setoff, he shall set forth in writing his objections thereto and shall send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time he shall file a copy of said notice, a copy of the garnishee's statement, and a copy of his objections thereto in the superior court of the county where the garnishee resides or does business where the issues made shall be tried as in civil actions.

If judgment is entered in favor of the Commissioner of Agriculture by default or after hearing, the garnishee shall become liable for the fee or taxes, interest and penalties due by the taxpayer to the extent of the amount over and above any defense or setoff of the garnishee belonging, owing, or to become due to the taxpayer, but payments shall not be required from amounts which are to become due to the taxpayer until the maturity thereof, nor shall more than ten percent (10%) of any taxpayer's salary or wages be required to be paid hereunder in any one month. The garnishee may satisfy said judgment upon paying said amount, and if he fails to do so, execution may issue as provided by law. From any judgment or order entered upon such hearing either the Commissioner of Agriculture or the garnishee may appeal as provided by law.

If, before or after judgment, adequate security is filed for the payment of said taxes, interest, penalties, and costs, the attachment or garnishment may be released or execution stayed pending appeal, but the final judgment shall be paid or enforced as above provided. The taxpayer's sole remedies to question his liability for said fees or taxes, interest, and penalties shall be those provided in this Article, as now or hereinafter amended or supplemented. If any third person claims any intangible attached or garnished hereunder and his lawful right thereto, or to any part thereof, is shown to the Commissioner, he shall discharge the attachment or garnishment to the extent necessary to protect such right, and if such right is asserted after the filing of said copies as aforesaid, it may be established by interpleader as now or hereafter provided by the General Statutes in cases of attachment and garnishment. In case such third party has no notice of proceedings hereunder, he shall have the right to file his petition under oath with the Commissioner at any time within 12 months after said intangible is paid to him and if the Commissioner finds that such party is lawfully entitled thereto or to any part thereof, he shall pay the same to such party as provided for refunds by G.S. 105-407 and if such payment is denied, said party may appeal from the determination of the Commissioner to the Superior Court of Wake County or to the superior court of the county wherein he resides or does business. The intangibles of a taxpayer shall be paid or collected hereunder only to the extent necessary to satisfy said fees or taxes, interest, penalties, and costs. Except as hereinafter set forth, the remedy provided in this section shall not be resorted to unless a warrant for collection or execution against the taxpayer has been returned unsatisfied: Provided, however, if the Commissioner is of opinion that the only effective remedy is that herein provided, it shall not be necessary that a warrant for collection or execution shall be first returned unsatisfied, and in no case shall it be a defense to the remedy herein provided that a warrant for collection or execution has not been first returned unsatisfied: Provided, however, that no salary or wage at the rate of less than two hundred dollars ($200.00) per month, whether paid weekly or monthly, shall be attached or garnished under the provisions of this section.

(c) In addition to the remedy herein provided, the Commissioner of Agriculture is authorized and empowered to make a certificate setting forth the essential particulars relating to the said fee or tax, including the amount thereof, the date when the same was due and payable, the person, firm, or corporation chargeable therewith, and the nature of the fee or tax, and under his hand and seal transmit the same to the clerk of the superior court of any county in which the delinquent taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the said certificate and index the same on the cross index of judgments, and execution may issue thereon with the same force and effect as an execution upon any other judgment of the superior court; said tax shall become a lien on realty only from the date of the docketing of such certificate in the office of the clerk of the superior court and in personalty only from the date of the levy on such personalty and upon execution thereon no homestead or personal property exemption shall be allowed.

(d) The remedies herein given are cumulative and in addition to all other remedies provided by law for the collection of said fees and taxes. (1963, c. 458; 1997-261, s. 109.)

Editor's Note. — Section 105-407, referred to in the last paragraph of subsection (b), was transferred to § 105-267.1 by Session Laws 1971, c. 806, s. 2. The section was repealed by Session Laws 1991, c. 45, s. 30. As to refund of overpayment, see now § 105-163.16.

§ 106-9.5. Refund of overpayment.

If the Commissioner of Agriculture discovers from the examination of any report, or otherwise, that any taxpayer has overpaid the correct amount of any fee or tax (including penalties, interest and costs, if any), such overpayment shall be refunded to the taxpayer within 60 days after it is ascertained together with interest thereon at the rate of six percent (6%) per annum: Provided, that interest on any such refund shall be computed from a date 90 days after date tax was originally paid by the taxpayer. Provided, further, that demand for such refund is made by the taxpayer within three years from the date of such overpayment or the due date of the report, whichever is later. (1963, c. 458.)

§ 106-9.6. Suits to prevent collection prohibited; payment under protest and recovery of fee or tax so paid.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any fee or tax imposed in this Chapter. Whenever a person shall have a valid defense to the enforcement of the collection of a fee or tax assessed or charged against him or his property, such person shall pay such fee or tax to the proper officer, and notify such officer in writing that he pays the same under protest. Such payment shall be without prejudice to any defense or rights he may have in the premises, and he may, at any time within 30 days after such payment, demand the same in writing from the Commissioner of Agriculture; and if the same shall not be refunded within 90 days thereafter, may sue such official in the courts of the State for the amount so demanded. Such suit must be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides. (1963, c. 458.)

Part 2. Commissioner of Agriculture.

§ 106-10. Election; term; vacancy.

The Commissioner of Agriculture shall be elected at the general election for other State officers, shall be voted for on the same ballot with such officers, and his term of office shall be four years, and until his successor is elected and qualified. Any vacancy in the office of such Commissioner shall be filled by the Governor, the appointee to hold until the next regular election to the office and the qualification of his successor. (1901, c. 479, s. 4; Rev., s. 3938; C.S., s. 4675.)

§ 106-11. Salary of Commissioner of Agriculture.

The salary of the Commissioner of Agriculture shall be set by the General Assembly in the Current Operations Appropriations Act. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1901, c. 479, s. 4; 1905, c. 529; Rev., s. 2749; 1907, c. 887, s. 1; 1913, c. 58; C. S., s. 3872; 1921, c. 25, s. 1; 1933, c. 282, s. 5; 1935, c. 293; 1937, c. 415; 1939, c. 338; 1943, c. 499, s. 1; 1947, c. 1041; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 4; 1967, c. 1130; c. 1237, s. 4; 1969, c. 1214, s. 4; 1971, c. 912, s. 4; 1973, c. 778, s. 4; 1975, 2nd Sess., c. 983, s. 19; 1977, c. 802, s. 42.10; 1983, c. 761, s. 208; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

§§ 106-12, 106-13: Repealed by Session Laws 1997-74, ss. 3 and 4.

§ 106-14. To establish regulations for transportation of livestock.

The Commissioner of Agriculture, by and with the consent and advice of the Board of Agriculture, shall promulgate and enforce such rules and regulations as may be necessary for the proper transporting of livestock by motor vehicle, and may require a permit for such vehicles if it becomes necessary in order to prevent the spread of animal diseases. This section shall not apply to any county having a local law providing for the vaccination of hogs against cholera. (1937, c. 427, ss. 1, 2.)

Part 3. Powers and Duties of Department and Board.

§§ 106-15 through 106-19: Repealed by Session Laws 1997-74, s. 5.

§ 106-20: Repealed by Session Laws 1987, c. 244, s. 1(a).

§ 106-21: Repealed by Session Laws 1997-74, s. 7.

§ 106-21.1. Feed Advisory Service; fee.

The Department of Agriculture and Consumer Services shall operate a Feed Advisory Service for the analysis of animal feeds in order to provide a feeding management service to all animal producers in North Carolina. A fee of ten dollars ($10.00) shall accompany each feed sample sent to the Department for testing. A fee of seventy-five dollars ($75.00) shall accompany each feed sample which is to be tested for the presence of fumonisin. (1979, c. 1026; 1989, c. 544, s. 9; 1991, c. 649, s. 1; 1997-261, s. 21.)

§ 106-21.2. Food Bank information and referral service.

The Department of Agriculture and Consumer Services may maintain an information and referral service for persons and organizations that have notified the department of their desire to donate food to a nonprofit organization or a nonprofit corporation. (1979, 2nd Sess., c. 1188, s. 2; 1997-261, s. 22.)

§ 106-22. Joint duties of Commissioner and Board.

The Commissioner of Agriculture, by and with the consent and advice of the Board of Agriculture shall:

(1) General. — Investigate and promote such subjects relating to the improvement of agriculture, the beneficial use of commercial fertilizers and composts, and for the inducement of immigration and capital as he may think proper; but he is especially charged:

(2) Commercial Fertilizers. — With such supervision of the trade in commercial fertilizers as will best protect the interests of the farmers, and shall report to district attorneys and to the General Assembly information as to the existence or formation of trusts or combinations in fertilizers or fertilizing materials which are or may be offered for sale in this State, whereby the interests of the farmers may be injuriously affected, and shall publish such information in the Bulletin of the Department;

(3) Cattle and Cattle Diseases. — With investigations adapted to promote the improvement of milk and beef cattle, and especially investigations relating to the diseases of cattle and other domestic animals, and shall publish and distribute from time to time information relative to any contagious diseases of stock, and suggest remedies therefor, and shall have power in such cases to quarantine the infected animals and to regulate the transportation of stock in this State, or from one section of it to another, and may cooperate with the United States Department of Agriculture in establishing and maintaining cattle districts or quarantine lines, to prevent the infection of cattle from splenic or Spanish fever. Any person willfully violating such regulations shall be liable in a civil action to any person injured, and for any and all damages resulting from such conduct, and shall also be guilty of a Class 1 misdemeanor;

(4) Honey and Bee Industry. — With investigations adapted to promote the improvement of the honey and bee industry in this State, and especially investigations relating to the diseases of bees, and shall publish and distribute from time to time information relative to such diseases, and such remedies therefor, and shall have power in such cases to quarantine the infected bees and to control or eradicate such infections and to regulate the transportation or importation into North Carolina from any other state or country of bees, honey, hives, or any apiary equipment, or from one section of the State to another, and may cooperate with the United States Department of Agriculture in establishing and maintaining quarantine lines or districts. The Commissioner of Agriculture, by and with the consent and advice of the Board of Agriculture, shall have power to make rules and regulations to carry out the provisions of this section; and in event of failure to comply with any such rules and regulations, the Commissioner of Agriculture or his duly authorized agent is authorized to confiscate and destroy any infected bees and equipment and any bees and/or used apiary equipment moved in violation of these regulations;

(5) Insect Pests. — With investigations relative to the ravages of insects and with the dissemination of such information as may be deemed essential for their abatement, and making regulations for destruction of such insects. The willful violation of any of such regulations by any person shall be a Class 1 misdemeanor;

(6) New Agricultural Industries. — With investigations and experiments directed to the introduction and fostering of new agricultural industries, adapted to the various climates and soils of the State, especially the culture of truck and market gardens, the grape and other fruits;

(7) Drainage and Irrigation; Fertilizer Sources. — With the investigations of the subject of drainage and irrigation and publication of information as to the best methods of both, and what surfaces, soils, and locations may be most benefited by such improvements; also with the collection and publication of information in regard to localities, character, accessibility, cost, and modes of utilization of native mineral and domestic sources of fertilizers, including formulae for composting adapted to the different crops, soils, and materials;

(8) Farm Fences. — With the collection of statistics relating to the subject of farm fences, with suggestions for diminishing their cost, and the conditions under which they may be dispensed with altogether;

(9) Sales of Fertilizers, Seeds, and Food Products. — With the enforcement and supervision of the laws which are or may be enacted in this State for the sale of commercial fertilizers, seeds and food products, with the authority to make regulations concerning the same;

(10) Inducement of Capital and Immigration. — With the inducement of capital and immigration by the dissemination of information relative to the advantages of soil and climate and to the natural resources and industrial opportunities offered in this State, by the keeping of a land registry and by the publication of descriptions of agricultural, mineral, forest, and trucking lands which may be offered the Department for sale; which publication shall be in tabulated form, setting forth the county, township, number of acres, names and addresses of owners, and such other information as may be needful in placing inquiring homeseekers in communication with landowners; and he shall publish a list of such inquiries in the Bulletin for the benefit of those who may have land for sale;

(11) Diversified Farming. — With such investigations as will best promote the improvement and extension of diversified farming, including the rotation of crops, the raising of home supplies, vegetables, fruits, stock, grasses, etc.;

(12) Farmers' Institutes. — With the holding of farmers' institutes in the several counties of the State, as frequently as may be deemed advisable, in order to instruct the people in improved methods in farming, in the beneficial use of fertilizers and composts, and to ascertain the wants and necessities of the various farming communities; and may collect the papers and addresses made at these institutes and publish the same in pamphlet form annually for distribution among the farmers of the State. He may secure such assistants as may be necessary or beneficial in holding such institutes;

(13) Publication of Bulletin. — The Commissioner shall publish bulletins which shall contain a list of the fertilizers and fertilizing materials registered for sale each year, the guaranteed constituents of each brand, reports of analyses of fertilizers, the dates of meeting and reports of farmers' institutes and similar societies, description of farm buildings suited to our climate and needs, reports of interesting experiments of farmers, and such other matters as may be deemed advisable. The Department may determine the number of bulletins which shall be issued each year;

(14) Reports to Legislature. — He shall transmit to the General Assembly at each session a report of the operations of the Department with suggestions of such legislation as may be deemed needful;

(15) Repealed by Session Laws 1993, c. 561, s. 116.

(16) State Agricultural Policies. — Establish State government policies relating to agriculture.

(17) Agronomic Testing. — Provide agronomic testing services and charge reasonable fees for plant analysis and nematode testing. The Board shall charge at least four dollars ($4.00) for plant analysis and at least two dollars ($2.00) for nematode testing. (1901, c. 479, s. 4; Rev., ss. 3294, 3724, 3944; 1917, c. 16; C.S., s. 4688; 1939, c. 173; 1973, c. 47, s. 2; 1979, c. 344, s. 1; 1981, c. 495, s. 9; 1989, c. 544, s. 4; 1993, c. 539, ss. 737, 738; c. 561, s. 116(d); 1994, Ex. Sess., c. 24, s. 14(c).)

State Government Reorganization. — The State Museum was transferred to the Department of Agriculture by § 143A-66, enacted by Session Laws 1971, c. 864. Section 143A-66 was repealed by Session Laws 1993, c. 561, s. 116(c), effective August 1, 1993. The State Museum was transferred to the Dep't of Environment, Health Natural Resources. See § 143B-344.18 et seq.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Constitutionality. — Legislation of this character has been upheld by well considered decisions in this and other jurisdictions. Morgan v. Stewart, 144 N.C. 424, 57 S.E. 149 (1907).

The authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation, because violations thereof are punished as "public offenses." State v. Southern Ry., 141 N.C. 846, 54 S.E. 294 (1906).

Cattle and Cattle Diseases. — The State Board of Agriculture has authority to make and enforce regulations for the quarantine of cattle and to prevent their transportation in view of preventing the spreading of contagious diseases. And an owner permitting cattle to run at large in a no-fence county who willfully allows cattle to stray across the line is guilty of a violation of the act. State v. Garner, 158 N.C. 630, 74 S.E. 458 (1912).

Subdivision (3) of this section confers power upon the Commissioner to make regulations prohibiting the transportation of cattle. State v. Southern Ry., 141 N.C. 846, 54 S.E. 294 (1906).

The provision to get rid of the ticks on cattle and prevent infection is a reasonable and valid regulation. State v. Hodges, 180 N.C. 751, 105 S.E. 417 (1920).

Judicial Notice of Quarantined District. — Where the quarantine regulations of the United States Department of Agriculture, relating to the transportation of cattle, which were adopted by the State Board of Agriculture, provided that no cattle originating in the quarantined district as therein described should be moved into "that part of Burke south of the Catawba River," the court judicially knows that a shipment of cattle from Burlington to Morganton has been across the line fixed as a quarantine line. State v. Southern Ry., 141 N.C. 846, 54 S.E. 294 (1906).

Cited in Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

§ 106-22.1. State farms.

State-owned farmland, including timberland, allocated to the Department of Agriculture and Consumer Services for the State Farm Program, shall be managed by the Department for research, teaching, and demonstration in agriculture, forestry, and aquaculture. Research projects on the State farms shall be approved by the Department. The Department may sell surplus commodities produced on the farms. (1989, c. 500, s. 107(c); 1997-261, s. 23.)

§ 106-22.2: Recodified as § 143B-344.23 by Session Laws 1998-212, s. 21(a), effective July 1, 1998.

§ 106-22.3. Organic Production Program.

(a) The Board of Agriculture may establish rules, standards, guidelines, and policies for the establishment and implementation of a voluntary program for the certification of organically produced agricultural products.

(b) The Commissioner of Agriculture may enter into agreements with the United States Department of Agriculture and may apply for approval, accreditation, certification, or similar authority as may be necessary to comply with the requirements of the Organic Foods Production Act of 1990, Public Law 101-624. (1993, c. 147, s. 1.)

§ 106-22.4. Llamas as livestock.

Any rules adopted by the Board of Agriculture that affect llamas shall not refer to llamas as exotic or wild animals. It is the intent of the General Assembly that llamas be treated as domesticated livestock in order to promote the development and improvement of the llama industry in the State. This section does not prohibit the Board of Agriculture from classifying llamas for animal health purposes in accordance with generally accepted standards of veterinary medicine. For purposes of the section, "llama" means a South American camelid that is an animal of the genus llama. Llama includes llamas, alpacas, and guanacos. Llama does not include vicunas. (1997-84, s. 3.)

Editor's Note. — Session Laws 1997-84, s. 3 was codified as this section at the direction of the Revisor of Statutes.

§ 106-22.5. Agricultural tourism signs.

(a) The Department of Agriculture and Consumer Services shall provide directional signs on major highways at or in reasonable proximity to the nearest interchange or within one mile leading to an agricultural facility that promotes tourism by providing tours and on-site sales or samples of North Carolina agricultural products to area tourists.

(b) An agricultural facility must be open for business at least four days a week, 10 months of the year in order to qualify for the directional signs provided for in this section. The Department shall assess the facility the actual reasonable costs of the sign and its installation. (1999-356, s. 1.)

Editor's Note. — Session Laws 1999-356, s. 2, made this section effective July 22, 1999.

Part 4. Cooperation of Federal and State Governments in Agricultural Work.

§ 106-23. Legislative assent to Adams Act for experiment station.

Legislative assent be and the same is hereby given to the purpose of an act of Congress approved March 16, 1906, entitled "An Act to provide for an increased annual appropriation for agricultural experiment stations, and regulating the expenditure thereof," known as the Adams Act, and the money appropriated by this act be and the same is hereby accepted on the part of the State for the use of the agricultural experiment station, and the whole amount shall be used for the benefit of the said agricultural experiment station, in accordance with the act of Congress making appropriations for agricultural experiment stations and governing the expenditure thereof. (1907, c. 793; C.S., s. 4689.)

Part 5. Cooperation between Department and United States Department of Agriculture, and County Commissioners.

§ 106-24. Collection and publication of information relating to agriculture; cooperation.

The Department of Agriculture and Consumer Services shall collect, compile, systematize, tabulate, and publish statistical information relating to agriculture. The Department is authorized to use sample surveys to collect primary data relating to agriculture. The Department is authorized to cooperate with the United States Department of Agriculture and the several boards of county commissioners of the State, to accomplish the purpose of this Part. (1921, c. 201, s. 1; C.S., s. 4689(a); 1941, c. 343; 1975, c. 611, s. 1; 1979, c. 228, s. 1; 1997-261, s. 25.)

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Cited in Nantahala Power & Light Co. v. Clay County, 213 N.C. 698, 197 S.E. 603 (1938).

§ 106-24.1. Confidentiality of information collected and published.

All information published by the Department of Agriculture and Consumer Services pursuant to this Part shall be classified so as to prevent the identification of information received from individual farm operators. All information received pursuant to this Part from individual farm operators shall be held confidential by the Department and its employees. Information collected by the Department from individual farm operators for the purposes of its animal health programs may be disclosed by the State Veterinarian when, in his judgment, the disclosure will assist in the implementation of these programs. (1979, c. 228, s. 3; 1993, c. 5, s. 1; 1997-261, s. 26.)

§§ 106-25 through 106-26.2: Repealed by Session Laws 1979, c. 288, s. 2.

§§ 106-26.3 through 106-26.6: Reserved for future codification purposes.

ARTICLE 1A.

State Farm Operations Commission.

§§ 106-26.7 through 106-26.12: Repealed by Session Laws 1977, c. 1122, s. 10.

ARTICLE 1B.

State Farm Operations Commission.

§§ 106-26.13 through 106-26.21: Repealed by Session Laws 1989, c. 500, s. 107(a).

ARTICLE 2.

North Carolina Fertilizer Law of 1947.

§§ 106-27 through 106-50: Superseded by G.S. 106-50.1 to 106-50.22.

§§ 106-50.1 through 106-50.22: Repealed by Session Laws 1977, c. 303, s. 24.

Cross References. — For present statute covering the subject matter of the repealed sections, see § 106-655 et seq.

§§ 106-50.23 through 106-50.27: Reserved for future codification purposes.

ARTICLE 2A.

North Carolina Soil Additives Act of 1977.

§ 106-50.28. Short title.

This Article shall be known as the North Carolina Soil Additives Act of 1977. (1977, c. 233, s. 1.)

§ 106-50.29. Administration of Article.

This Article shall be administered by the Commissioner of Agriculture of the State of North Carolina. (1977, c. 233, s. 2.)

§ 106-50.30. Definitions.

Words used in this Article shall be defined as follows:

(1) "Adulterated" means any soil additive:
   a. Which contains any deleterious substance in sufficient quantity to be injurious to desirable terrestrial or aquatic organisms when applied in accordance with the directions for use shown on the label; or
   b. Whose composition differs from that offered in support of registration or shown on the label; or
   c. Which contains noxious weed seed.

(2) "Bulk" means in nonpackaged form.

(3) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina or his designated agent.

(4) "Distribute" means to import, consign, offer for sale, sell, barter, exchange, or to otherwise supply soil additives to any person in this State.

(5) "Distributor" means any person who imports, consigns, sells, offers for sale, barters, exchanges, or otherwise supplies soil additives in this State.

(6) "Label" means the display of written, printed, or graphic matter upon the immediate container of, or accompanying soil additives.

(7) "Labeling" means all written, printed, or graphic matter accompanying any soil additive and all advertisements, brochures, posters, television, radio or oral claims used in promoting its sale.

(8) "Percent" or "percentage" means the parts per hundred by weight.

(9) "Person" means individuals, partnerships, associations, corporations or other legal entity.

(10) "Product name" means the designation under which a soil additive is offered for distribution.

(11) "Registrant" means any person who registers a soil additive under the provisions of this Article.

(12) "Sale" means any transfer of title or possession, or both, exchange or barter of tangible personal property, conditioned or otherwise for a consideration paid or to be paid, and this shall include any of said transactions whereby title or ownership is to pass and shall further mean and include any bailment, loan, lease, rental, or license to use or consume tangible personal property for a consideration paid in which

possession of said property passes to the bailor, borrower, lessee, or licensee.

(13) "Sell" means the alienation, exchange, transfer or contract for such transfer of property for a fixed price in money or its equivalent.

(14) "Soil additive" means any substance intended for changing the characteristics of soil or other growth medium for purposes of:

a. Increasing the biological population, or
b. Increasing penetrability of water or air, or
c. Increasing water holding capacity, or
d. Increasing root development, or
e. Alleviating or decreasing soil compaction, or
f. Otherwise altering the soil or other medium in such manner that the physical and biological properties are materially enhanced.
g. The term "soil additive" does not include any substance for which nutritional claims are made, such as, but not limited to, commercial fertilizers, liming materials, or unmanipulated vegetable or animal manures. It also specifically does not include rhizobial inoculants, pine bark, peat moss, other unfortified mulches, or pesticides. (1977, c. 233, s. 3.)

§ 106-50.31. Registration of additives.

Every soil additive distributed in North Carolina shall be registered with the Commissioner by the person whose name appears on the label on forms furnished by the Commissioner. The applicant shall furnish such information as the Commissioner may require. In determining the acceptability of any product for registration, the Commissioner may require proof of claims made for the soil additive. If no specific claims are made, the Commissioner may require proof of usefulness and value of the soil additive. As evidence of proof, the Commissioner may rely on experimental data furnished by the applicant and may require that such data be developed by a recognized research or experimental institution. The Commissioner may further require that such data be developed from tests conducted under conditions identical to or closely related to those present in North Carolina. The Commissioner may reject any data not developed under such conditions and may rely on the advice of the Director of the North Carolina Agricultural Experiment Station in evaluating data for registration.

The registration fee shall be one hundred dollars ($100.00) per year for each product. Registration shall expire on December 31, annually, unless an application for renewal has been received prior to the expiration date.

The application for registration shall include the following:

(1) The name and address of the registrant;
(2) Product name;
(3) Guaranteed analysis;
a. Active ingredients (name of each ingredient and percent)
b. Inert ingredients (name of each ingredient and percent)
(4) Directions for use;
(5) Purpose of product.

The application shall be accompanied by the label for the product and all advertisements including brochures, posters, or other information promoting the product. The registrant is responsible for all guaranteed analysis and claims appearing on the label. (1977, c. 233, s. 4; 1989, c. 544, s. 8.)

§ 106-50.32. Labeling of containers.

Every soil additive container shall be labeled on the face or display side in readable and conspicuous form showing:

(1) The product name;
(2) The guaranteed analysis;
(3) A statement of claim or purpose;
(4) Adequate directions for use;
(5) Net weight or volume;
(6) Name and address of registrant. (1977, c. 233, s. 5.)

§ 106-50.33. When additive considered misbranded.

A soil additive shall be considered misbranded if:
(1) Its label or labeling is false or misleading in any particular;
(2) It is distributed under the name of another soil additive;
(3) It is represented as a soil additive or is represented to contain a soil additive unless such soil additive conforms to the soil additive definition in this Article. (1977, c. 233, s. 6.)

§ 106-50.34. Records and reports of registrants.

Each registrant shall keep accurate records of his sales, and shall file a semiannual report covering the periods January 1 through June 30, and July 1 through December 31. Such reports shall be due within 30 days from the close of each period. If the report is not filed within the 30-day period or is false in any respect, the Commissioner may revoke the registration. For the purpose of auditing reports, each registrant shall make his records available for audit from time to time as the Commissioner may deem necessary. (1977, c. 233, s. 7.)

§ 106-50.35. Violations of Article.

It shall be a violation of this Article for any person:
(1) To distribute an unregistered soil additive;
(2) To distribute an unlabeled soil additive;
(3) To distribute a misbranded soil additive;
(4) To distribute an "adulterated" soil additive;
(5) To fail to comply with a "stop sale, use or removal" order; or
(6) To fail to submit semiannual reports. (1977, c. 233, s. 8.)

§ 106-50.36. Inspection and sampling of additives.

The Commissioner is authorized to enter upon any public or private property with permission or with a proper court order during normal business hours for the purpose of inspecting or sampling any soil additive to determine if such additive is being distributed in compliance with the provisions of this Article. In the examination of such samples, the Commissioner may rely on such tests as he may establish as necessary for the enforcement of this Article. (1977, c. 233, s. 9.)

§ 106-50.37. Stop sale, etc., orders.

The Commissioner may issue and enforce a written or printed stop sale, use, or removal order to the owner or custodian of any lot of soil additive, and hold at a designated place, any such lot of soil additive which the Commissioner determines does not comply with the provisions of this Article. When such soil additive has been made to comply with the provisions of this Article, it shall then be released in writing by the Commissioner. (1977, c. 233, s. 10.)

§ 106-50.38. Injunctions.

The Commissioner may bring an action to enjoin the violation or threatened violation of any provision of this Article or regulations adopted hereunder, in the Superior Court of Wake County, or in the superior court of the county in which such violation occurs or is about to occur. (1977, c. 233, s. 11.)

§ 106-50.39. Refusal or revocation of registration.

The Commissioner shall refuse to register any soil additive which fails to comply with the provisions of this Article, and may revoke, after opportunity for a hearing, any registration, upon sufficient evidence that the registrant or any of his designated agents has used misleading, fraudulent, or deceptive practices in the distribution of any soil additive. (1977, c. 233, s. 12.)

§ 106-50.40. Rules and regulations.

The Board of Agriculture is authorized to promulgate and adopt, pursuant to Chapter 150B of the General Statutes of North Carolina, such rules and regulations as may be necessary to enforce the provisions of this Article. Such regulations may relate to, but shall not be limited to:

(1) Methods of inspection and sampling;
(2) Examination and analysis of samples;
(3) Designation of ingredients;
(4) Identity of product;
(5) Monetary penalties for samples not meeting guarantees;
(6) Acceptable ingredients for registration;
(7) Labeling format. (1977, c. 233, s. 13; 1987, c. 827, s. 1.)

§ 106-50.41. Penalties.

Any person violating the provisions of this Article or the regulations adopted thereunder, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Commissioner each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties. (1977, c. 233, s. 14; 1993, c. 539, s. 739; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 3.

Fertilizer Laboratories.

§ 106-51: Repealed by Session Laws 1987, c. 244, s. 1(b).

Article 4.

Insecticides and Fungicides.

§§ 106-52 through 106-65: Repealed by Session Laws 1971, c. 832, s. 4.

Cross References. — For present provisions as to pesticide control, see § 143-434 et seq.

Article 4A.

Insecticide, Fungicide and Rodenticide Act of 1947.

§§ 106-65.1 through 106-65.12: Repealed by Session Laws 1971, c. 832, s. 4.

Cross References. — For present provisions as to pesticide control, see § 143-434 et seq.

Article 4B.

Aircraft Application of Pesticides.

§§ 106-65.13 through 106-65.21: Repealed by Session Laws 1971, c. 832, s. 4.

Cross References. — For present provisions as to pesticide control, see § 143-434 et seq.

Article 4C.

Structural Pest Control Act.

§ 106-65.22. Title.

This Article shall be known by the title of "Structural Pest Control Act of North Carolina of 1955." It is declared to be the policy of this State that the regulation of persons, corporations and firms engaged in the business of structural pest control in this State, as defined in G.S. 106-65.25, is in the public interest in order to ensure a high quality of workmanship and in order to prevent deception, fraud and unfair trade practices in the conduct of said business. The General Assembly finds that quality of structural pest control work is not easily determined by the general public due to the inaccessibility of the areas treated and the complexity of the methods of treatment. (1955, c. 1017; 1977, c. 231, s. 1.)

§ 106-65.23. Structural Pest Control Division of Department of Agriculture and Consumer Services recreated; Director; powers and duties of Commissioner; Structural Pest Control Committee created; appointment; terms; powers and duties; quorum.

(a) There is recreated, within the North Carolina Department of Agriculture and Consumer Services, a Division to be known as the Structural Pest Control Division. The Commissioner of Agriculture may appoint a Director of the Division, chosen from a list of nominees submitted to him by the Structural Pest Control Committee created in this section, whose duties and authority shall be determined by the Commissioner in consultation with the Committee. The Director shall be responsible for and answerable to the Commissioner of

Agriculture and the Structural Pest Control Committee as to the operation and conduct of the Structural Pest Control Division. The Director shall act as secretary to the Structural Pest Control Committee.

(b) The Commissioner shall have the following powers and duties under this Article:

(1) To administer and enforce the provisions of this Article and the rules adopted thereunder by the Structural Pest Control Committee. In order to carry out these powers and duties, the Commissioner may delegate to the Director of the Structural Pest Control Division the powers and duties assigned to him under this Article.

(2) To assign the administrative and enforcement duties assigned to him in this Article.

(3) To direct, in consultation with the Structural Pest Control Committee, the work of the personnel employed by the Structural Pest Control Committee and the work of the personnel of the Department assigned to perform the administrative and enforcement functions of this Article.

(4) To develop, for the Structural Pest Control Committee's consideration for adoption, proposed rules, policies, new programs, and revisions of existing programs under this Article.

(5) To monitor existing enforcement programs and to provide evaluations of these programs to the Structural Pest Control Committee.

(6) To attend all meetings of the Structural Pest Control Committee, but without the power to vote unless the Commissioner attends as the designee on the Committee from the Department of Agriculture and Consumer Services.

(7) To keep an accurate and complete record of all meetings of the Structural Pest Control Committee and to have legal custody of all books, papers, documents, and other records of the Committee.

(8) To perform such other duties as may be assigned to him by the Structural Pest Control Committee.

(c) There is hereby created a Structural Pest Control Committee to be composed of the following members. The Commissioner shall appoint one member of the Committee who is not in the structural pest control business for a four-year term. The Commissioner of Agriculture shall designate an employee of the Department of Agriculture and Consumer Services to serve on the Committee at the pleasure of the Commissioner. The dean of the School of Agriculture of North Carolina State University at Raleigh shall appoint one member of the Committee who shall serve for one term of two years and who shall be a member of the entomology faculty of the University. The vacancy occurring on the Committee by the expired term of the member from the entomology faculty of the University shall be filled by the dean of the School of Agriculture of North Carolina State University at Raleigh who shall designate any person of the dean's choice from the entomology faculty of the University to serve on the Committee at the pleasure of the dean. The Secretary of Health and Human Services shall appoint one member of the Committee who shall be an epidemiologist and who shall serve at the pleasure of the Secretary. The Governor shall appoint two members of the Committee who are actively engaged in the pest control industry, who are licensed in at least two phases of structural pest control as provided under G.S. 106-65.25(a), and who are residents of the State of North Carolina but not affiliates of the same company.

One member of the Committee shall be appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one member of the Committee shall be appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. Vacancies in such appointments shall be filled in accordance with G.S. 120-122.

The initial Committee members from the pest control industry shall be appointed as follows: one for a two-year term and one for a three-year term. The Governor shall appoint one member of the Committee who is a public member and who is unaffiliated with the structural pest control industry, the pesticide industry, the Department of Agriculture and Consumer Services, the Department of Health and Human Services and the School of Agriculture at North Carolina State University at Raleigh. The initial public member shall be appointed for a term of two years, commencing July 1, 1991. After the initial appointments by the Governor, all ensuing appointments by the Governor shall be for terms of four years. Appointments made by the General Assembly shall be for terms of two years. Any vacancy occurring on the Committee by reason of death, resignation, or otherwise shall be filled by the Governor or the Commissioner of Agriculture, as the case may be, for the unexpired term of the member whose seat is vacant.

(d) The Structural Pest Control Committee shall have the following powers and duties:

(1) To adopt rules and make policies as provided in this Article.

(2) To issue, deny, suspend, revoke, modify, or restrict licenses, certified applicator cards, and registered technician cards under the provisions of this Article. In all matters affecting licensure, the decision of the Committee shall constitute the final agency decision.

(3) To report annually to the Board of Agriculture the action taken in the Committee's final decisions and the financial status of the Structural Pest Control Division.

(e) Each member of the Committee who is not an employee of the State shall receive as compensation for services per diem and necessary travel expenses and registration fees in accordance with the provisions as outlined for members of occupational licensing boards and currently provided for in G.S. 93B-5. Such per diem and necessary travel expenses and registration fees shall apply to the same effect that G.S. 93B-5 might hereafter be amended.

Five members of the Committee shall constitute a quorum but no action at any meeting of the Committee shall be taken without four votes in accord. The chairman shall be entitled to vote at all times.

The Committee shall meet at such times and such places in North Carolina as the chairman shall direct; provided, however, that four members of the Committee may call a special meeting of the Committee on five days' notice to the other members thereof.

Except as otherwise provided herein, all members of the Committee shall be appointed or designated, as the case may be, prior to and shall commence their respective terms on July 1, 1967.

At the first meeting of the Committee they shall elect a chairman who shall serve as such at the pleasure of the Committee. (1955, c. 1017; 1057, c. 1243, s. 1; 1967, c. 1184, s. 1; 1969, c. 541, s. 7; 1973, c. 556, s. 1; 1975, c. 570, ss. 1, 2; 1977, c. 231, s. 2; 1987, c. 827, s. 26; 1989, c. 238; c. 727, s. 219(30); 1997-261, s. 27; 1997-443, s. 11A.40; 1998-224, s. 19(a); 1999-381, s. 1.)

Editor's Note. — Session Laws 1998-224, s. 19(b), provides that the two additional members authorized by Session Laws 1998-224, s. 19(a) shall be appointed for initial terms to expire June 30, 2002.

Effect of Amendments. — The 1998 amendment, effective November 5, 1998, added the present third paragraph; and in the eighth paragraph, substituted "Five members" for "Four members."

Session Laws 1999-381, s. 1, effective October 1, 1999, in the catchline, inserted "powers and duties of commissioner" and inserted "powers and duties"; designated the former first, second and fifth paragraphs as subsections (a), (c) and (e); rewrote subsection (a); added subsection (b); inserted the present fifth sentence in the third paragraph of subsection (c); and rewrote subsection (d).

State Government Reorganization. — The Structural Pest Control Division was transferred to the Department of Agriculture by § 143A-60, enacted by Session Laws 1971, c. 864.

§ 106-65.24. Definitions.

As used in this Article:

(1) "Animal" means all vertebrate and invertebrate species, including but not limited to man and other mammals, birds, fish, and shellfish.

(1a) "Applicant for a certified applicator's identification card" means any person making application to use restricted use pesticides in any phase of structural pest control.

(2) "Applicant for a license" means any person in charge of any individual, firm, partnership, corporation, association, or any other organization or any combination thereof, making application for a license to engage in structural pest control, control of structural pests or household pests, or fumigation operations, or any person qualified under the terms of this Article.

(3) "Attractants" means substances, under whatever name known, which may be toxic to insects and other pests but are used primarily to induce insects and other pests to eat poisoned baits or to enter traps.

(3a) Repealed by Session Laws 1989, c. 725.

(3b) "Branch Office" means any office under the management of a licensee that is not a home office.

(4) "Certified applicator" means any individual who is certified under G.S. 106-65.25 as authorized to use or supervise the use of any pesticide which is classified for restricted use.

(5) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(6) "Committee" means the Structural Pest Control Committee.

(6a) "Deviation" means failure of the licensee or certified applicator or registered technician card holder to follow any rule adopted by the Committee under provisions of this Article.

(7) "Device" means any instrument or contrivance (other than a firearm) which is intended for trapping, destroying, repelling, or mitigating any pest or any other form of plant or animal life (other than man and other than bacteria, virus, or other microorganism on or in living man or other living animals); but not including equipment used for the application of pesticides when sold separately therefrom.

(8) Repealed by Session Laws 1975, c. 570, s. 4.

(8a) "Director" means the Director of the Structural Pest Control Division of the Department of Agriculture and Consumer Services.

(9) "Employee" means any person employed by a licensee with the exceptions of clerical, janitorial, or office maintenance employees, or those employees performing work completely disassociated with the control of insect pests, rodents or the control of wood-destroying organisms.

(9a) "Enforcement agency" means the Structural Pest Control Division of the Department of Agriculture and Consumer Services.

(10) "Fumigants" means any substance which by itself or in combination with any other substance emits or liberates a gas or gases, fumes or vapors and which gas or gases, fumes or vapors when liberated and when used will destroy vermin, rodents, insects, and other pests; but may be lethal, poisonous, noxious, or dangerous to human life.

(11) "Fungi" means wood-decaying fungi.

(11a) "Home office" means the office identified to the enforcement agency by a licensee as his or her principal place of business.

(12) "Insect" means any of the numerous small invertebrate animals generally having the body more or less obviously segmented, for the most part belonging to the class Insecta, comprising six-legged,

usually winged forms, as for example, beetles, bugs, bees, flies, and to other allied classes of arthropods whose members are wingless and usually have more than six legs, as for example, spiders, mites, ticks, centipedes, and sowbugs.

(13) "Insecticides" means substances, not fumigants, under whatever name known, used for the destruction or control of insects and similar pests.

(14) "Label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(14a) The term "labeling" means all labels and other written, printed, or graphic matter:

a. Upon the pesticide (or device) or any of its containers or wrappers;

b. Accompanying the pesticide (or device) at any time;

c. To which reference is made on the label or in literature accompanying the pesticide (or device) except when accurate nonmisleading reference is made to current official publications of the United States Department of Agriculture or Interior, the United States Public Health Service, state experiment stations, state agricultural colleges, or other similar federal institutions or official agencies of this State or other states authorized by the law to conduct research in the field of pesticides.

(15) "Licensee" means any person qualified for and holding a license for any phase of structural pest control pursuant to this Article.

(16) "Person" means any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.

(17) "Pest" means any living organism, including but not limited to, insects, rodents, birds, and fungi, which the Commissioner declares to be a pest.

(18) "Pesticide" means any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest.

(19) "Registered pesticide" means a pesticide which has been registered by federal and/or State agency responsible for registering pesticides.

(19a) "Registered technician" means any individual who is required to be registered with the Structural Pest Control Division under G.S. 106-65.31.

(20) "Repellents" means substances, not fumigants, under whatever name known, which may be toxic to insects and related pests, but are generally employed because of capacity for preventing the entrance or attack of pests.

(21) "Restricted use pesticide" means a pesticide which has been designated as such by the federal and/or State agency responsible for registering pesticides.

(22) "Rodenticides" means substances, not fumigants, under whatever name known, whether poisonous or otherwise, used for the destruction or control of rodents.

(23) "Structural pest control" means the control of wood-destroying organisms or household pests (including, but not limited to, animals such as moths, cockroaches, ants, beetles, flies, mosquitoes, ticks, wasps, bees, fleas, mites, silverfish, millipedes, centipedes, sowbugs, crickets, termites, wood borers, etc.), including the identification of infestations or infections, the making of inspections, the use of pesticides, including insecticides, repellents, attractants, rodenticides, fungicides, and fumigants, as well as all other substances, mechanical devices or structural modifications under whatever name known, for the purpose of preventing, controlling and eradicating insects, vermin, rodents and other pests in household structures, commercial buildings,

and other structures (including household structures, commercial buildings and other structures in all stages of construction), and outside areas, as well as all phases of fumigation, including treatment of products by vacuum fumigation, and the fumigation of railroad cars, trucks, ships, and airplanes, or any one or any combination thereof.

(24) "Under the direct supervision of a certified applicator" means, unless otherwise prescribed by its labeling, a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied. (1955, c. 1017; 1957, c. 1243, s. 2; 1967, c. 1184, ss. 2, 3; 1973, c. 556, s. 2; 1975, c. 570, ss. 3, 4; 1977, c. 231, ss. 3-5; 1989, c. 725, s. 1; 1997-261, ss. 28, 29; 1999-381, s. 2.)

Effect of Amendments. — Session Laws 1999-381, s. 2, effective October 1, 1999, rewrote the introductory language; and rewrote subdivisions (3b), (11a), and (15).

§ 106-65.25. Phases of structural pest control; prohibited acts; license required; exceptions.

(a) The Committee shall classify license phases to be issued under this Article. Separate phases or subphases shall be specified for:

(1) Control of household pests by any method other than fumigation ("P" phase);

(2) Control of wood-destroying organisms by any method other than fumigation ("W" phase); and

(3) Fumigation ("F" phase).

(b) It shall be unlawful for any person to:

(1) Advertise as, offer to engage in, or engage in or supervise work as a manager, owner, or owner-operator in any phase of structural pest control or otherwise act in the capacity of a structural pest control licensee unless the person is licensed pursuant to this Article or has engaged the services of a licensee as a full-time regular employee who is responsible for the structural pest control performed by the company. A license is required for each phase of structural pest control.

(2) Hold more than one license for each phase of structural pest control.

(3) Use a restricted use pesticide in any phase of structural pest control, whether it be on the person's own property or on the property of another, unless the person:

a. Qualifies as a certified applicator for that phase of structural pest control; or

b. Is under the direct supervision of a certified applicator who possesses a valid certified applicator's identification card for that phase of structural pest control.

(4) Use or supervise the use of restricted use pesticides in demonstrating or supervising a demonstration to the public of the proper use and techniques of the application of pesticides or conducting field research with pesticides unless:

a. The person possesses a valid certified applicator's identification card;

b. The person is conducting laboratory research involving restricted use pesticides; or

c. The person is a doctor of medicine or a doctor of veterinary medicine applying restricted use pesticides as drugs or medication during the course of his or her normal professional practice.

This subdivision applies to all persons, including cooperative extension specialists demonstrating pesticide products, individuals demonstrating methods used in public programs, and local, State, federal, commercial, and other persons conducting field research on or using restricted use pesticides.

(c) It shall be unlawful for any licensee to do any of the following:

(1) Establish, be in charge of, or manage any branch office in excess of the number of branch offices that may be established, supervised, or managed by a licensee as set forth in rules adopted by the Committee.

(2) Fail to supervise the structural pest control performed out of the licensee's home office or any branch office under the licensee's management.

(3) Allow his or her license to be used by any person or company for which he or she is not a full-time regular employee actively and personally engaged in the supervision of the structural pest control performed under the license.

(4) Use any pesticide, material, or device prohibited by the Committee or use any approved pesticide, material, or device in a manner prohibited by the Committee.

(5) Use or supervise the use of restricted use pesticides in a phase of structural pest control for which the person is not licensed or qualified as a certified applicator unless the person's use is under the supervision of a licensee or certified applicator certified in that phase of structural pest control.

(c1) The Committee shall adopt rules that permit a licensee to establish branch offices in addition to a home office. In no event shall the rules adopted restrict the number of branch offices a licensee can establish, supervise, or manage to fewer than two branch offices. The rules shall include provisions to ensure that the licensee can adequately supervise all structural pest control performed from the offices and under his or her license.

(d) A license is not required for any person (or the person's full-time regular employees) doing structural pest control on the person's own property. No fee may be charged for structural pest control performed by any such person.

(e), (f) Repealed by Session Laws 1999-381, s. 3, effective October 1, 1999.

(g) Any person issued a license for any one or any combination of the phases of structural pest control shall be deemed to be a "certified applicator" to use or supervise the use of restricted use pesticides so long as the pesticides are being used only in the phase of structural pest control for which the person is licensed.

(h) Licenses and certified applicator's identification cards may only be issued to individuals. License certificates and certified applicator's identification cards shall be issued in the name of the individual, shall bear the name and address of the individual's business or employer's business and shall indicate the phase or phases for which the individual is qualified and such other information as the Committee may specify. (1955, c. 1017; 1957, c. 1243, s. 3; 1967, c. 1184, s. 4; 1973, c. 556, s. 3; 1975, c. 570, s. 5; 1989, c. 725, s. 2; 1999-381, s. 3.)

Effect of Amendments. — Session Laws 1999-381, s. 3, effective October 1, 1999, inserted "prohibited acts" in the catchline; rewrote subsections (b) and (c); added subsection (c1); in subsection (d), substituted "the person's" for "his" twice, deleted "work" following "pest control" twice, deleted "provided, however, that" following "property"; repealed subsections (e) and (f), pertaining to qualifications of persons who use restricted use pesticides and proper identification of these persons when demonstrating to the public; substituted "phase" for "phase(s)" in subsection (g); substituted "the individual's business" for "his business" in subsection (h); and made a minor punctuation and stylistic change.

§ 106-65.26. Qualifications for certified applicator and licensee; applicants for certified applicator's identification card and license.

(a) An applicant for a certified applicator's identification card or license must present satisfactory evidence to the Committee concerning his qualifications for such card or license.

(b) Certified Applicator. — Each applicant for a certified applicator's identification card must demonstrate that he possesses a practical knowledge of the pest problems and pest control practices associated with the phase or phases of structural pest control for which he is seeking certification.

(c) Licensee. — The basic qualifications for a license shall be:

(1) Qualify as a certified applicator for the phase or phases of structural pest control for which he is making application; and

(2) Two years as an employee or owner-operator in the field of structural pest control, control of wood-destroying organisms or fumigation, for which license is applied; or

(3) One or more years' training in specialized pest control, control of wood-destroying organisms or fumigation under university or college supervision may be substituted for practical experience. Each year of such training may be substituted for one year of practical experience; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination; or

(4) A degree from a recognized college or university with training in entomology, sanitary or public health engineering, or related subjects; provided, however, if applicant has had less than 12 months' practical experience, the Committee is authorized to determine whether said applicant has had sufficient experience to take the examination.

(d) All applicants for license must have practical experience and knowledge of practical and scientific facts underlying the practice of structural pest control, control of wood-destroying organisms, or fumigation. No applicant is entitled to take an examination for the issuance of a license pursuant to this Article who has within five years of the date of application been convicted, entered a plea of guilty or of nolo contendre, or forfeited bond in any State or federal court for a violation of G.S. 106-65.25(b), any felony, or any crime involving moral turpitude. (1955, c. 1017; 1967, c. 1184, s. 5; 1973, c. 556, s. 4; 1975, c. 570, s. 6; 1999-381, s. 4.)

Effect of Amendments. — Session Laws 1999-381, s. 4, effective October 1, 1999, in subsection (d), inserted a comma in the first sentence and substituted the present provisions or the second sentence for the former which read: "No person who has within five years of his application been convicted of or has entered a plea of guilty or a plea of nolo contendere to a crime involving moral turpitude, or who has forfeited bond to a charge involving moral tupritude, shall be entitled to take an examination or the issuance of a license under the provisions of this Article."

§ 106-65.27. Examinations of applicants; fee; license not transferable.

(a) Certified Applicator. — All applicants for a certified applicator's identification card shall demonstrate practical knowledge of the principles and practices of pest control and safe use of pesticides. Competency shall be determined on the basis of written examinations to be provided and administered by the Committee and, as appropriate, performance testing. Testing shall be based upon examples of problems and situations appropriate to the

particular phase or subphase of structural pest control for which application is made and shall include, where relevant, the following areas of competency:

(1) Label and labeling comprehension.
(2) Safety factors associated with pesticides — toxicity, precautions, first aid, proper handling, etc.
(3) Influence of and on the environment.
(4) Pests — identification, biology, and habits.
(5) Pesticides — types, formulations, compatibility, hazards, etc.
(6) Equipment — types and uses.
(7) Application techniques.
(8) Laws and regulations.

An applicant for a certified applicator's identification card shall submit an examination fee of ten dollars ($10.00) for each phase or subphase of structural pest control in which the applicant chooses to be examined. An examination for more than one phase or subphase may be taken at the same time at any regularly scheduled examination. Frequency of such examinations shall be at the discretion of the Committee, provided that a minimum of two examinations be given annually. The examination will cover each phase or subphase of structural pest control for which application is being made.

(b) License. — Each applicant for an original license must demonstrate upon written examination, to be provided and administered by the Committee, his competency as a structural pest control operator for the phase or subphase in which he is applying for a license. Frequency of such examinations shall be at the discretion of the Committee, provided that a minimum of two examinations shall be given annually. The examination will cover each phase or subphase of structural pest control for which application is being made. All applicants for a license shall register with the Division on a prescribed form. A license examination fee of twenty-five dollars ($25.00) shall be charged for each phase or subphase of structural pest control in which the applicant chooses to be examined. An examination for more than one phase or subphase of structural pest control may be taken at the same time.

(c) A license, certified applicator's identification card or registered technician's identification card is not transferable from one person to another. A licensee or certified applicator may change the name of his business or employer's business on his license certificate or certified applicator's identification card upon application to the Division.

(c1) When there is a transfer of ownership, management, operation of a structural pest control business or in the event of the death or disability of a licensee there shall be not more than a total of 90 days during any 12-month period in which said business shall operate without a licensee assigned to it; provided that, in the event of the death or disability of a licensee, the Committee shall have the authority to grant up to an additional 90 days within the 12-month period in which a business may operate without a licensee assigned to it.

The owner, partnership, corporation, or other entity operating said business shall, within 10 days of such transfer or disability or within 30 days of death, designate in writing to the Division a certified applicator who shall be responsible for and in charge of the structural pest control operations of said business during the 90-day period. If the owner, partnership, corporation, or other entity operating the business fails to designate a certified applicator who shall be responsible for the operation of the business during the 90-day period, the business shall cease all structural pest control activities upon expiration of the applicable notification period and shall not resume operations until a certified applicator is so designated.

During the 90-day period the use of any restricted use pesticide shall be by or under the direct supervision of the certified applicator designated in writing

to the Division. The designated certified applicator shall be responsible for correcting all deviations on all existing contracts and for all work performed under his supervision.

The new licensee shall be responsible for correcting all deviations on all existing contracts and for all work performed under his supervision.

(d) The Committee shall by regulation provide for:

(1) Establishing categories of certified applicators, along with such appropriate subcategories as are necessary, to meet the requirements of this Article;

(2) All licensees licensed prior to October 21, 1976, to become qualified as certified applicators; and

(3) Requalifying certified applicators thereafter as required by the federal government at intervals no more frequent than that specified by federal law and federal regulations. (1955, c. 1017; 1967, c. 1184, s. 6; 1973, c. 556, ss. 5, 6; 1975, c. 570, s. 7; 1977, c. 231, s. 6; 1989, c. 725, s. 3; 1999-381, s. 5.)

Effect of Amendments. — Session Laws 1999-381, s. 5, effective October 1, 1999, added the proviso at the end of subsection (c1), and made a minor punctuation change.

§ 106-65.28. Revocation or suspension of license or identification card.

(a) Any license or certified applicator's identification card or registered technician's identification card may be denied, revoked or suspended by a majority vote of the Committee for any one or more of the following causes:

(1) Misrepresentation for the purpose of defrauding; deceit or fraud; the making of a false statement with knowledge of its falsity for the purpose of inducing others to act thereon to their damage; or the use of methods or materials which are not reasonably suitable for the purpose contracted.

(2) Failure of the licensee or certified applicator to give the Committee, the Commissioner, or their authorized representatives, upon request, true information regarding methods and materials used, or work performed.

(3) Failure of the licensee or certified applicator to make registrations herein required or failure to pay the registration fees.

(4) Any misrepresentation in the application for a license or certified applicator's identification card or registered technician's identification card.

(5) Willful violation of any rule or regulation adopted pursuant to this Article.

(6) Aiding or abetting a licensed or unlicensed person or a certified applicator or a noncertified person to evade the provisions of this Article, combining or conspiring with such a licensed or unlicensed person or a certified applicator or noncertified person to evade the provisions of this Article, or allowing one's license, certified applicator's identification card or registered technician's identification card, to be used by any person other than the individual to whom it has been issued.

(7) Impersonating any State, county or city inspector or official.

(8) Storing or disposing of containers or pesticides by means other than those prescribed on the label or adopted regulations.

(9) Using any pesticide in a manner inconsistent with its labeling.

(10) Payment, or the offer to pay, by any licensee to any party to a real estate transaction of any commission, bonus, rebate, or other thing of

value as compensation or inducement for the referral to such licensee of structural pest control work arising out of such transaction.

(11) Falsification of records required to be kept by this Article or the rules and regulations of the Committee.

(12) Failure of a licensee or certified applicator to pay the original or renewal license or identification card fee when due and continuing to operate as a licensee or a certified applicator.

(13) Conviction of a felony or conviction of a violation of G.S. 106-65.28 within five years preceding the date of application for a license or a certified applicator's identification card or conviction of any said crimes while such license or card is in effect.

(14) Applying any substance that:

a. Has the active ingredients contained in a pesticide that is registered pursuant to G.S. 143-442, but

b. Is not registered as a pesticide pursuant to G.S. 143-442.

(15) Combining any substance whose application is prohibited under subdivision (14) of this subsection with any other substance to apply as a pesticide or to apply for any other reason, whether the combination occurs before, during, or after the application.

(b) Suspension of any license or certified applicator's identification card or registered technician's identification card under the provisions of this Article shall not be for less than 10 days nor more than two years, in the discretion of the Committee.

(c) If a license or certified applicator's identification card or registered technician's identification card is suspended or revoked under the provisions hereof, the licensee shall within five days of such suspension or revocation, surrender all licenses and identification cards issued thereunder to the Commissioner or his authorized representative.

(d) Any licensee whose license or certified applicator or operator whose identification card is revoked under the provisions of this Article shall not be eligible to apply for a new license or certified applicator's identification card or registered technician's identification card hereunder until two years have elapsed from the date of the order revoking said license or certified applicator's identification card or registered technician's identification card or if an appeal is taken from said order of revocation, two years from the date of the order or final judgment sustaining said revocation.

(e) The lapsing of a State structural pest control license or certified applicator's identification card or registered technician's identification card by operation of law or the voluntary surrender of said license or said card shall not deprive the Committee of jurisdiction to proceed with any investigation or disciplinary proceedings against such licensee or card holder or to render a decision suspending or revoking such license or card.

(f) The Committee may deny an application for a license, a certified applicator's identification card or a registered technician's identification card of any person whose license, certified applicator's identification card or equivalent thereto has been suspended or revoked in another state within two years prior to the application.

(g) Any pesticide, material, or device for which such information is requested by the Committee pursuant to G.S. 106-65.29(9a) and denied by the registrant or manufacturer shall not be used in any structural pest control performed for compensation and may only be used by an individual performing structural pest control on the individual's own property. (1955, c. 1017; 1967, c. 1184, s. 7; 1973, c. 556, ss. 7, 8; 1975, c. 19, s. 30; c. 570, ss. 8-13; 1977, c. 231, ss. 7-9; 1987, c. 827, s. 27; 1989, c. 725, s. 4; 1995, c. 478, s. 2; 1999-381, s. 6.)

Effect of Amendments. — Session Laws 1999-381, s. 6, effective October 1, 1999, added subsection (g).

§ 106-65.29. Rules and regulations.

In order to ensure that persons licensed and certified under this Article are capable of performing a high quality of workmanship, the Committee may adopt rules with respect to:

(1) The amount and kind of training required of an applicant for a license and certified applicator's card to engage in any one or more of the three phases of structural pest control, and the amount and kind of training required of an applicant for a registered technician's identification card.

(2) The type, frequency and passing score of any examination given an applicant for a license and certified applicator's card under this Article.

(3) The amount, kind and frequency of continuing education required of a licensee and certified applicator.

(4) The methods and materials to be used in performing any work authorized by the issuance of a license and certified applicator's card under this Article.

(5) The business records to be made and maintained by licensees and certified applicators under this Article necessary for the Committee to determine whether the licensee and certified applicator is performing a high quality of workmanship.

(6) The credentials and identification required of licensees and certified applicators, their employees and equipment, including service vehicles, when engaged in any work defined under this Article.

(7) Safety methods and procedures for structural pest control work.

(8) Fees for reinspection following a finding of a deviation, as defined by the Committee.

(9) Fees for training materials provided by the Committee or the Division. Such fees may be placed in a revolving fund to be used for training and continuing education purposes and shall not revert to the General Fund.

(9a) Efficacy data and other technical information to be submitted by registrants and manufacturers of pesticides and other materials or devices for review and approval, in order for the Committee and the enforcement agency to ensure the efficacy of pesticides and other materials or devices used in structural pest control in this State. This subdivision does not require either the Committee or the enforcement agency to disclose any information that is confidential information within the meaning of G.S. 132-1.2.

(10) The policies and programs set forth in this Article. (1955, c. 1017; 1967, c. 1184, s. 8; 1975, c. 570, s. 14; 1977, c. 231, s. 9; 1981, c. 495, s. 3; 1987, c. 368, s. 2; c. 827, s. 28; 1989, c. 725, s. 5; 1999-381, s. 7.)

Effect of Amendments. — Session Laws 1999-381, s. 7, effective October 1, 1999, in the introductory language, substituted "may adopt" for "is hereby authorized and empowered to make" and deleted "and regulations" following "rules"; and added subdivision (9a).

§ 106-65.30. Inspectors; inspections and reports of violations; designation of resident agent.

(a) For the enforcement of the provisions of this Article the Commissioner is authorized to appoint one or more qualified inspectors and such other employees as are necessary in order to carry out and enforce the provisions of this Article. The inspectors shall be known as "structural pest control inspectors." The Commissioner may enforce compliance with the provisions of this Article by making or causing to be made periodical and unannounced inspections of work done by licensees and certified applicators under this Article who engage in or supervise any one or more phases of structural pest control as defined in G.S. 106-65.25. The Commissioner shall cause the prompt and diligent investigation of all reports of violations of the provisions of this Article and all rules and regulations adopted pursuant to the provisions hereof; provided, however, no inspection shall be made by a representative of the Commissioner of any property without first securing the permission of the owner or occupant thereof.

(b) Prior to the issuance or renewal of a license or certified applicator's identification card, every nonresident owner of a business performing any phase of structural pest control work shall designate in writing to the Commissioner or his authorized agent a resident agent upon whom service of notice or process may be made to enforce the provisions of this Article and rules and regulations adopted pursuant to the provisions hereof or any civil or criminal liabilities arising hereunder.

(c) The Commissioner shall have authority to appoint personnel of the Structural Pest Control Division as special inspectors and said special inspectors are hereby vested with the authority to arrest with a warrant, or to arrest without a warrant when a violation of this Article is being committed in their presence or they have reasonable grounds to believe that a violation of this Article is being committed in their presence. Said special inspectors shall take offenders before the several courts of this State for prosecution or other proceedings. The provisions of this section do not apply to any person holding a valid structural pest control license, or a certified applicator's identification card, or a registered technician's identification card as issued under the provisions of this Article. Special inspectors shall not be entitled to the benefits of the Law Enforcement Officers' Benefit and Retirement Fund or the benefits of the Law Enforcement Officers' and Others Death Benefit Act as provided for in Articles 12 and 12A of Chapter 143 of the General Statutes, respectively. (1955, c. 1017; 1967, c. 1184, s. 9; 1973, c. 556, s. 9; 1975, c. 570, s. 15; 1977, c. 231, s. 10; 1989, c. 725, s. 6; 1999-381, s. 8.)

Editor's Note. — Article 12 of Chapter 143, referred to in this section, was repealed by Session Laws 1985, c. 479, s. 196(t). See now Articles 12E and 12F of Chapter 143.

Effect of Amendments. — Session Laws 1999-381, s. 8, effective October 1, 1999, redesignated the former paragraphs as present subsections (a), (b), and (c); and substituted "may enforce" for "shall enforce" in the second sentence of subsection (a).

§ 106-65.31. Annual certified applicator card and license fee; registration of servicemen, salesmen, solicitors, and estimators; identification cards.

(a) Certified Applicator's Identification Card. — The fee for issuance or renewal of a certified applicator's identification card shall be thirty dollars ($30.00). Within 75 days after the employment of a certified applicator, the licensee shall apply to the Division for the issuance of a certified applicator's identification card. A certified applicator's identification card shall expire on

June 30 of each year and shall be renewed annually. All certified applicators who fail or neglect to renew their card on or before June 30 but make application before January 1 of the following year may have their card renewed without having to be reexamined unless the applicant is scheduled for periodic reexamination under regulations adopted pursuant to G.S. 106-65.27(d)(3). All applicants submitting applications for the renewal of their cards after June 30 shall not use or supervise the use of restricted use pesticides until a new card has been issued.

Any certified applicator whose employment is terminated with a licensee or agent prior to the end of any license year may at any time prior to the end of the license year be reissued a certified applicator's identification card for the remainder of the license year as an employee of another licensee or agency or as an individual for a fee of five dollars ($5.00). The licensee shall notify the Division of the termination or change in status of any certified applicator.

Any certified applicator whose identification card is lost or destroyed or changed in any way may be reissued a new card for the remainder of the license year for a fee of five dollars ($5.00).

(b) License. — The fee for the issuance or renewal of a license for any one phase of structural pest control shall be one hundred fifty dollars ($150.00). Each additional phase shall be sixty-five dollars ($65.00). The fee for each subphase shall be fifteen dollars ($15.00). Licenses shall expire on June 30 of each year and shall be renewed annually. All licensees who fail or neglect to renew their license on or before June 30, but who make application before January 1 of the following year, may have their license renewed without having to be reexamined, unless the applicant is scheduled for periodic reexamination under regulations adopted pursuant to G.S. 106-65.27(d)(3). No structural pest control work may be performed until the license has been renewed or until a new license has been issued.

Any licensee whose employment is terminated by his employer or any licensee who is transferred to another company or location other than the company or location shown on his license certificate, may at any time, have his license reissued for the remainder of the license year for a fee of ten dollars ($10.00).

Any licensee whose license is lost or destroyed may secure a duplicate license for a fee of ten dollars ($10.00).

(b1) Registration. — Within 75 days after the hiring of an employee who is either an estimator, salesman, serviceman, or solicitor, the licensee shall apply to the Division for the issuance of an identification card for such employee. The application must be accompanied by a fee of twenty-five dollars ($25.00) for each card. The card shall be issued in the name of the employee and shall bear the name of the employing licensee, the employer's license number and phases, the name and address of the employer's business, and such other information as the Committee may specify. The identification card shall be carried by the employee on his person at all times while performing any phase of structural pest control work. The card must be displayed upon demand by the Commissioner, the Committee, the Division, or any representative thereof, or the person for whom any phase of structural pest control work is being performed. A registered technician's identification card must be renewed annually on or before June 30 by payment of a renewal fee of twenty-five dollars ($25.00). If a card is lost or destroyed the licensee may secure a duplicate for a fee of five dollars ($5.00).The licensee shall notify the Division of the termination or change in status of any registered technician. All identification cards expire when a license expires.

When a license is reissued, the licensee shall be responsible for registering and securing identification cards for all existing employees who engage in structural pest control within 10 days of the reissuance of the license.

A certified applicator who is not an employee of a licensed individual shall register the names of all employees under his supervision who are engaged in the performance of structural pest control with the Division and shall purchase a registered technician's identification card for each such employee.

(b2) No person shall act as an estimator, serviceman, salesman, solicitor, or agent for any licensee under this Article nor shall any such person be issued an identification card by the Committee who has within three years of the date of application for an identification card been convicted of, plead guilty or nolo contendere, or forfeited bond in any State or federal court for a felony or any violation of the North Carolina Structural Pest Control Act or any regulation promulgated by the Committee. This provision shall not apply to any person whose citizenship has been restored as provided by law.

(b3) No person or business shall advertise as a contractor for structural pest control services nor actually contract for such services unless that person or business advertises or contracts in the name of the company shown on the license certificate of the licensee or identification card of the certified applicator who will perform the services.

(c) Notwithstanding any other provision of this law, the Committee may adopt rules to provide for the issuance of licenses, certified applicator's cards, and registered technician's identification cards with staggered expiration dates and may prorate renewal fees on a monthly basis to implement such rules. (1955, c. 1017; 1957, c. 1243, s. 4; 1967, c. 1184, s. 10; 1973, c. 47, s. 2; c. 556, s. 10; 1975, c. 570, s. 16; 1981, c. 495, s. 2; 1987, c. 368, s. 3; 1989, c. 544, s. 16; c. 725, s. 7; 1991, c. 636, s. 7; 1999-381, s. 9.)

Effect of Amendments. — Session Laws 1999-381, s. 9, effective October 1, 1999, in subsection (b), substituted "one hundred fifty dollars ($150.00)" for "one hundred twenty-five dollars ($125.00)," substituted "sixty-five dollars ($65.00)" for "fifty dollars ($50.00)," and substituted "fifteen dollars ($15.00)" for "ten dollars ($10.00)."

§ 106-65.32. Administrative Procedure Act applicable.

A denial, suspension, or revocation of a license, certified applicator card, or identification card under this Article shall be made in accordance with Chapter 150B of the General Statutes. (1955, c. 1017; 1957, c. 1243, s. 5; 1967, c. 1184, s. 11; 1973, c. 556, s. 11; 1975, c. 570, s. 17; 1987, c. 827, s. 29.)

§ 106-65.33. Violation of Article, falsification of records, or misuse of registered pesticide a misdemeanor.

(a) Any person who shall be adjudged to have violated any provision of this Article or who falsifies any records required to be kept by this Article or by the rules and regulations pursuant to this Article or who uses a registered pesticide in a manner inconsistent with its labeling shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Committee, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(b) Nothing in this Article shall be construed to require the Committee or the Commissioner to initiate, or attempt to initiate, any criminal or administrative proceedings under this Article for a minor violation of this Article whenever the Committee or Commissioner determines that the public interest will be adequately served in the circumstances by a suitable written notice or warning. (1955, c. 1017; 1957, c. 1243, s. 6; 1967, c. 1184, s. 12; 1977, c. 231, s. 11; 1993, c. 539, s. 740; 1994, Ex. Sess., c. 24, s. 14(c); 1999-381, s. 10.)

Effect of Amendments. — Session Laws 1999-381, s. 10, effective October 1, 1999, designated the existing paragraph as subsection (a); and added subsection (b).

§ 106-65.34: Repealed by Session Laws 1967, c. 1184, s. 13.

§ 106-65.35: Repealed by Session Laws 1973, c. 556, s. 12.

§ 106-65.36. Reciprocity; intergovernmental cooperation.

The Committee may cooperate or enter into formal agreements with any other agency of this State or its subdivisions or with any agency of any other state or of the federal government for the purpose of enforcing any of the provisions of this Article. (1973, c. 556, s. 13.)

§ 106-65.37. Financial responsibility.

(a) The Committee may require by regulation from a licensee or certified applicator or an applicant for a license or certified applicator's identification card under this Article evidence of his financial ability to properly indemnify persons suffering from the use or application of pesticides in the form of liability insurance or other means acceptable to the Committee. The amount of this insurance or financial ability shall be determined by the Committee.

(b) Any regulation adopted by the Committee pursuant to G.S. 106-65.29 to implement this section may provide for such conditions, limitations and requirements concerning the financial responsibility required by this section as the Committee deems necessary including but not limited to notice or reduction or cancellation of coverage and deductible provisions. Such regulations may classify financial responsibility requirements according to the separate license classifications and subclassifications as may be prescribed by the Committee. (1975, c. 570, s. 18.)

§ 106-65.38. Disposition of fees and charges.

Except as otherwise provided in G.S. 106-65.41, all fees and charges received by the Division under this Article shall be deposited in the Department of Agriculture and Consumer Services General Fund Budget for the purpose of administration and enforcement of this Article, with proper approved accounting procedures accounting for all expenditures and receipts. (1977, c. 231, s. 12; 1997-261, s. 109; 1998-215, s. 5(b).)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added "Except as otherwise provided in G.S. 106-65.41," at the beginning of the section.

§ 106-65.39. Judicial enforcement.

The Commissioner may apply to either the superior or district court for an injunction to prevent and restrain violations of this Article and the rules and regulations adopted under this Article, provided however, that the district court shall have original jurisdiction to hear and determine alleged misdemeanor violations of the Article and the rules and regulations of the Committee. (1977, c. 231, s. 13; 1981, c. 836.)

§ 106-65.40. City privilege license tax prohibited.

A city, as defined in G.S. 160A-1(2), may not levy a privilege license tax on persons engaged in a business licensed under this Article. (1983, c. 193.)

§ 106-65.41. Civil penalties.

A civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Committee against any person for any one or more of the causes set forth in G.S. 106-65.28(a)(1) through (12) and G.S. 106-65.28(a)(14) and (15), or who violates or directly causes a violation of any provision of this Article or any rule adopted pursuant to this Article. In determining the amount of any penalty, the Committee shall consider the degree and extent of harm caused by the violation. No civil penalty may be assessed under this section unless the person has been given an opportunity for a hearing pursuant to Chapter 150B of the General Statutes. Assessments may be collected, following judicial review, if any, of the Committee's final decision imposing the assessment, in any lawful manner for the collection of a debt.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1987, c. 368, s. 1; 1989, c. 725, s. 8; 1998-215, s. 5(a); 1999-381, s. 11.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

Session Laws 1999-381, s. 11, effective October 1, 1999, inserted "and G.S. 106-65.28(a)(14) and (15), or who violates or directly causes a violation of any provision of this Article or any rule adopted pursuant to this Article" in the first sentence of the first paragraph.

Article 4D.

North Carolina Biological Organism Act.

§ 106-65.42. Short title.

This Article shall be known as the "North Carolina Biological Organism Act." (1973, c. 713, s. 2.)

§ 106-65.43. Purpose.

The purpose of this Article is to regulate the production, sale, use and distribution of biological organisms that may have an adverse effect on the environment. (1973, c. 713, s. 1.)

§ 106-65.44. Definitions.

For the purposes of this Article, unless the context clearly requires otherwise:

(1) The term "biological organism" means any plant, lower animal, virus or disease causal agent intended for release into the environment; or, an organism which affects the environment by its presence or absence.
(2) The term "Board" means North Carolina Board of Agriculture.
(3) The term "Commissioner" means the Commissioner of Agriculture of North Carolina or his designated agent or agents.
(4) The term "Division of Entomology" means the Division of the Department of Agriculture and Consumer Services. (1973, c. 713, s. 3; 1997-261, s. 30.)

§ 106-65.45. Authority of the Board to adopt regulations.

The Board of Agriculture is hereby authorized to adopt regulations to implement and carry out the purposes of this Article so as to protect the

environment from detrimental importation, rearing, sale, and/or release of insects, parasites, predators and other biological organisms in North Carolina, and to protect organisms that are beneficial to man and/or his environment. No viable biological organism shall be brought into North Carolina, reared, collected, propagated or offered for sale or released except under such conditions as are prescribed by regulations adopted under the provisions of this Article. (1973, c. 713, s. 4.)

§ 106-65.46. Commissioner of Agriculture to enforce Article; further authority of Board.

It shall be the duty of the Commissioner to exercise the powers and duties imposed upon him by this Article and such regulations as shall be adopted under these provisions for the purpose of protecting the environment from adverse effects of biological organisms released into the environment of North Carolina and to protect beneficial biological organisms in the State. The Board is hereby authorized to cause importation, collection, release, destruction and propagation of beneficial organisms when such action is deemed to be in the best interest of North Carolina and its environment. The Board is authorized to promote and/or regulate businesses, persons or agencies engaged in the importation, collection, rearing, sales, release, or use of biological organisms. The Board is authorized to establish standards of positive identification, purity of culture or colony, freedom from disease and hyperparasites of biological organisms and to establish standards of competence and responsibility for the private practitioner engaged in the propagation, use, distribution, release or sale of biological organisms.

The Commissioner is hereby authorized to cause or cooperate in management or mitigation programs to be conducted against such plant, environmental, or nuisance pests as can be controlled in an economically, ecologically, and biologically sound manner. The Board is authorized to cause use of pesticides, parasites, predators, pheromones, genetic material, and other control techniques which are consistent with the pesticide, environmental and other laws applicable in the State of North Carolina.

The Commissioner shall have authority to designate such employees of the North Carolina Department of Agriculture and Consumer Services and/or to enter into cooperative agreements with other governmental agencies as may be needed to carry out the duties and exercise the powers provided by this Article. Persons collaborating with the Division of Entomology may also be designated by the Commissioner as agents for the purpose of this Article. (1973, c. 713, s. 5; 1997-261, s. 109.)

§ 106-65.47. Authority under other statutes not abrogated; memoranda of understanding.

The provisions of this Article shall in no way abrogate the authority as defined in other Articles of the General Statutes of the State of North Carolina as previously enacted. The Commissioner is hereby authorized to enter into memoranda of understanding with other State and federal agencies and individuals concerning biological organisms or pest mitigation programs when such action is desirable to ensure cooperation and prevent conflicts of interest. (1973, c. 713, s. 6.)

§ 106-65.48. Criminal penalties; violation of law or regulations.

If anyone shall interfere with or attempt to interfere with the Commissioner or any of his agents, while engaged in the performance of his duties under this

Article, or shall violate any provision of this Article or any regulation of the Board of Agriculture adopted pursuant to this Article, he shall be guilty of a Class 3 misdemeanor. Each day's violation shall constitute a separate offense. (1973, c. 713, s. 7; 1993, c. 539, s. 741; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-65.49. Article not applicable in certain cases.

The provisions of this Article and/or regulations promulgated hereunder shall not apply to:

(1) Any virus, serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product, or other product propagated or manufactured and prepared at an establishment holding an unsuspended and unrevoked license issued pursuant to section 351 of the Public Health Service Act (42 U.S.C. section 262) and regulations promulgated thereunder;

(2) Any finished virus, serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic product or other biological product shipped prior to licensing for development or investigational purposes in compliance with the requirements of the Federal Food, Drug and Cosmetic Act (21 U.S.C. section 301 et seq.) or the Animal Virus, Serum, and Toxin Law of March 4, 1913 (37 Stat. 832; 21 U.S.C. section 151 et seq.), and rules and regulations promulgated thereunder; and

(3) Any etiological agent shipped in accordance with regulations promulgated under section 361 of the Public Health Service Act (42 U.S.C. section 264). (1973, c. 1091.)

§§ 106-65.50 through 106-65.54: Reserved for future codification purposes.

Article 4E.

Pest Control Compact.

§ 106-65.55. Adoption of Compact.

The Pest Control Compact is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

Pest Control Compact.

Article I. Findings.

The party states find that:

(a) In the absence of the higher degree of cooperation among them possible under this Compact, the annual loss of approximately ten billion dollars ($10,000,000,000) from the depredations of pests is virtually certain to continue, if not to increase.

(b) Because of varying climatic, geographic and economic factors, each state may be affected differently by particular species of pests; but all states share the inability to protect themselves fully against those pests which present serious dangers to them.

(c) The migratory character of pest infestations makes it necessary for states both adjacent to and distant from one another, to complement each other's activities when faced with conditions of infestation and reinfestation.

(d) While every state is seriously affected by a substantial number of pests, and every state is susceptible of infestation by many species of pests not now causing damage to its crop and plant life and products, the fact that relatively few species of pests present equal danger to or are of interest to all states makes the establishment and operation of an insurance fund, from which individual states may obtain financial support for pest control programs of benefit to them in other states and to which they may contribute in accordance with their relative interests, the most equitable means of financing cooperative pest eradication and control programs.

Article II. Definitions.

As used in this Compact, unless the context clearly requires a different construction:

(a) "State" means a state, territory or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b) "Requesting state" means a state which invokes the procedures of the Compact to secure the undertaking or intensification of measures to control or eradicate one or more pests within one or more other states.

(c) "Responding state" means a state requested to undertake or intensify the measures referred to in subdivision (b) of this Article.

(d) "Pest" means any invertebrate animal, pathogen, parasitic plant or similar or allied organism which can cause disease or damage in any crops, trees, shrubs, grasses or other plants of substantial value.

(e) "Insurance fund" means the Pest Control Insurance Fund established pursuant to this Compact.

(f) "Governing board" means the administrators of this Compact representing all of the party states when such administrators are acting as a body in pursuance of authority vested in them by this Compact.

(g) "Executive committee" means the committee established pursuant to Article V(e) of this Compact.

Article III. The Insurance Fund.

There is hereby established the Pest Control Insurance Fund for the purpose of financing other than normal pest control operations which states may be called upon to engage in pursuant to this Compact. The insurance fund shall contain moneys appropriated to it by the party states and any donations and grants accepted by it. All appropriations, except as conditioned by the rights and obligations of party states expressly set forth in this Compact, shall be unconditional and may not be restricted by the appropriating state to use in the control of any specified pest or pests. Donations and grants may be conditional or unconditional, provided that the insurance fund shall not accept any donation or grant whose terms are inconsistent with any provision of this Compact.

Article IV. The Insurance Fund, Internal Operations and Management.

(a) The insurance fund shall be administered by a governing board and executive committee as hereinafter provided. The actions of the governing board and executive committee pursuant to this Compact shall be deemed the actions of the insurance fund.

(b) The members of the governing board shall be entitled to one vote each on such board. No action of the governing board shall be binding unless taken at a meeting at which a majority of the total number of votes on the governing board are cast in favor thereof. Action of the governing board shall be only at a meeting at which a majority of the members are present.

(c) The insurance fund shall have a seal which may be employed as an official symbol and which may be affixed to documents and otherwise used as the governing board may provide.

(d) The governing board shall elect annually, from among its members, a chairman, a vice-chairman, a secretary and a treasurer. The chairman may not succeed himself. The governing board may appoint an executive director and fix his duties and his compensation, if any. Such executive director shall serve at the pleasure of the governing board. The governing board shall make provision for the bonding of such of the officers and employees of the insurance fund as may be appropriate.

(e) Irrespective of the civil service, personnel or other merit system laws of any of the party states, the executive director, or if there be no executive director, the chairman, in accordance with such procedures as the bylaws may provide, shall appoint, remove or discharge such personnel as may be necessary for the performance of the functions of the insurance fund and shall fix the duties and compensation of such personnel. The governing board in its bylaws shall provide for the personnel policies and programs of the insurance fund.

(f) The insurance fund may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation.

(g) The insurance fund may accept for any of its purposes and functions under this Compact any and all donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any state, the United States, or any other governmental agency, or from any person, firm, association or corporation, and may receive, utilize and dispose of the same. Any donation, gift or grant accepted by the governing board pursuant to this paragraph or services borrowed pursuant to paragraph (f) of this Article shall be reported in the annual report of the insurance fund. Such report shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender.

(h) The governing board shall adopt bylaws for the conduct of the business of the insurance fund and shall have the power to amend and rescind these bylaws. The insurance fund shall publish its bylaws in convenient form and shall file a copy thereof and a copy of any amendment thereto with the appropriate agency or officer in each of the party states.

(i) The insurance fund annually shall make to the Governor and legislature of each party state a report covering its activities for the preceding year. The insurance fund may make such additional reports as it may deem desirable.

(j) In addition to the powers and duties specifically authorized and imposed, the insurance fund may do such other things as are necessary and incidental to the conduct of its affairs pursuant to this Compact.

Article V. Compact and Insurance Fund Administration.

(a) In each party state there shall be a Compact administrator, who shall be selected and serve in such manner as the laws of his state may provide, and who shall:

(1) Assist in the coordination of activities pursuant to the Compact in his state; and

(2) Represent his state on the governing board of the insurance fund.

(b) If the laws of the United States specifically so provide, or if administrative provision is made therefor within the federal government, the United States may be represented on the governing board of the insurance fund by not to exceed three representatives. Any such representative or representatives of the United States shall be appointed and serve in such manner as may be provided by or pursuant to federal law, but no such representative shall have a vote on the governing board or on the executive committee thereof.

(c) The governing board shall meet at least once each year for the purpose of determining policies and procedures in the administration of the insurance fund and, consistent with the provisions of the Compact, supervising and giving direction to the expenditure of moneys from the insurance fund. Additional meetings of the governing board shall be held on call of the chairman, the executive committee, or a majority of the membership of the governing board.

(d) At such times as it may be meeting, the governing board shall pass upon applications for assistance from the insurance fund and authorize disbursements therefrom. When the governing board is not in session, the executive committee thereof shall act as agent of the governing board, with full authority to act for it in passing upon such applications.

(e) The executive committee shall be composed of the chairman of the governing board and four additional members of the governing board chosen by it so that there shall be one member representing each of four geographic groupings of party states. The governing board shall make such geographic groupings. If there is representation of the United States on the governing board, one such representative may meet with the executive committee. The chairman of the governing board shall be chairman of the executive committee. No action of the executive committee shall be binding unless taken at a meeting at which at least four members of such committee are present and vote in favor thereof. Necessary expenses of each of the five members of the executive committee incurred in attending meetings of such committee, when not held at the same time and place as a meeting of the governing board, shall be charges against the insurance fund.

Article VI. Assistance and Reimbursement.

(a) Each party state pledges to each other party state that it will employ its best efforts to eradicate, or control within the strictest practicable limits, any and all pests. It is recognized that performance of this responsibility involves:

(1) The maintenance of pest control and eradication activities of interstate significance by a party state at a level that would be reasonable for its own protection in the absence of this Compact.

(2) The meeting of emergency outbreaks or infestations of interstate significance to no less an extent than would have been done in the absence of this Compact.

(b) Whenever a party state is threatened by a pest not present within its borders but present within another party state, or whenever a party state is undertaking or engaged in activities for the control or eradication of a pest or pests, and finds that such activities are or would be impracticable or substantially more difficult of success by reason of failure of another party state to cope with infestation or threatened infestation, that state may request the governing board to authorize expenditures from the insurance fund for eradication or control measures to be taken by one or more of such other party states at a level sufficient to prevent, or to reduce to the greatest practicable extent, infestation or reinfestation of the requesting state. Upon such authorization the responding state or states shall take or increase such eradication or control measures as may be warranted. A responding state shall use moneys made available from the insurance fund expeditiously and efficiently to assist in affording the protection requested.

(c) In order to apply for expenditures from the insurance fund, a requesting state shall submit the following in writing:

(1) A detailed statement of the circumstances which occasion the request for the invoking of the Compact.

(2) Evidence that the pest on account of whose eradication or control assistance is requested constitutes a danger to an agricultural or

forest crop, product, tree, shrub, grass or other plant having a substantial value to the requesting state.

(3) A statement of the extent of the present and projected program of the requesting state and its subdivisions, including full information as to the legal authority for the conduct of such program or programs and the expenditures being made or budgeted therefor, in connection with the eradication, control, or prevention of introduction of the pest concerned.

(4) Proof that the expenditures being made or budgeted as detailed in item (3) do not constitute a reduction of the effort for the control or eradication of the pest concerned or, if there is a reduction, the reasons why the level of program detailed in item (3) constitutes a normal level of pest-control activity.

(5) A declaration as to whether, to the best of its knowledge and belief, the conditions which in its view occasion the invoking of the Compact in the particular instance can be abated by a program undertaken with the aid of moneys from the insurance fund in one year or less, or whether the request is for an installment in a program which is likely to continue for a longer period of time.

(6) Such other information as the governing board may require consistent with the provisions of this Compact.

(d) The governing board or executive committee shall give due notice of any meeting at which an application for assistance from the insurance fund is to be considered. Such notice shall be given to the Compact administrator of each party state and to such other officers and agencies as may be designated by the laws of the party states. The requesting state and any other party state shall be entitled to be represented and present evidence and argument at such meeting.

(e) Upon the submission as required by paragraph (c) of this Article and such other information as it may have or acquire, and upon determining that an expenditure of funds is within the purposes of this Compact and justified thereby, the governing board or executive committee shall authorize support of the program. The governing board or the executive committee may meet at any time or place for the purpose of receiving and considering an application. Any and all determinations of the governing board or executive committee, with respect to an application, together with the reasons therefor shall be recorded and subscribed in such manner as to show and preserve the votes of the individual members thereof.

(f) A requesting state which is dissatisfied with a determination of the executive committee shall, upon notice in writing given within 20 days of the determination with which it is dissatisfied, be entitled to receive a review thereof at the next meeting of the governing board. Determinations of the executive committee shall be reviewable only by the governing board at one of its regular meetings, or at a special meeting held in such manner as the governing board may authorize.

(g) Responding states required to undertake or increase measures pursuant to this Compact may receive moneys from the insurance fund, either at the time or times when such state incurs expenditures on account of such measures, or as reimbursement for expenses incurred and chargeable to the insurance fund. The governing board shall adopt and, from time to time, may amend or revise procedures for submission of claims upon it and for payment thereof.

(h) Before authorizing the expenditure of moneys from the insurance fund pursuant to an application of a requesting state, the insurance fund shall ascertain the extent and nature of any timely assistance or participation which may be available from the federal government and shall request the appropri-

ate agency or agencies of the federal government for such assistance and participation.

(i) The insurance fund may negotiate and execute a memorandum of understanding or other appropriate instrument defining the extent and degree of assistance or participation between and among the insurance fund, cooperating federal agencies, states and any other entities concerned.

Article VII. Advisory and Technical Committees.

The governing board may establish advisory and technical committees composed of State, local, and federal officials, and private persons to advise it with respect to any one or more of its functions. Any such advisory or technical committee, or any member or members thereof may meet with and participate in its deliberations. Upon request of the governing board or executive committee an advisory or technical committee may furnish information and recommendations with respect to any application for assistance from the insurance fund being considered by such board or committee and the board or committee may receive and consider the same: Provided that any participant in a meeting of the governing board or executive committee held pursuant to Article VI(d) of the Compact shall be entitled to know the substance of any such information and recommendations, at the time of the meeting if made prior thereto or as a part thereof or, if made thereafter, no later than the time at which the governing board or executive committee makes its disposition of the application.

Article VIII. Relations with Nonparty Jurisdictions.

(a) A party state may make application for assistance from the insurance fund in respect of a pest in a nonparty state. Such application shall be considered and disposed of by the governing board or executive committee in the same manner as an application with respect to a pest within a party state, except as provided in this Article.

(b) At or in connection with any meeting of the governing board or executive committee held pursuant to Article VI(d) of this Compact a nonparty state shall be entitled to appear, participate, and receive information only to such extent as the governing board or executive committee may provide. A nonparty state shall not be entitled to review of any determination made by the executive committee.

(c) The governing board or executive committee shall authorize expenditures from the insurance fund to be made in a nonparty state only after determining that the conditions in such state and the value of such expenditures to the party states as a whole justify them. The governing board or executive committee may set any conditions which it deems appropriate with respect to the expenditure of moneys from the insurance fund in a nonparty state and may enter into such agreement or agreements with nonparty states and other jurisdictions or entities as it may deem necessary or appropriate to protect the interests of the insurance fund with respect to expenditures and activities outside of party states.

Article IX. Finance.

(a) The insurance fund shall submit to the executive head or designated officer or officers of each party state a budget for the insurance fund for such period as may be required by the laws of that party state for presentation to the legislature thereof.

(b) Each of the budgets shall contain specific recommendations of the amount or amounts to be appropriated by each of the party states. The

requests for appropriations shall be apportioned among the party states as follows: one tenth of the total budget in equal shares and the remainder in proportion to the value of agricultural and forest crops and products, excluding animals and animal products, produced in each party state. In determining the value of such crops and products the insurance fund may employ such source or sources of information as in its judgment present the most equitable and accurate comparisons among the party states. Each of the budgets and requests for appropriations shall indicate the source or sources used in obtaining information concerning value of products.

(c) The financial assets of the insurance fund shall be maintained in two accounts to be designated respectively as the "operating account" and the "claims account." The operating account shall consist only of those assets necessary for the administration of the insurance fund during the next ensuing two-year period. The claims account shall contain all moneys not included in the operating account and shall not exceed the amount reasonably estimated to be sufficient to pay all legitimate claims on the insurance fund for a period of three years. At any time when the claims account has reached its maximum limit or would reach its maximum limit by the addition of moneys requested for appropriation by the party states, the governing board shall reduce its budget requests on a pro rata basis in such manner as to keep the claims account within such maximum limit. Any moneys in the claims account by virtue of conditional donations, grants or gifts shall be included in calculations made pursuant to this paragraph only to the extent that such moneys are available to meet demands arising out of claims.

(d) The insurance fund shall not pledge the credit of any party state. The insurance fund may meet any of its obligations in whole or in part with moneys available to it under Article IV(g) of this Compact, provided that the governing board takes specific action setting aside such moneys prior to incurring any obligation to be met in whole or in part in such manner. Except where the insurance fund makes use of moneys available to it under Article IV(g) hereof, the insurance fund shall not incur any obligation prior to the allotment of moneys by the party states adequate to meet the same.

(e) The insurance fund shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the insurance fund shall be subject to the audit and accounting procedures established under its bylaws. However, all receipts and disbursements of funds handled by the insurance fund shall be audited yearly by a certified or licensed public accountant and a report of the audit shall be included in and become part of the annual report of the insurance fund.

(f) The accounts of the insurance fund shall be open at any reasonable time for inspection by duly authorized officers of the party states and by any persons authorized by the insurance fund.

Article X. Entry into Force and Withdrawal.

(a) This Compact shall enter into force when enacted into law by any five or more states. Thereafter, this Compact shall become effective as to any other state upon its enactment thereof.

(b) Any party state may withdraw from this Compact by enacting a statute repealing the same, but no such withdrawal shall take effect until two years after the executive head of the withdrawing state has given notice in writing of the withdrawal to the executive heads of all other party states. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

Article XI. Construction and Severability.

This Compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this Compact shall be severable and if any phrase, clause, sentence or provision of this Compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this Compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this Compact shall be held contrary to the constitution of any state participating herein, the Compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters. (1975, c. 810, s. 1.)

§ 106-65.56. Cooperation of State agencies with insurance fund.

Consistent with law and within available appropriations, the departments, agencies and officers of this State may cooperate with the insurance fund established by the Pest Control Compact. (1975, c. 810, s. 2.)

§ 106-65.57. Filing of bylaws and amendments.

Pursuant to Article IV(h) of the Compact, copies of bylaws and amendments thereto shall be filed with the Department of Agriculture and Consumer Services. (1975, c. 810, s. 3; 1997-261, s. 109.)

§ 106-65.58. Compact administrator.

The Compact administrator for this State shall be the Commissioner of Agriculture or his designated representative. The duties of the Compact administrator shall be deemed a regular part of the duties of his office. (1975, c. 810, s. 4.)

§ 106-65.59. Request for assistance from insurance fund.

Within the meaning of Article VI(b) or Article VIII(a), a request or application for assistance from the insurance fund may be made by the Commissioner of Agriculture or his designee whenever in his judgment the conditions qualifying this State for such assistance exist and it would be in the best interest of this State to make such request. (1975, c. 810, s. 5.)

§ 106-65.60. Credit for expenditures.

The department, agency, or officer expending or becoming liable for an expenditure on account of a control or eradication program undertaken or intensified pursuant to the Compact shall have credited to his account in the State treasury the amount or amounts of any payments made to this State to defray the cost of such program, or any part thereof, or as reimbursement thereof. (1975, c. 810, s. 6.)

§ 106-65.61. "Executive head" means Governor.

As used in the Compact, with reference to this State, the term "executive head" shall mean the Governor. (1975, c. 810, s. 7.)

§§ 106-65.62 through 106-65.66: Reserved for future codification purposes.

Article 4F.

Uniform Boll Weevil Eradication Act.

§ 106-65.67. Short title.

This Article may be cited as the Uniform Boll Weevil Eradication Act. (1975, c. 958, s. 1.)

§ 106-65.68. Declaration of policy.

The Anthonomus grandis Boheman, known as the boll weevil, is hereby declared to be a public nuisance, a pest, and a menace to the cotton industry. The purpose of this Article is to secure the eradication of the boll weevil. (1975, c. 958, s. 2.)

§ 106-65.69. Definitions.

As used in this Article, the following words shall have the meaning stated below, unless the context requires otherwise:

(1) Boll Weevil. — Anthonomus grandis Boheman, the boll weevil, in any stage of development.

(2) Certificate. — A document issued or authorized by the Commissioner indicating that a regulated article is not contaminated with boll weevils.

(3) Commissioner. — The Commissioner of Agriculture of this State or any officer or employee of the Department of Agriculture and Consumer Services or designated cooperator to whom authority to act in his stead has been or hereafter may be delegated.

(4) Cotton. — Any cotton plant or cotton plant product upon which the boll weevil is dependent for completion of any portion of its life cycle.

(5) Host. — Any plant or plant product upon which the boll weevil is dependent for completion of any portion of its life cycle.

(6) Infested. — Actually infested with a boll weevil or so exposed to infestation that it would be reasonable to believe that an infestation exists.

(7) Permit. — A document issued or authorized by the Commissioner to provide for the movement of regulated articles to restricted destinations for limited handling, utilization, or processing.

(8) Person. — Any individual, corporation, company, society, or association, or other business entity.

(9) Regulated Article. — Any article of any character carrying or capable of carrying the boll weevil, including, but not limited to cotton plants, seed cotton, other hosts, gin trash, and mechanical cotton pickers, as designated by regulations of the Commissioner. (1975, c. 958, s. 3; 1997-261, s. 31.)

§ 106-65.70. Cooperative programs authorized.

The Commissioner is hereby authorized and directed to carry out programs to destroy and eliminate boll weevils in this State. The Commissioner is authorized to cooperate with any agency of the federal government or any state

contiguous to this State, any other agency in this State, or any person engaged in growing, processing, marketing, or handling cotton, or any group of such persons, in this State, in programs to effectuate the purposes of this Article, and may enter into written agreements to effectuate such purposes. Such agreements may provide for cost sharing, and for division of duties and responsibilities under this Article and may include other provisions generally to effectuate the purposes of this Article. (1975, c. 958, s. 4.)

§ 106-65.71. Entry of premises; eradication activities; inspections.

The Commissioner, or his authorized representative, shall have authority, as provided in this section, to enter cotton fields and other premises in order to carry out such activities, including but not limited to treatment with pesticides, monitoring, and destruction of growing cotton and/or other host plants, as may be necessary to carry out the provisions of this Article. The Commissioner, or his authorized representative, shall have authority to make inspection of any fields or premises in this State and any property located therein or thereon for the purpose of determining whether such property is infested with the boll weevil. Such inspection and other activities may be conducted at any hour with the permission of the owner or person in charge. If permission is denied the Commissioner or his authorized representative, such inspection and other activities may be conducted without a warrant with respect to any outdoor premises, if conducted in a reasonable manner between the hours of sunrise and sunset. Such inspections and other activities may be conducted in a reasonable manner, with a warrant, with respect to any premises. Any judge of this State may, within his territorial jurisdiction, and upon proper cause to believe that any cotton or other regulated article is in or upon any premises in this State, issue warrants for the purpose of conducting administrative inspections and other activities authorized by this Article. (1975, c. 958, s. 5.)

§ 106-65.72. Reports.

Every person growing cotton in this State shall furnish to the Commissioner, or his authorized representative, on forms supplied by the Commissioner, such information as the Commissioner may require, concerning the size and location of all commercial cotton fields and of noncommercial patches of cotton grown as ornamentals or for other purposes. (1975, c. 958, s. 6.)

§ 106-65.73. Quarantine.

The Commissioner is authorized to promulgate regulations, quarantining this State, or any portion thereof, and governing the storage or other handling in the quarantined areas of regulated articles and the movement of regulated articles into or from such areas, when he shall determine that such action is necessary, or reasonably appears necessary, to prevent or retard the spread of the boll weevil. The Commissioner is also authorized to promulgate regulations governing the movement of regulated articles from other states or portions thereof into this State when such state is known to be infested with the boll weevil. Before quarantining any area, the Commissioner shall hold a public hearing under such rules as he shall determine, at which hearing any interested party may appear and be heard either in person or by attorney: Provided, however, the Commissioner may promulgate regulations, imposing a temporary quarantine for a period not to exceed 60 days, during which time a public hearing, as herein provided, shall be held if it appears that a quarantine for more than 60 days will be necessary to prevent or retard the spread of the

boll weevil. It shall be unlawful for any person to store or handle any regulated article in a quarantined area, or to move into or from a quarantined area any regulated article, except under such conditions as may be prescribed by the regulations promulgated by the Commissioner. (1975, c. 958, s. 7; 1977, c. 507, s. 1.)

§ 106-65.74. Authority to designate elimination zones; authority to prohibit planting of cotton and to require participation in eradication program.

The Commissioner, subject to the provisions of section 13 of this act [Session Laws 1975, chapter 958, section 13] is authorized to designate by regulation one or more areas of this State as "elimination zones" where boll weevil eradication programs will be undertaken. The Commissioner is authorized to promulgate reasonable regulations regarding areas where cotton cannot be planted within an elimination zone when he has reason to believe it will jeopardize the success of the program or present a hazard to public health or safety. The Commissioner is authorized to issue regulations prohibiting the planting of noncommercial cotton in such elimination zones, and requiring that all growers of commercial cotton in the elimination zones participate in a program of boll weevil eradication including cost sharing as prescribed in the regulations. Notice of such prohibition and requirement shall be given by publication for one day each week for three successive weeks in a newspaper having general circulation in the affected area. The Commissioner is authorized to set by regulation a reasonable schedule of penalty fees to be assessed when growers in designated "elimination zones" do not meet the requirements of (G.S. 106-65.73) and participation in cost sharing as prescribed by regulation. Such penalty fees shall not exceed a charge of twenty-five dollars ($25.00) per acre. When a grower fails to meet the requirements of regulations promulgated by the Commissioner, the Commissioner shall have authority in elimination zones to destroy cotton not in compliance with such regulations. (1975, c. 958, s. 8; 1977, c. 507, ss. 2, 3.)

§ 106-65.75. Authority for destruction or treatment of cotton in elimination zones; when compensation payable.

The Commissioner or his authorized representative shall have authority to destroy, or in his discretion, to treat with pesticides volunteer or other noncommercial cotton and to establish procedures for the purchase and destruction of commercial cotton in elimination zones when the Commissioner deems such action necessary to effectuate the purposes of this Article. No payment shall be made by the Commissioner to the owner or lessee for the destruction or injury of any cotton which was planted in an elimination zone after publication of notice as provided in G.S. 106-65.74, or which was otherwise handled in violation of this Article or the regulations adopted pursuant thereto. However, the Commissioner shall pay for losses resulting from the destruction of cotton which was planted in such zones prior to promulgation of such notice. (1975, c. 958, s. 9; 1977, c. 507, ss. 4, 5.)

§ 106-65.76. Authority to regulate pasturage, entry, and honeybee colonies in elimination zones and other areas.

The Commissioner is authorized to promulgate regulations restricting the pasturage of livestock, entry by persons, and location of honeybee colonies in

any premises in an elimination zone which have been or are to be treated with pesticides or otherwise treated to cause the eradication of the boll weevil, or in any other area that may be affected by such treatments. (1975, c. 958, s. 10.)

§ 106-65.77. Rules and regulations.

The Commissioner shall have authority to adopt such other rules and regulations as he deems necessary to further effectuate the purposes of this Article. All rules and regulations issued under this Article shall be adopted and published in accordance with any additional requirements prescribed in this Article. (1975, c. 958, s. 11.)

§ 106-65.78. Penalties.

(a) Any person who shall violate any of the provisions of this Article or the regulations promulgated hereunder, or who shall alter, forge or counterfeit, or use without authority, any certificate or permit or other document provided for in this Article or in the regulations promulgated hereunder, shall be guilty of a Class 1 misdemeanor.

(b) Any person who shall, except in compliance with the regulations of the Commissioner, move any regulated article into this State from any other state which the Commissioner found in such regulations is infested by the boll weevil, shall be guilty of a Class 1 misdemeanor. (1975, c. 958, s. 12; 1993, c. 539, s. 742; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 106-65.79 through 106-65.83: Reserved for future codification purposes.

Article 4G.

Official Cotton Growers' Organization.

§ 106-65.84. Findings and purpose.

The General Assembly of North Carolina finds that due to the interstate nature of boll weevil infestation, it is necessary to secure the cooperation of cotton growers, other State governments and agencies of the federal government, in order to carry out a program of boll weevil suppression and eradication. The purpose of this Article is to provide for the certification of a cotton growers' organization to cooperate with State and federal agencies in the administration of cost-sharing programs for the eradication and suppression of the boll weevil (Anthonomus grandis Boheman) and other cotton pests. (1983, c. 136, s. 1.)

§ 106-65.85. Definitions.

As used in this Article:

(1) "Board" means the North Carolina Board of Agriculture.

(2) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(3) "Cotton grower" means any person who is engaged in and has an economic risk in the business of producing or causing to be produced, for market, cotton.

(4) "Department" means the North Carolina Department of Agriculture and Consumer Services. (1983, c. 136, s. 2; 1997-261, s. 109.)

§ 106-65.86. Certification by Board; requirements.

(a) The Board may certify a cotton growers' organization for the purpose of entering into agreements with the State of North Carolina, other states, the federal government and other parties as may be necessary to carry out the purposes of this Article.

(b) In order to be eligible for certification by the Board, the cotton growers' organization must demonstrate to the satisfaction of the Board that:

(1) It is a nonprofit organization and could qualify as a tax-exempt organization under section 501(a) of the Internal Revenue Code of 1954 (26 USC 501(a));

(2) Membership in the organization shall be open to all cotton growers in this State;

(3) The organization shall have only one class of members with each member entitled to only one vote;

(4) The organization's board of directors shall be composed of:

a. Two cotton growers from this State being appointed by the Commissioner, with the consent of the Board; and

b. One representative of State government from this State, appointed by the Commissioner, with the consent of the Board.

(5) All books and records of account and minutes of proceedings of the organization shall be available for inspection or audit by the Commissioner or his representative at any reasonable time; and

(6) Employees or agents of the growers' organization who handle funds of the organization shall be adequately bonded. (1983, c. 136, s. 3.)

§ 106-65.87. Certification; revocation.

(a) Upon determination by the Board that the organization meets the requirements of the preceding section, the Board shall certify the organization as the official cotton growers' organization. Such certification shall be for the purposes of this Article only, and shall not affect other organizations or associations of cotton growers established for other purposes.

(b) The Board shall certify only one such organization; provided, that the Board may revoke the certification of the organization if at any time the organization shall fail to meet the requirements of this Article. (1983, c. 136, s. 4.)

§ 106-65.88. Referendum; assessments.

(a) At the request of the certified organization, the Board shall authorize a referendum among cotton growers upon the question of whether an assessment shall be levied upon cotton growers in the State to offset, in whole or in part, the cost of boll weevil or other cotton pest eradication and suppression programs authorized by this Article or by any other law of this State.

(b) The assessment levied under this Article shall be based upon the number of acres of cotton planted. The amount of the assessment, the period of time for which it shall be levied, and the geographical area to be covered by the assessment shall be determined by the Board.

(c) All affected cotton growers shall be entitled to vote in any such referendum and the Board shall determine any questions of eligibility to vote.

(d) If at least two-thirds of those voting vote in favor of the assessment, then the assessment shall be collected by the Department from the affected cotton growers.

(e) The assessments collected by the Department under this Article shall be promptly remitted to the certified organization under such terms and condi-

tions as the Commissioner shall deem necessary to ensure that such assessments are used in a sound program of eradication or suppression of the boll weevil or other cotton pests.

(f) The certified organization shall provide to the Department an annual audit of its accounts performed by a certified public accountant.

(g) For the purposes of the Executive Budget Act, G.S. 143-1 et seq., the assessments collected by the Department under this Article shall not be "State funds." (1983, c. 136, s. 5.)

§ 106-65.89. Agreements.

The Board may authorize the Department to enter into agreements with the certified organization, other state governments, the federal government and individual cotton growers as may be necessary to carry out the purposes of this Article. (1983, c. 136, s. 6.)

§ 106-65.90. Failure to pay assessments.

(a) A cotton grower who fails to pay, when due and upon reasonable notice, any assessment levied under this Article, shall be subject to a penalty of not more than twenty-five dollars ($25.00) per acre, as established in the Board's regulations.

(b) A cotton grower who fails to pay all assessments, including penalties, within 30 days of notice of penalty, shall destroy any cotton plants growing on his acreage which is subject to the assessment. Any such cotton plants which are not destroyed shall be deemed to be a public nuisance. The Commissioner may apply to a court of competent jurisdiction to abate and prevent such nuisance. Upon judgment and order of the court, such nuisance shall be condemned and destroyed in the manner directed by the court. The grower shall be liable for all court costs and fees, and other proper expenses incurred in the enforcement of this section.

(c) In addition to any other remedies for the collection of assessments, including penalties, the Department of Agriculture and Consumer Services has a lien upon cotton subject to such assessments. Provided, that any buyer of cotton shall take free of such lien if he has not received written notice of the lien from the Department or if he has paid for such cotton by a check in which the Department is named as joint payee. In any action to enforce the lien, the burden shall be upon the Department to prove that the buyer of cotton received written notice of the lien. A buyer of cotton other than a person buying cotton from the grower takes free of the lien created herein. (1983, c. 136, s. 7; 1987, c. 293; 1997-261, s. 109.)

§ 106-65.91. Regulations.

The Board of Agriculture may adopt such regulations as are necessary to carry out the purposes of this Article. (1983, c. 136, s. 8.)

Article 5.

Seed Cotton and Peanuts.

§§ 106-66, 106-67: Repealed by Session Laws 1987, c. 244, s. 1(c).

Article 5A.

Marketing of Farmers Stock Peanuts.

§§ 106-67.1 through 106-67.8: Repealed by Session Laws 1983, c. 248, s. 1.

Article 6.

Cottonseed Meal.

§§ 106-68 through 106-78: Repealed by Session Laws 1987, c. 244, s. 1(d).

Article 7.

Pulverized Limestone and Marl.

§§ 106-79, 106-80: Repealed by Session Laws 1987, c. 244, s. 1(e).

Article 8.

Sale, etc., of Agricultural Liming Material, etc.

§§ 106-81 through 106-92: Repealed by Session Laws 1981, c. 284.

Cross References. — For present provisions as to the regulation of the sale of agricultural liming materials, etc., see §§ 106-92.1 to 106-92.17.

Article 8A.

Sale of Agricultural Liming Materials and Landplaster.

§ 106-92.1. Title of Article.

This Article shall be known as the North Carolina Agricultural Liming Materials and Landplaster Act. (1979, c. 590.)

§ 106-92.2. Purpose of Article.

The purpose of this Article shall be to assure the manufacturer, distributor, and consumer of the correct quality and quantity of all agricultural liming materials and landplaster sold in this State. (1979, c. 590.)

§ 106-92.3. Definitions of terms.

For the purpose of this Article:

(1) "Agricultural liming materials" means oxides, hydroxides, silicates or carbonates of calcium and/or magnesium compounds capable of neutralizing soil acidity.

(1a) "Agricultural liming material and fertilizer mixture" means any agricultural liming material combined with a single fertilizer element or single plant nutrient.

(2) "Brand" means the term, designation, trademark, product name or other specific designation truly descriptive of the product under which individual agricultural liming material is offered for sale.

(3) "Bulk" means in nonpackaged form.

(4) "Burnt lime" means a material, made from limestone which consists essentially of calcium oxide or combination of calcium oxide with magnesium oxide.

(5) "Calcitic limestone" means limestone which contains less than six percent (6%) magnesium from magnesium carbonate.

(6) "Calcium carbonate equivalent" means the acid neutralizing capacity of an agricultural liming material expressed as weight percentage of calcium carbonate.

(7) "Dolomitic limestone" means limestone having a minimum of six percent (6%) magnesium from magnesium carbonate.

(8) "Fineness" means the percentage by weight of the material which will pass U.S. Standard sieves of specified sizes.

(9) "Hydrated lime" means a material, made from burnt lime, which consists essentially of calcium hydroxide or a combination of calcium hydroxide with magnesium oxide and/or magnesium hydroxide.

(10) "Industrial by-product liming material" means any industrial waste or by-product containing calcium or calcium and magnesium in forms that will neutralize soil acidity.

(11) "Label" means any written or printed matter on or attached to the package or on the delivery ticket which accompanies bulk shipments.

(12) "Landplaster" means a material containing calcium sulfate.

(13) "Limestone" means a material consisting essentially of calcium carbonate or a combination of calcium carbonate with magnesium carbonate capable of neutralizing soil acidity.

(14) "Marl" means a granular or loosely consolidated earth-like material composed largely of sea shell fragments and calcium carbonate.

(15) "Percent" or "percentage" which means by weight.

(16) "Person" means individual, partnership, association, firm or corporation.

(17) "Sale" means any transfer of title or possession, or both, exchange or barter of tangible personal property, conditional or otherwise for a consideration paid or to be paid, and this shall include any of said transactions whereby title or ownership is to pass and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid in which possession of said property passes to bailee, borrower, lessee, or licensee.

(18) "Sell" means the alienation, exchange, transfer or contract for such transfer of property for a fixed price in money or its equivalent.

(19) "Suspension lime" means a product made by mixing agricultural liming materials with water and a suspending agent.

(20) "Ton" means a net weight of 2,000 pounds avoirdupois.

(21) "Weight" means the weight of undried material as offered for sale. (1979, c. 590; 1981, c. 449, s. 2.)

§ 106-92.4. Enforcing official.

This Article shall be administered by the Commissioner of Agriculture of the State of North Carolina, or his authorized agent, hereinafter referred to as the "Commissioner." (1979, c. 590.)

§ 106-92.5. Labeling.

(a) Agricultural liming materials sold, offered for sale or distributed in the State shall have affixed to each package in a conspicuous manner on the outside thereof, a plainly printed, stamped or otherwise marked label, tag or statement, or in the case of bulk sales, a delivery slip, setting forth at least the following information:

(1) The name and principal office address of the manufacturer or distributor.
(2) The brand or trade name truly descriptive of the material.
(3) The identification of the product as to the type of the agricultural liming material.
(4) The net weight of the agricultural liming material.
(5) The minimum percentages of calcium and magnesium.
(6) Calcium carbonate equivalent as determined by methods prescribed by the Association of Official Analytical Chemists. Minimum calcium carbonate equivalent shall be prescribed by regulation.
(7) The minimum percent by weight passing through U. S. Standard sieves as prescribed by regulations.

(b) Landplaster sold, offered for sale or distributed in this State shall have affixed to each package in a conspicuous manner on the outside thereof, a plainly printed, stamped or otherwise marked label, tag or statement, or in the case of bulk sales, a delivery slip, setting forth at least the following information:

(1) The name and address of the manufacturer or distributor guaranteeing the registration.
(2) The brand or trade name of the material.
(3) The net weight.
(4) The guaranteed analysis showing the minimum percentage of calcium sulfate. (1979, c. 590.)

§ 106-92.6. Prohibited acts.

(a) Agricultural liming material or landplaster shall not be sold or offered for sale or distributed in this State unless it complies with provisions of this law or regulations.

(b) Agricultural liming material or landplaster shall not be sold or offered for sale in this State which contains toxic materials in quantities injurious to plants or animals.

(c) It is unlawful to make any false or misleading statement or representation with regard to any agricultural liming material or landplaster product offered for sale, sold, or distributed in this State, or to use any misleading or deceptive trademark or brand name in connection therewith. The Commissioner may refuse, suspend, revoke, or terminate the registration of any such product for any violation of this section. (1979, c. 590; 1993, c. 144, s. 2.)

§ 106-92.7. Registration of brands.

(a) Each separately identified product shall be registered before being sold, offered for sale, or distributed in this State. Registration fee shall be twenty-

five dollars ($25.00) for each separately identified product in packages of 10 pounds or less. For each other separately identified product registration fee shall be five dollars ($5.00). The application for registration shall be submitted to the Commissioner on forms furnished by the Commissioner and shall be accompanied by the appropriate registration fee. Upon approval by the Commissioner, a copy of the registration shall be furnished to the applicant. All registrations expire on June 30 of each year.

(b) A distributor shall not be required to register any brand of agricultural liming material or landplaster which is already registered under this Article by another person, providing the label does not differ in any respect.

(c) In determining the acceptability of any product for registration, the Commissioner may require proof of claims made for the product. If no specific claims are made, the Commissioner may require proof of usefulness and value of the product. As evidence of proof, the Commissioner may rely on experimental data furnished by the applicant and may require that the data be developed by a recognized research or experimental institution. The Commissioner may further require that the data be developed from tests conducted under conditions identical to or closely related to those present in North Carolina. The Commissioner may reject any data not developed under those conditions and may rely on advice from sources such as the Cooperative Extension Service of North Carolina State University. (1979, c. 590; 1993, c. 144, s. 1.)

§ 106-92.8. Tonnage fees: reporting system.

For the purpose of defraying expenses connected with the registration, inspection and analysis of the materials coming under this Article, each manufacturer or registrant shall pay to the Department of Agriculture and Consumer Services tonnage fees in addition to registration fees as follows: for agricultural liming material, ten cents (10¢) per ton; for landplaster, ten cents (10¢) per ton; excepting that these fees shall not apply to materials which are sold to fertilizer manufacturers for the sole purpose for use in the manufacture of fertilizer or to materials when sold in packages of 10 pounds or less.

Any manufacturer, importer, jobber, firm, corporation or person who distributes materials coming under this Article in this State shall make application for a permit to report the materials sold and pay the tonnage fees as set forth in this section.

The Commissioner of Agriculture shall grant such permits on the following conditions: The applicant's agreement that he will keep such records as may be necessary to indicate accurately the tonnage of liming materials, etc., sold in the State and his agreement for the Commissioner or this authorized representative to examine such records to verify the tonnage statement. The registrant shall report quarterly and pay the applicable tonnage fees quarterly, on or before the tenth day of October, January, April, and July of each year. The report and payment shall cover the tonnage of liming materials, etc., sold during the preceding quarter. The report shall be on forms furnished by the Commissioner. If the report is not filed and the tonnage fees paid by the last day of the month in which it is due, or if the report be false, the amount due shall bear a penalty of ten percent (10%) which shall be added to the tonnage fees due. If the report is not filed and the tonnage fees paid within 60 days of the date due, or if the report or tonnage be false, the Commissioner may revoke the permit and cancel the registration. (1979, c. 590; 1997-261, s. 109.)

§ 106-92.9. Report of tonnage.

(a) Within 30 days following the expiration of registration each registrant shall submit on a form furnished or approved by the Commissioner an annual

statement, setting forth by counties, the number of net tons of each agricultural liming material and landplaster sold by him for use in the State during the previous 12 month period.

(b) The Commissioner shall publish and distribute annually, to each agricultural liming material and landplaster registrant and other interested persons a composite report showing the tons of agricultural liming material and landplaster sold in each county of the State. This report shall in no way divulge the operation of any registrant. (1979, c. 590.)

§ 106-92.10. Inspection, sampling, analysis.

(a) It shall be the duty of the Commissioner to sample, inspect, make analysis of, and test agricultural liming materials and landplaster distributed within this State as he may deem necessary to determine if such materials are in compliance with the provisions of this Article. The Commissioner is authorized to enter upon any public or private premises or carriers during regular business hours in order to have access to agricultural liming material and landplaster subject to the provisions of this Article, and regulations pertaining thereto, and to the records relating to their distribution.

(b) The methods of analysis and sampling shall be those approved by the State Chemist, and shall be guided by the Association of Official Analytical Chemists procedures.

(c) The results of official analysis of agricultural liming materials and portions of official samples may be distributed to the registrant by the Commissioner at least annually if requested. (1979, c. 590.)

§ 106-92.11. Deficiencies: refunds to consumer.

Should any of the agricultural liming and landplaster materials defined in this Article be found to be deficient in the components claimed by the manufacturer or registrant thereof, said manufacturer or registrant, upon official notification to [of] such deficiency by the Commissioner of Agriculture, shall, within 90 days, make refunds to the consumers of the deficient materials as follows:

In case of "agricultural liming material" if the deficiency is five percent (5%) of the guarantee or more, there shall be refunded an amount equal to three times the value of such deficiency and in case of "landplaster," for deficiencies in excess of one percent (1%) of the guarantee, there shall be refunded an amount equal to three times the value of the deficiency. Values shall be based on the selling price of said materials. When said consumers cannot be found within the above specified time, refunds shall be forwarded to the Commissioner of Agriculture, where said refund shall be held for payment to the proper consumer upon order of the Commissioner. If the consumer to whom the refund is due cannot be found within a period of one year, the clear proceeds of such refund shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1979, c. 590; 1997-261, s. 109; 1998-215, s. 6.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, in the fourth sentence of the last paragraph, inserted "the clear proceeds of" and substituted "shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2" for "shall revert to the Department of Agriculture and Consumer Services for expenditure by the Commissioner in promoting the agricultural programs of the State."

§ 106-92.12. "Stop sale" orders.

The Commissioner may issue and enforce a written or printed "stop sale, use, or removal" order to the owner or custodian of any lot of agricultural liming material or landplaster at a designated place when the Commissioner finds said material is being offered or exposed for sale in violation of any of the provisions of this Article until the law has been complied with and said violation has been otherwise legally disposed of by written authority. The Commissioner shall release the agricultural liming materials or landplaster so withdrawn, when the requirements of the provisions of this Article have been complied with and all costs and expense incurred in connection with the withdrawal have been paid.

If a manufacturer or registrant fails to make a refund as required by G.S. 106-92.11, the Commissioner may stop the sale of any agricultural liming materials or landplaster registered by the manufacturer or registrant and offered for sale in this State. (1979, c. 590; 1993, c. 144, s. 3.)

§ 106-92.13. Appeals from assessments and orders of Commissioner.

Nothing in this Article shall prevent any person from appealing to a court of competent jurisdiction from any assessment of penalty or other final order or ruling of the Commissioner or Board of Agriculture. (1979, c. 590.)

§ 106-92.14. Penalties for violations of this Article.

Any person convicted of violating any provision of this Article or the rules and regulations promulgated thereunder shall be guilty of a Class 3 misdemeanor and fined not less than two hundred dollars ($200.00) nor more than one thousand dollars ($1,000) in the discretion of the court. Nothing in this Article shall be construed as requiring the Commissioner or his authorized agent to report for prosecution or for the institution of seizure proceedings as a result of minor violations of the Article when he believes that the public interest will best be served by a suitable written warning. (1979, c. 590; 1993, c. 539, s. 743; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-92.15. Declaration of policy.

The General Assembly hereby finds and declares that it is in the public interest that the State regulate the activities of those persons engaged in the business of preparing, or manufacturing agricultural liming material and landplaster in order to insure the manufacturer, distributor, and consumer of the correct quantity and quality of all said materials sold or offered for sale in this State. It shall therefore be the policy of this State to regulate the activities of those persons engaged in the business of preparing or manufacturing agricultural liming material and landplaster. (1979, c. 590.)

§ 106-92.16. Authority of Board of Agriculture to make rules and regulations.

Because legislation with regard to agricultural liming material and landplaster sold or offered for sale in this State must be adopted (adapted) to complex conditions and standards involving numerous details with which the General Assembly cannot deal directly and in order to effectuate the purposes and policies of the Article, and in order to insure the manufacturer, distributor, and consumer of the correct quality and quantity of all agricultural liming

material and landplaster sold or offered for sale in this State, the Board of Agriculture shall have the authority to make rules and regulations with respect to:

(1) Defining a standard agricultural liming material in terms of neutralizing equivalents.
(2) Fineness of agricultural liming material.
(3) Form and order of labeling.
(4) Monetary penalties for deficiencies from guarantee.
(5) Monetary penalties for materials that do not meet screen guarantee. (1979, c. 590.)

§ 106-92.17. Lime and fertilizer mixtures.

The provisions of this Article shall apply to mixtures of agricultural liming material and fertilizer, except as follows:

(1) Such mixtures shall meet the labeling requirements of G.S. 106-92.5(a) in addition to providing information including, but not limited to, a guaranteed analysis of the fertilizer element or plant nutrient;
(2) The tonnage fee for such mixtures under G.S. 106-92.8 shall be twenty-five cents (25¢) per ton; and,
(3) The Board of Agriculture shall establish the allowable deficiency percentage and refund rate for such mixtures under G.S. 106-92.11. (1981, c. 449, s. 1.)

Article 9.

Commercial Feedingstuffs.

§§ 106-93 through 106-110: Repealed by Session Laws 1973, c. 771, s. 19.

Cross References. — For present provisions covering the subject matter of the repealed sections, see §§ 106-284.30 through 106-284.46.

Article 10.

Mixed Feed Oats.

§ 106-111: Repealed by Session Laws 1987, c. 244, s. 1(f).

Article 11.

Stock and Poultry Tonics.

§§ 106-112 through 106-119: Repealed by Session Laws 1975, c. 39.

Article 12.

Food, Drugs and Cosmetics.

§ 106-120. Title of Article.

This Article may be cited as the North Carolina Food, Drug and Cosmetic Act. (1939, c. 320, s. 1.)

Legal Periodicals. — For comment on this enactment, see 17 N.C.L. Rev. 400 (1939).

§ 106-121. Definitions and general consideration.

For the purpose of this Article:

(1) The term "advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purposes of inducing, or which are likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics.

(1a) The term "color" includes black, white, and intermediate grays.

(1b) The term "color additive" means a material which:

a. Is a dye, pigment, or other substance made by a process of synthesis or similar artifice, or extracted, isolated, or otherwise derived, with or without intermediate or final change of identity, from a vegetable, animal, mineral, or other source; or

b. When added or applied to a food, drug, or cosmetic, or to the human body or any part thereof, is capable (alone or through reaction with other substance) of imparting color thereto;

Provided, that such term does not apply to any pesticide chemical, soil or plant nutrient, or other agricultural chemical solely because of its effect in aiding, retarding, or otherwise affecting, directly or indirectly, the growth or other natural physiological process of produce of the soil and thereby affecting its color, whether before or after harvest.

(2) The term "Commissioner" means the Commissioner of Agriculture; the term "Department" means the Department of Agriculture and Consumer Services, and the term "Board" means the Board of Agriculture.

(2a) The term "consumer commodity" except as otherwise specifically provided by this subdivision means any food, drug, device, or cosmetic as those terms are defined by this Article. Such term does not include:

a. Any tobacco or tobacco product; or

b. Any commodity subject to packaging or labeling requirements imposed under the North Carolina Pesticide Law of 1971, Article 52, Chapter 143, of the General Statutes of North Carolina, or the provisions of the eighth paragraph under the heading "Bureau of Animal Industry" of the act of March 4, 1913 (37 Stat. 832-833; 21 U.S.C. 151-157) commonly known as the Virus-Serum Toxin Act; or

c. Any drug subject to the provisions of G.S. 106-134(13) or 106-134.1 of this Article or section 503(b)(1) or 506 of the federal act; or

d. Any beverage subject to or complying with packaging or labeling requirements imposed under the Federal Alcohol Administration Act (27 U.S.C., et seq.); or

e. Any commodity subject to the provisions of the North Carolina Seed Law, Article 31, Chapter 106 of the General Statutes of North Carolina.

(3) The term "contaminated with filth" applies to any food, drug, device or cosmetic not securely protected from dust, dirt, and as far as may be necessary by all reasonable means, from all foreign or injurious contaminations.

(4) The term "cosmetic" means

a. Articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and

b. Articles intended for use as a component of any such articles, except that such terms shall not include soap.

(4a) The term "counterfeit drug" means a drug which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, or device, or any likeness thereof, of a drug manufacturer, processor, packer or distributor other than the person or persons who in fact manufactured, processed, packed or distributed such drug and which thereby falsely purports or is represented to be the product of, or to have been packed or distributed by, such other drug manufacturer, processor, packer or distributor.

(5) The term "device," except when used in subdivision (15) of this section and in G.S. 106-122, subdivision (10), 106-130, subdivision (6), 106-134, subdivision (3) and 106-137, subdivision (3) means instruments, apparatus and contrivances, including their components, parts and accessories, intended

a. For use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or

b. To affect the structure or any function of the body of man or other animals.

(6) The term "drug" means

a. Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and

b. Articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; and

c. Articles (other than food) intended to affect the structure or any function of the body of man or other animals; and

d. Articles intended for use as a component of any article specified in paragraphs a, b or c; but does not include devices or their components, parts, or accessories.

(7) The term "federal act" means the Federal Food, Drug and Cosmetic Act (Title 21 U.S.C. 301 et seq.; 52 Stat. 1040 et seq.).

(8) The term "food" means

a. Articles used for food or drink for man or other animals,

b. Chewing gum, and

c. Articles used for components of any such article.

(8a) The term "food additive" means any substance, the intended use of which results or may be reasonably expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food (including any substance intended for use in producing, manufacturing, packing, processing, preparing, treating, packaging, transporting or holding food; and including any source of radiation intended for any such use) if such substance is not generally recognized, among experts qualified by scientific training and experience to evaluate its safety, as having been adequately shown through scientific procedures (or, in the case of a substance used in a food prior to January 1, 1958, through either scientific procedures or experience based on common use in food) to be safe under the conditions of its intended use; except that such term does not include:

a. A pesticide chemical in or on a raw agricultural commodity; or

b. A pesticide chemical to the extent that it is intended for use or is used in the production, storage, or transportation of any raw agricultural commodity; or

c. A color additive; or

d. Any substance used in accordance with a sanction or approval granted prior to the enactment of the Food Additives Amendment

of 1958, pursuant to the federal act; the Poultry Products Inspection Act (21 U.S.C. 451 et seq.) or the Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. 71 et seq.).

(9) The term "immediate container" does not include package liners.

(10) The term "label" means a display of written, printed or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Article that any word, statement, or other information appearing on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(11) The term "labeling" means all labels and other written, printed, or graphic matter

a. Upon an article or any of its containers or wrappers, or

b. Accompanying such article.

(11a) Repealed by Session Laws 1989, c. 226, s. 1.

(12) The term "new drug" means

a. Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof; or

b. Any drug the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigation, been used to a material extent or for a material time under such conditions.

(12a) Repealed by Session Laws 1989, c. 226, s. 1.

(13) The term "official compendium" means the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, official National Formulary, or any supplement to any of them.

(13a) The term "package" means any container or wrapping in which any consumer commodity is enclosed for use in the delivery or display of that consumer commodity to retail purchasers, but does not include:

a. Shipping containers or wrappings used solely for the transportation of any consumer commodity in bulk or in quantity to manufacturers, packers, or processors, or to wholesale or retail distributors thereof; or

b. Shipping containers or outer wrappings used by retailers to ship or deliver any commodity to retail customers if such containers and wrappings bear no printed matter pertaining to any particular commodity.

(14) The term "person" includes individual, partnership, corporation, and association.

(14a) The term "pesticide chemical" means any substance which, alone, in chemical combination, or in formulation with one or more other substances is a "pesticide" within the meaning of the North Carolina Pesticide Law of 1971, Article 52, Chapter 143, of the General Statutes of North Carolina, or the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 135 et seq.), and which is used in the production, storage, or transportation of raw agricultural commodities.

(14b) The term "practitioner" means a physician, dentist, veterinarian or other person licensed, registered or otherwise permitted to distribute,

dispense, conduct research with respect to or to administer a drug so long as such activity is within the normal course of professional practice or research.

(14c) The term "principal display panel" means that part of a label that is most likely to be displayed, presented, shown, or examined under normal and customary conditions of display for retail sale.

(14d) The term "raw agricultural commodity" means any food in its raw or natural state, including all fruits that are washed, colored, or otherwise treated in their unpeeled natural form prior to marketing.

(14e), (14f) Repealed by Session Laws 1989, c. 226, s. 1.

(15) If an article is alleged to be misbranded because the labeling is misleading, or if an advertisement is alleged to be false because it is misleading, then in determining whether the labeling or advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which labeling or advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling or advertisement relates under the conditions of use prescribed in the labeling or advertisement thereof or under such conditions of use as are customary or usual.

(16) The representation of a drug, in its labeling or advertisement, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(17) The provisions of this Article regarding the selling of food, drugs, devices, or cosmetics, shall be considered to include the manufacture, production, processing, packing, exposure, offer, possession, and holding of any such article for sale; and the sale, dispensing, and giving of any such article; and the supplying or applying of any such article in the conduct of any food, drug or cosmetic establishment. (1939, c. 320, s. 2; 1975, c. 614, ss. 1, 2; 1987, c. 737, s. 1; 1989, c. 226, s. 1; 1997-261, s. 32.)

§ 106-122. Certain acts prohibited.

The following acts and the causing thereof within the State of North Carolina are hereby prohibited:

(1) The manufacture, sale, or delivery, holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded.

(2) The adulteration or misbranding of any food, drug, device, or cosmetic.

(3) The receipt in commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(4) The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of G.S. 106-131 or 106-135.

(5) The dissemination of any false advertisement.

(6) The refusal to permit entry or inspection, or to permit the taking of a sample, or to permit access to or copying of any record as authorized by G.S. 106-140.

(7) The giving of a guaranty or undertaking which guaranty or undertaking is false, except by a person who relied on a guaranty or undertaking to the same effect signed by, and containing the name and address

of the person residing in the State of North Carolina from whom he received in good faith the food, drug, device or cosmetic.

(8) The removal or disposal of a detained or embargoed article in violation of G.S. 106-125.

(9) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device or cosmetic, if such act is done while such article is held for sale and results in such article being misbranded or adulterated.

(10) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label or other identification device authorized or required by regulations promulgated under the provisions of this Article.

(11) The using, on the labeling of any drug or in any advertisement relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under G.S. 106-135, or that such drug complies with the provisions of such section.

(12) The sale at retail of any food for which a definition and standard of identity for enrichment with vitamins, minerals or other nutrients has been promulgated by the Board, unless such food conforms to such definition and standard, or has been specifically exempted from same by the Board.

(13) The distribution in commerce of a consumer commodity, as defined in this Article, if such commodity is contained in a package, or if there is affixed to that commodity a label, which does not conform to the provisions of this Article and regulations promulgated under authority of this Article; provided, however, that this prohibition shall not apply to persons engaged in business as wholesale or retail distributors of consumer commodities except to the extent that such persons:

a. Are engaged in the packaging or labeling of such commodities; or

b. Prescribe or specify by any means the manner in which such commodities are packaged or labeled.

(14) The using by any person to his own advantage, or revealing, other than to the Commissioner or authorized officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this Article, any information acquired under authority of this Article concerning any method or process which as a trade secret is entitled to protection.

(15) In the case of a prescription drug distributed or offered for sale in this State, the failure of the manufacturer, packer, or distributor thereof to maintain for transmittal, or to transmit, to any practitioner licensed by applicable law to administer such drug within the normal course of professional practice, who makes written request for information as to such drug, true and correct copies of all printed matter which is required to be included in any package in which that drug is distributed or sold, or such other printed matter as is approved under the federal act. Nothing in this paragraph shall be construed to exempt any person from any labeling requirement imposed by or under other provisions of this Article.

(16) a. Placing or causing to be placed upon any drug or device or container thereof, with intent to defraud, the trade name or other identifying mark, or imprint of another or any likeness of any of the foregoing; or

b. Selling, dispensing, disposing of or causing to be sold, dispensed or disposed of, or concealing or keeping in possession, control or custody, with intent to sell, dispense or dispose of, any drug,

device or any container thereof, with knowledge that the trade name or other identifying mark or imprint of another or any likeness of any of the foregoing has been placed thereon in a manner prohibited by subsection (a) of this section; or

c. Making, selling, or disposing of; causing to be made, sold or disposed of; keeping in possession, control or custody; or concealing any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling thereof so as to render such drug a counterfeit drug.

(17) The doing of any act which causes a drug to be a counterfeit drug, or the sale or dispensing, or the holding for sale or dispensing of a counterfeit drug.

(18) Dispensing or causing to be dispensed a different drug in place of the drug ordered or prescribed without the express permission of the person ordering or prescribing.

(19) The acquiring or obtaining or attempting to acquire or obtain any drug subject to the provisions of G.S. 106-134.1(a)(3) or (4) by fraud, deceit, misrepresentation, or subterfuge, or by forgery or alteration of a prescription, or by the use of a false name, or the giving of a false address. (1939, c. 320, s. 3; 1975, c. 614, ss. 3-5.)

CASE NOTES

This section applies to adulteration of foods kept for sale. It has no application, therefore, to a controversy involving certain preservation powders for fruits. Smith v. Alphin, 150 N.C. 425, 64 S.E. 210 (1909).

Cited in Goodman v. Wenco Mgt., 100 N.C. App. 108, 394 S.E.2d 832 (1990); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992).

§ 106-123. Injunctions restraining violations.

In addition to the remedies hereinafter provided, the Commissioner of Agriculture is hereby authorized to apply to the superior court for, and such court shall have jurisdiction upon hearing and for cause shown to grant, a temporary or permanent injunction restraining any person from violating any provision of G.S. 106-122, irrespective of whether or not there exists an adequate remedy at law. (1939, c. 320, s. 4.)

§ 106-124. Violations made misdemeanor.

(a) Any person, firm or corporation violating any provision of this Article, or any regulation of the Board adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Commissioner, or his duly designated agent, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(b) No person shall be subject to the penalties of subsection (a) of this section, for having violated G.S. 106-122, subdivision (1) or (3) if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the State of North Carolina from whom he received in good faith the article, to the effect that such article is not adulterated or misbranded within the meaning of this Article, designating this article.

(c) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of an advertisement, except the manufacturer, packer, distrib-

utor, or seller of the article to which a false advertisement relates, shall be liable under this section by reason of the dissemination by him of such false advertisement, unless he has refused on the request of the Commissioner of Agriculture to furnish the Commissioner the name and post-office address of the manufacturer, packer, distributor, seller or advertising agency residing in the State of North Carolina who caused him to disseminate such advertisement. (1939, c. 320, s. 5; 1975, c. 614, s. 6; 1993, c. 539, s. 744; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Civil Liability. — Impure and dangerous articles of food, causing death of purchaser, subject the seller to liability in a civil action for damages. Ward v. Morehead City Sea Food Co., 171 N.C. 33, 87 S.E. 958 (1916).

Cited in Goodman v. Wenco Mgt., 100 N.C. App. 108, 394 S.E.2d 832 (1990); Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992).

§ 106-125. Detention of product or article suspected of being adulterated or misbranded.

(a) Whenever a duly authorized agent of the Department of Agriculture and Consumer Services finds or has probable cause to believe, that any food, drug, device, cosmetic or consumer commodity is adulterated, or so misbranded as to be dangerous or fraudulent within the meaning of this Article or is in violation of G.S. 106-131 or 106-135 of this Article, he shall affix to such article a tag or other appropriate marking giving notice that such article is, or is suspected of being, adulterated or misbranded and has been detained or embargoed, and warning all persons not to remove or dispose of such article by sale or otherwise until permission for removal or disposal is given by such agent or the court. It shall be unlawful for any person to remove or dispose of such detained or embargoed article by sale or otherwise without such permission.

(b) When an article detained or embargoed under subsection (a) has been found by such agent to be adulterated, or misbranded or to be in violation of G.S. 106-131 or 106-135 of this Article, he shall petition a judge of the district, or superior court in whose jurisdiction the article is detained or embargoed for an order for condemnation of such article. When such agent has found that an article so detained or embargoed is not adulterated or misbranded, he shall remove the tag or other marking.

(c) If the court finds that a detained or embargoed article is adulterated or misbranded, such article shall, after entry of the decree, be destroyed at the expense of the claimant thereof, under the supervision of such agent; and all court costs and fees, and storage and other proper expenses, shall be taxed against the claimant of such article or his agent: Provided, that when the adulteration or misbranding can be corrected by proper labeling or processing of the article, the court, after entry of the decree and after such costs, fees, and expenses have been paid and a good and sufficient bond, conditioned that such article shall be so labeled or processed, has been executed, may by order direct that such article be delivered to the claimant thereof for such labeling or processing under the supervision of an agent of the Department of Agriculture and Consumer Services. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant of the article on representation to the court by the Department of Agriculture and Consumer Services that the article is no longer in violation of this Article, and that the expenses of such supervision have been paid.

(d) Whenever any duly authorized agent of the Department of Agriculture and Consumer Services shall find in any room, building, vehicle of transpor-

tation or other structure, any meat, seafood, poultry, vegetable, fruit or other perishable articles which are unsound, or contain any filthy, decomposed or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, the same being hereby declared to be a nuisance, the agent shall forthwith condemn or destroy the same, or in any other manner render the same unsalable as human food. (1939, c. 320, s. 6; 1973, c. 108, s. 53; 1975, c. 614, ss. 7-9; 1997-261, s. 109.)

§ 106-126. Prosecutions of violations.

It shall be the duty of the solicitors and district attorneys of this State to promptly prosecute all violations of this Article. (1939, c. 320, s. 7; 1973, c. 47, s. 2; c. 108, s. 54; 1975, c. 614, s. 10.)

§ 106-127. Report of minor violations in discretion of Commissioner.

Nothing in this Article shall be construed as requiring the Commissioner of Agriculture to report for the institution of proceedings under this Article, minor violations of this Article, whenever the Commissioner believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning. (1939, c. 320, s. 8.)

§ 106-128. Establishment of reasonable standards of quality by Board of Agriculture.

Whenever in the judgment of the Board of Agriculture such action will promote honesty and fair dealing in the interest of consumers, the Board shall promulgate regulations fixing and establishing for any food or class of food a reasonable definition and standard of identity, and/or reasonable standard of quality and/or fill of container. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Board shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. The definitions and standards so promulgated shall conform so far as practicable to the definitions and standards promulgated by the Commissioner of the Federal Food and Drug Administration under authority conferred by section 401 of the federal act.

Temporary permits now or hereafter granted for interstate shipment of experimental packs of food varying from the requirements of federal definitions and standards of identity are automatically effective in this State under the conditions provided in such permits. In addition, the Board of Agriculture may cause to be issued additional permits where they are necessary to the completion or conclusiveness of an otherwise adequate investigation and where the interests of consumers are safeguarded. Such permits are subject to the terms and conditions the Board of Agriculture may prescribe by regulation. (1939, c. 320, s. 9; 1975, c. 614, ss. 11, 12.)

CASE NOTES

Quoted in Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992).

Cited in Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

§ 106-129. Foods deemed to be adulterated.

A food shall be deemed to be adulterated:

(1)a. If it bears or contains any poisonous or deleterious substance which

may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this paragraph if the quantity of such substance in such food does not ordinarily render it injurious to health; or

b. 1. If it bears or contains any added poisonous or added deleterious substance, other than one which is

I. A pesticide chemical in or on a raw agricultural commodity;

II. A food additive; or

III. A color additive, which is unsafe within the meaning of G.S. 106-132; or

2. If it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of G.S. 106-132; or

3. If it is or it bears or contains any food additive which is unsafe within the meaning of G.S. 106-132;

provided, that where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or tolerance prescribed under G.S. 106-132 of this Article, and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed food shall, notwithstanding the provisions of G.S. 106-132 and clause 3 of this section, not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice, and the concentration of such residue in the processed food when ready-to-eat, is not greater than the tolerance prescribed for the raw agricultural commodity; or

c. If it consists in whole or in part of a diseased, contaminated, filthy, putrid or decomposed substance, or if it is otherwise unfit for food; or

d. If it has been produced, prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered diseased, unwholesome or injurious to health; or

e. If it is the product of a diseased animal or an animal which has died otherwise than by slaughter, or that has been fed upon the uncooked offal from a slaughterhouse; or

f. If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

g. If it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to G.S. 106-132 of this Article; or

h. If a retail or wholesale establishment has added sulfiting agents, including sulfur dioxide, sodium sulfite, sodium or potassium bisulfite, and sodium or potassium metabisulfite, separately or in combination, to fresh fruits and fresh vegetables intended for retail sale as fresh food products.

(2) a. If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or

b. If any substance has been substituted wholly or in part therefor; or

c. If damage or inferiority has been concealed in any manner; or

d. If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength or make it appear better or of greater value than it is.

(3) If it is confectionery, and:
a. Has partially or completely imbedded therein any nonnutritive object: Provided, that this clause shall not apply in the case of any nonnutritive object if, in the judgment of the Board of Agriculture as provided by regulations, such object is of practical functional value to the confectionery product and would not render the product injurious or hazardous to health; or
b. Bears or contains any alcohol other than alcohol not in excess of one half of one per centum (0.5%) by volume derived solely from the use of flavoring extracts; or
c. Bears or contains any nonnutritive substance: Provided, that this clause shall not apply to a safe nonnutritive substance which is in or on confectionery by reason of its use for some practical functional purpose in the manufacture, packaging, or storing of such confectionery if the use of the substance does not promote deception of the consumer or otherwise result in adulteration or misbranding in violation of any provision of this Article; and provided further, that the Board may, for the purpose of avoiding or resolving uncertainty as to the application of this clause, issue regulations allowing or prohibiting the use of particular nonnutritive substances.
(4) If it is or bears or contains any color additive which is unsafe within the meaning of G.S. 106-132. (1939, c. 320, s. 10; 1975, c. 614, ss. 13-16; 1985, c. 399.)

Legal Periodicals. — For note on control of pesticides, see 49 N.C.L. Rev. 529 (1971).

CASE NOTES

Quoted in Goodman v. Wenco Mgt., 100 N.C. App. 108, 394 S.E.2d 832 (1990).

Cited in Goodman v. Wenco Foods, Inc., 331 N.C. 1, 423 S.E.2d 444 (1992).

§ 106-130. Foods deemed misbranded.

A food shall be deemed to be misbranded:
(1) a. If its labeling is false or misleading in any particular, or
b. If its labeling or packaging fails to conform with the requirements of G.S. 106-139 and 106-139.1 of this Article.
(2) If it is offered for sale under the name of another food.
(3) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.
(4) If its container is so made, formed or filled as to be misleading.
(5) If in package form, unless it bears a label containing
a. The name and place of business of the manufacturer, packer, or distributor; and
b. An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, which statement shall be separately and accurately stated in a uniform location upon the principal display panel of the label:
Provided, that under paragraph b of this subdivision reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Board of Agriculture.
(6) If any word, statement, or other information required by or under authority of this Article to appear on the label or labeling is not

prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(7) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by G.S. 106-128, unless

a. It conforms to such definition and standard, and

b. Its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

(8) If it purports to be or is represented as

a. A food for which a standard of quality has been prescribed by regulations as provided by G.S. 106-128 and its quality falls below such standard unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

b. A food for which a standard or standards of fill of container have been prescribed by regulation as provided by G.S. 106-128, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

(9) If it is not subject to the provisions of subdivision (7) of this section, unless its label bears

a. The common or usual name of the food, if any there be, and

b. In case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings without naming each:

Provided, that, to the extent that compliance with the requirements of paragraph b of this subdivision is impracticable or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Board of Agriculture.

(10) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Board of Agriculture determines to be, and by regulations prescribes as, necessary in order to fully inform purchasers as to its value for such uses.

(11) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservatives, unless it bears labeling stating that fact: Provided, that to the extent that compliance with the requirements of this subdivision are impracticable, exemptions shall be established by regulations promulgated by the Board of Agriculture. The provisions of this subdivision and subdivisions (7) and (9) with respect to artificial coloring do not apply to butter, cheese, or ice cream. The provisions of this subdivision with respect to chemical preservatives do not apply to a pesticide chemical when used in or on a raw agricultural commodity which is the product of the soil.

(12) If it is a raw agricultural commodity which is the produce of the soil, bearing or containing a pesticide chemical applied after harvest, unless the shipping container of such commodity bears labeling which declares the presence of such chemical in or on such commodity and the common or usual name and the function of such chemical:

Provided, however, that no such declaration shall be required while such commodity, having been removed from the shipping container, is being held or displayed for sale at retail out of such container in accordance with the custom of the trade.

(13) If it is a product intended as an ingredient of another food and when used according to the directions of the purveyor will result in the final food product being adulterated or misbranded.

(14) If it is a color additive unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of G.S. 106-132 of this Article. (1939, c. 320, s. 11; 1975, c. 614, ss. 17-20.)

§ 106-131. Permits governing manufacture of foods subject to contamination with microorganisms.

(a) Whenever the Commissioner of Agriculture finds after investigation by himself or his duly authorized agents, that the distribution in North Carolina of any class of food may, by reason of contamination with microorganisms during manufacture, processing, or packing thereof in any locality in this State, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered commerce, the Commissioner, then, and in such case only, shall promulgate regulations providing for the issuance, to manufacturers, processors, or packers of such class of food in such locality, of permits to which shall be attached such conditions governing the manufacture, processing, or packing of such class of food, for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations, and during such temporary period, no person shall introduce or deliver for introduction into commerce any such food manufactured, processed, or packed by any such manufacturer, processor, or packer unless such manufacturer, processor, or packer holds a permit issued by the Commissioner as provided by such regulations.

(b) The Commissioner of Agriculture is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the Commissioner shall immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued, or as amended.

(c) Any officer or employee duly designated by the Commissioner of Agriculture shall have access to any factory or establishment, the operator of which holds a permit from the Commissioner of Agriculture for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator. (1939, c. 320, s. 12.)

§ 106-132. Additives, etc., deemed unsafe.

Any added poisonous or added deleterious substance, any food additive, any pesticide chemical in or on a raw agricultural commodity or any color additive, shall with respect to any particular use or intended use be deemed unsafe for the purpose of application of G.S. 106-129(1), paragraphs b and g and 106-129(4) with respect to any food, 106-133(1) with respect to any drug or device, or 106-136(1) and (5) with respect to any cosmetic, unless there is in effect a regulation pursuant to G.S. 106-139 of this Article limiting the

quantity of substance, and the use or intended use of such substance conforms to the terms prescribed by such regulation. While such regulations relating to such substance are in effect, a food, drug, or cosmetic shall not, by reason of bearing or containing such substance in accordance with the regulations be considered adulterated within the meaning of G.S. 106-129(1)a, 106-133(1) and 106-136(1). (1939, c. 320, s. 13; 1975, c. 614, s. 21.)

§ 106-133. Drugs deemed to be adulterated.

A drug or device shall be deemed to be adulterated:

(1)a. If it consists in whole or in part of any filthy, putrid or decomposed substance; or

b. If it has been produced, prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or

c. If it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or

d. If

1. It is a drug and it bears or contains, for purposes of coloring only, a color additive which is unsafe within the meaning of G.S. 106-132, or
2. If it is a color additive, the intended use of which in or on drugs is for purposes of coloring only, and is unsafe within the meaning of G.S. 106-132;

e. If it is a drug and the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of this Article as to safety and has the identity and strength, and meets the quality and purity characteristics, which it purports or is represented to possess.

(2) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, or in the absence of or inadequacy of such tests or methods of assay, those so prescribed under authority of the federal act. No drug defined in an official compendium shall be deemed to be adulterated under this subdivision because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

(3) If it is not subject to the provisions of subdivision (2) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(4) If it is a drug and any substance has been

a. Mixed or packed therewith so as to reduce its quality or strength; or

b. Substituted wholly or in part therefor. (1939, c. 320, s. 14; 1975, c. 614, ss. 22-24.)

§ 106-134. Drugs deemed misbranded.

A drug or device shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular, or if its labeling or packaging fails to conform with the requirements of G.S. 106-139 or 106-139.1 of this Article.

(2) If in package form unless it bears a label containing

a. The name and place of business of the manufacturer, packer, or distributor; and

b. An accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, which statement shall be separately and accurately stated in a uniform location upon the principal display panel of the label, except as exempted with respect to this clause by G.S. 106-121(2a)c of this Article; provided, that under paragraph b of this subdivision reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Board of Agriculture.

(3) If any word, statement, or other information required by or under authority of this Article to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(4) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alphaeucaine, barbituric acid, betaeucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marijuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substances, which derivative has been by the Board after investigation, found to be, and by regulations under this Article, designated as, habit forming; unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning — May be habit forming."

(5)a. If it is a drug, unless:

1. Its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula),

I. The established name (as defined in paragraph b of this subdivision) of the drug, if such there be, and

II. In case it is fabricated from two or more ingredients the established name and quantity of each active ingredient, including the kind and quantity or proportion of any alcohol and also including, whether active or not, the established name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: Provided, that the requirement for stating the quantity of the active ingredients, other than the quantity of those specifically named in this subdivision, shall apply only to prescription drugs; and

2. For any prescription drug the established name of such drug or ingredient, as the case may be, on such label (and on any labeling on which a name for such drug or ingredient is used) is printed prominently and in type at least half as large as that used thereon for any proprietary name or designation for such drug or ingredient; and provided, that to the extent that compliance with the requirements of 1 II or 2 of this subdivision is impracticable, exemptions shall be allowed under regulations promulgated by the Board.

b. As used in this subdivision (5), the term "established name," with respect to a drug or ingredient thereof, means:

1. The applicable official name designated pursuant to section 508 of the federal act, or
2. If there is no such name and such drug, or such ingredient, is an article recognized in an official compendium, then the official title thereof, in such compendium, or
3. If neither 1 nor 2 of this paragraph applies, then the common or usual name, if any, of such drug or of such ingredient:

Provided further, that where 2 of this sub-subdivision applies to an article recognized in the United States Pharmacopoeia and in the Homeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopoeia shall apply unless it is labeled and offered for sale as a homeopathic drug, in which case the official title used in the Homeopathic Pharmacopoeia shall apply.

(6) Unless its labeling bears

a. Adequate directions for use; and

b. Such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: Provided, that where any requirement of paragraph a of this subdivision, as applied to any drug or device, is not necessary for the protection of the public health, the Board of Agriculture shall promulgate regulations exempting such drug or device from such requirements.

(7) If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: Provided, that the method of packing may be modified with the consent of the Board of Agriculture. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States, it shall be subject to the requirements of the United States Pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

(8) If it has been found by the Department of Agriculture and Consumer Services to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Board of Agriculture shall by regulations require as necessary for the protection of public health. No such regulation shall be established for any drug recognized in an official compendium until the Commissioner of Agriculture shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(9)a. If it is a drug and its container is so made, formed, or filled as to be misleading; or

b. If it is an imitation of another drug; or

c. If it is offered for sale under the name of another drug.

(10) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

(11), (12) Repealed by Session Laws 1975, c. 614, s. 28.

(13) If it is, or purports to be, or is represented as a drug composed wholly or partly of insulin, unless:

a. It is from a batch with respect to which a certificate or release has been issued pursuant to section 506 of the federal act, and

b. Such certificate or release is in effect with respect to such drug.

(14) If it is, or purports to be, or is represented as a drug composed wholly or partly of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof, unless

a. It is from a batch with respect to which a certificate or release has been issued pursuant to section 507 of the federal act, and

b. Such certificate or release is in effect with respect to such drug:

Provided, that this subsection shall not apply to any drug or class of drugs exempted by regulations promulgated under section 507(c) or (d) of the federal act. For the purpose of this subsection the term "antibiotic drug" means any drug intended for use by man containing any quantity of any chemical substance which is produced by microorganisms and which has the capacity to inhibit or destroy microorganisms in dilute solution (including the chemically synthesized equivalent of any such substance).

(15) If it is a color additive, the intended use of which in or on drugs is for the purpose of coloring only, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive, prescribed under the provisions of G.S. 106-132 of this Article.

(16) In the case of any prescription drug distributed or offered for sale in this State, unless the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that drug a true statement of

a. The established name, as defined in G.S. 106-134(5)b of this Article, printed prominently and in type at least half as large as that used for any trade or brand name thereof,

b. The formula showing quantitatively each ingredient of such drug to the extent required for labels under section 502(e) of the federal act, and

c. Such other information in brief summary relating to side effects, contraindications, and effectiveness as shall be required in regulations issued under the federal act.

(17) If a trademark, trade name or other identifying mark, imprint or device of another or any likeness of the foregoing has been placed thereon or upon its container with intent to defraud.

(18) If it is a drug and its packaging or labeling is in violation of an applicable regulation issued pursuant to section 3 or 4 of the Federal Poison Prevention Packaging Act of 1970. (1939, c. 320, s. 15; 1949, c. 370; 1973, c. 831, s. 1; 1975, c. 614, ss. 25-28, 30; 1997-261, s. 33.)

§ 106-134.1. Prescriptions required; label requirements; removal of certain drugs from requirements of this section.

(a) A drug intended for use by man which:

(1) Is a habit-forming drug to which G.S. 106-134(4) applies; or

(2) Because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug in the course of his normal practice; or

(3) Is limited by an approved application under section 505 of the federal act to use under the professional supervision of a practitioner licensed by law to administer such drug; or

(4) Is a drug the label of which bears the statement "Caution: Federal law prohibits dispensing without a prescription," shall be dispensed only

a. Upon a written prescription of a practitioner licensed by law to administer such drug, or authorized to issue orders pursuant to G.S. 90-87(23)(a), provided that the written prescription must bear the printed or stamped name, address, telephone number and DEA number of the prescriber in addition to his legal signature, or

b. Upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or

c. By refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. If any prescription for such drug does not indicate the times it may be refilled, if any, such prescription may not be refilled unless the pharmacist is subsequently authorized to do so by the practitioner.

The act of dispensing a drug contrary to the provisions of this subdivision shall be deemed to be an act which results in a drug being misbranded while held for sale.

(b) Any drug dispensed by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug shall be exempt from the requirements of G.S. 106-134, except subsections (1), (9)b and c, (13) and (14), and the packaging requirements of subsections (7) and (8), if the drug bears an affixed label containing the name of the patient, the name and address of the pharmacy, the phrase "Filled by _____" or "Dispensed by _____," with the name of the practitioner who dispenses the prescription appearing in the blank, the serial number and date of the prescription or of its filling, the name of the prescriber, the directions for use, and unless otherwise directed by the prescriber of such drug, the name and strength of such drug. This exemption shall not apply to any drugs dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail, or to a drug dispensed in violation of subsection (a) of this section.

Any tranquilizer or sedative dispensed by filling or refilling a written or oral prescription of a practitioner licensed by law to administer such drug shall be labelled by the pharmacist, if the prescriber so directs on the prescription, with a warning that: "The consumption of alcoholic beverages while on this medication can be harmful to your health."

(c) The Board may, by regulation, remove drugs subject to G.S. 106-134(4) and G.S. 106-135 from the requirements of subsection (a) of this section when such requirements are not necessary for the protection of the public health. Drugs removed from the prescription requirements of the federal act by regulations issued thereunder shall also, by regulations issued by the Board, be removed from the requirement of subsection (a).

(d) A drug which is subject to subsection (a) of this section shall be deemed to be misbranded if at any time prior to dispensing its label fails to bear the statement "Caution: Federal Law Prohibits Dispensing Without Prescription." A drug to which subsection (a) of this section does not apply shall be deemed to be misbranded if at any time prior to dispensing its label bears the caution statement quoted in the preceding sentence.

(e) Nothing in this section shall be construed to relieve any person from any requirement prescribed by or under authority of law with respect to drugs now included or which may hereafter be included within the classification of "controlled substances" as this term is defined in applicable federal and State controlled substance acts. (1975, c. 614, s. 29; 1977, c. 421; 1979, c. 626; 1981, c. 75, s. 2.)

§ 106-135. Regulations for sale of new drugs.

(a) No person shall sell, deliver, offer for sale, hold for sale or give away any new drug unless:

(1) An application with respect thereto has been approved and said approval has not been withdrawn under section 505 of the federal act, or

(2) When not subject to the federal act, by virtue of not being a drug in interstate commerce, unless such drug has been tested and has been found to be safe for use and effective in use under the conditions prescribed, recommended, or suggested in the labeling thereof, and prior to selling or offering for sale such drug, there has been filed with the Commissioner an application setting forth

a. Full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use;

b. A full list of the articles used as components of such drug;

c. A full statement of the composition of such drug;

d. A full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug;

e. Such samples of such drug and of the articles used as components thereof as the Commissioner may require; and

f. Specimens of the labeling proposed to be used for such drug.

(b) An application provided for in subdivision (a)(2) of this section shall become effective on the one hundred eightieth day after the filing thereof, except that if the Commissioner finds, after due notice to the applicant and giving him an opportunity for hearing,

(1) That the drug is not safe or not effective for use under the conditions prescribed, recommended or suggested in the proposed labeling thereof; or

(2) The methods used in, and the facilities and controls used for, the manufacture, processing and packing of such drug is inadequate to preserve its identity, strength, quality, and purity; or

(3) Based on a fair evaluation of all material facts, such labeling is false or misleading in any particular; he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

(c) An order refusing to permit an application under this section to become effective may be revoked by the Commissioner.

(d) The Commissioner shall promulgate regulations for exempting from the operation of the foregoing subsections and subdivisions of this section drugs intended solely for investigational use by experts qualified by scientific

training and experience to investigate the safety and effectiveness of drugs. Such regulations may, within the discretion of the Commissioner among other conditions relating to the protection of the public health, provide for conditioning such exemption upon

(1) The submission to the Commissioner, before any clinical testing of a new drug is undertaken, of reports, by the manufacturer or the sponsor of the investigation of such drug, of preclinical tests (including tests on animals) of such drug adequate to justify the proposed clinical testing;

(2) The manufacturer or the sponsor of the investigation of a new drug proposed to be distributed to investigators for clinical testing obtaining a signed agreement from each of such investigators that patients to whom the drug is administered will be under his personal supervision, or under the supervision of investigators responsible to him, and that he will not supply such drug to any other investigator, or to clinics, for administration to human beings; and

(3) The establishment and maintenance of such records, and the making of such reports to the Commissioner, by the manufacturer or the sponsor of the investigation of such drug, of data (including but not limited to analytical reports by investigators) obtained as the result of such investigational use of such drug, as the Commissioner finds will enable him to evaluate the safety and effectiveness of such drug in the event of the filing of an application pursuant to subsection (b).

Such regulations shall provide that such exemption shall be conditioned upon the manufacturer, or the sponsor of the investigation, requiring that experts using such drugs for investigational purposes certify to such manufacturer or sponsor that they will inform any human beings to whom such drugs, or any controls used in connection therewith, are being administered, or their representatives, that such drugs are being used for investigational purposes and will obtain the consent of such human beings or their representatives, except where they deem it not feasible, or, in their professional judgment, contrary to the best interests of such human beings. Nothing in this subsection shall be construed to require any clinical investigator to submit directly to the Commissioner reports on the investigational use of drugs; provided, that regulations adopted under section 505(i) of the federal act may be adopted by the Commissioner as the regulations in this State.

(e)(1) In the case of any drug for which an approval of an application filed pursuant to this section is in effect, the applicant shall establish and maintain such records, and make such reports to the Commissioner, of data relating to clinical experience and other data or information, received or otherwise obtained by such applicant with respect to such drug, as the Commissioner may by general regulation, or by order with respect to such application, prescribe: Provided, however, that regulations and orders issued under this subsection and under subsection (d) shall have due regard for the professional ethics of the medical profession and the interests of patients and shall provide, where the Commissioner deems it to be appropriate, for the examination, upon request, by the persons to whom such regulations or orders are applicable, of similar information received or otherwise obtained by the Commissioner.

(2) Every person required under this section to maintain records, and every person in charge or custody thereof, shall, upon request of an officer or employee designated by the Commissioner, permit such officer or employee at all reasonable times to have access to and copy and certify such records.

(f) The Commissioner may, after affording an opportunity for public hearing, revoke an application approved pursuant to this section if he finds that the

drug, based on evidence acquired after such approval, may not be safe or effective for its intended use, or that the facilities or controls used in the manufacture, processing, or labeling of such drug may present a hazard to the public health.

(g) This section shall not apply:

(1) To a drug sold in this State or introduced into interstate commerce at any time prior to the enactment of the federal act, if its labeling contained the same representations concerning the conditions of its use; or

(2) To any drug which is licensed under the Public Health Service Act of July 1, 1944 (58 Stat. 682, as amended; 42 U.S.C. 201 et seq.) or under the Animal Virus-Serum-Toxin Act of March 4, 1913 (13 Stat. 832; 21 U.S.C. 151 et seq.); or

(3) To any drug which is subject to G.S. 106-134 (14) of this Article. (1939, c. 320, s. 16; 1975, c. 614, s. 31.)

Editor's Note. — For the Federal Food, Drug and Cosmetic Act, see 21 U.S.C. § 301 et seq.

§ 106-136. Cosmetics deemed adulterated.

A cosmetic shall be deemed to be adulterated:

(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling or advertisement thereof, or under such conditions of use as are customary or usual: Provided, that this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution — This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness," and the labeling of which bears adequate directions for such preliminary testing. For the purposes of this subdivision and subdivision (5) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.

(2) If it consists in whole or in part of any filthy, putrid, or decomposed substance.

(3) If it has been produced, prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

(4) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(5) If it is not a hair dye and it is, or it bears or contains a color additive which is unsafe within the meaning of G.S. 106-132. (1939, c. 320, s. 17; 1975, c. 614, s. 32.)

CASE NOTES

Cited in Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955).

§ 106-137. Cosmetics deemed misbranded.

A cosmetic shall be deemed to be misbranded:

(1) a. If its labeling is false or misleading in any particular; or

b. If its labeling or packaging fails to conform with the requirements of G.S. 106-139 and 106-139.1 of this Article.

(2) If in package form unless it bears a label containing

a. The name and place of business of the manufacturer, packer, or distributor; and

b. An accurate statement of the quantity, of the contents in terms of weight, measure, or numerical count, which statement shall be separately and accurately stated in a uniform location upon the principal display panel of the label: Provided, that under paragraph b of this subdivision reasonable variations shall be permitted, and exemptions as to small packages shall be established by regulations prescribed by the Board of Agriculture.

(3) If any word, statement, or other information required by or under authority of this Article to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(4) If its container is so made, formed, or filled as to be misleading.

(5) If it is a color additive, unless its packaging and labeling are in conformity with such packaging and labeling requirements applicable to such color additive prescribed under the provisions of G.S. 106-132 of this Article. This subdivision shall not apply to packages of color additives which, with respect to their use for cosmetics, are marketed and intended for use only in or on hair dyes (as defined in the last sentence of G.S. 106-136(1)). (1939, c. 320, s. 18; 1975, c. 614, ss. 33-35.)

CASE NOTES

Cited in Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955).

§ 106-138. False advertising.

(a) An advertisement of a food, drug, device or cosmetic shall be deemed to be false if it is false or misleading in any particular.

(b) For the purpose of this Article the advertisement of a drug or device representing it to have any effect in albuminuria, appendicitis, arteriosclerosis, blood poison, bone disease, Bright's disease, cancer, carbuncles, cholecystitis, diabetes, diphtheria, dropsy, erysipelas, gallstones, heart and vascular diseases, high blood pressure, mastoiditis, measles, meningitis, mumps, nephritis, otitis, media, paralysis, pneumonia, poliomyelitis, (infantile paralysis), prostate gland disorders, pyelitis, scarlet fever, sexual impotence, sinus infection, smallpox, tuberculosis, tumors, typhoid, uremia, or venereal diseases, shall also be deemed to be false; except that no advertisement not in violation of subsection (a) shall be deemed to be false under this subsection if it is disseminated only to members of the medical, dental, pharmaceutical, or veterinary professions, or appears only in the scientific periodicals of these professions, or is disseminated only for the purpose of public health education by persons not commercially interested, directly or indirectly, in the sale of such drugs or devices: Provided, that whenever the Department of Agriculture and Consumer Services determines that an advance in medical science has

made any type of self-medication safe as to any of the diseases named above, the Board shall by regulation authorize the advertisement of drugs having curative or therapeutic effect for such disease, subject to such conditions and restrictions as the Board may deem necessary in the interest of public health: Provided, that this subsection shall not be construed as indicating that self-medication for diseases other than those named herein is safe or efficacious. (1939, c. 320, s. 19; 1997-261, s. 109.)

CASE NOTES

Cited in Hanrahan v. Walgreen Co., 243 N.C. 268, 90 S.E.2d 392 (1955).

§ 106-139. Regulations by Board of Agriculture.

(a) The authority to promulgate regulations for the efficient enforcement of this Article is hereby vested in the Board of Agriculture, except the Commissioner of Agriculture is hereby authorized to promulgate regulations under G.S. 106-131 and 106-135. The Board and Commissioner are hereby authorized to make the regulations promulgated under this Article conform, insofar as practicable, with those promulgated for foods, drugs, devices, cosmetics and consumer commodities under the federal act, including but not limited to pesticide chemical residues on or in foods, food additives, color additives, special dietary foods, labeling of margarine for retail sale or distribution, nutritional labeling of foods, the fair packaging and labeling of consumer commodities and new drug clearance. Notwithstanding the provisions of subsection (e) of this section, a federal regulation adopted by the Board or Commissioner pursuant to this Article shall take effect in this State on the date it becomes effective as a federal regulation.

(b) The Board may promulgate regulations exempting from any affirmative labeling requirement of this Article consumer commodities which are, in accordance with the practice of the trade, to be processed, labeled or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such consumer commodities are not adulterated or misbranded under the provisions of this Article upon removal from such processing, labeling or repacking establishment. The Board may additionally promulgate regulations exempting from any labeling requirement of this Article foods packaged or dispensed at the direction of the retail purchaser at the time of sale, whether or not for immediate consumption by the purchaser on the premises of the seller.

(c) Whenever the Board determines that regulations containing prohibitions or requirements other than those prescribed by G.S. 106-139.1(a) are necessary to prevent the deception of consumers or to facilitate value comparisons as to any consumer commodity, the Board shall promulgate with respect to that commodity regulations effective to:

(1) Establish and define standards for the characterization of the size of a package enclosing any consumer commodity, which may be used to supplement the label statement of net quantity of contents of packages containing such commodity, but this paragraph shall not be construed as authorizing any limitation of the size, shape, weight, dimensions, or number of packages which may be used to enclose any commodity;

(2) Regulate the placement upon any package containing any commodity or upon any label affixed to such commodity, of any printed matter stating or representing by implication that such commodity is offered for retail sale at a price lower than the ordinary and customary retail

sale price or that a retail sale price advantage is accorded to purchasers thereof by reason of the size of that package or the quantity of its contents;

(3) Require that the label on each package of a consumer commodity bear
   a. The common or usual name of such consumer commodity, if any, and
   b. In case such consumer commodity consists of two or more ingredients, the common or usual name of each such ingredient listed in order of decreasing predominance, but nothing in this paragraph shall be deemed to require that any trade secret be divulged; or

(4) Prevent the nonfunctional slack-fill of packages containing consumer commodities.

For the purposes of subdivision (4) of this subsection, a package shall be deemed to be nonfunctionally slack-filled if it is filled of substantially less than its capacity for reasons other than
   a. Protection of the contents of such package, or
   b. The requirements of machines used for enclosing the contents in such package;

provided, the Board may adopt any regulations promulgated pursuant to the Federal Fair Packaging and Labeling Act which shall have the force and effect of law in this State.

(d) Hearings authorized or required by G.S. 106-131 or G.S. 106-135 shall be conducted in accordance with Chapter 150B of the General Statutes.

(e) Repealed by Session Laws 1987, c. 827, s. 30. (1939, c. 320, s. 20; 1973, c. 476, s. 128; 1975, c. 614, s. 36; 1987, c. 827, s. 30.)

§ 106-139.1. Declaration of net quantity of contents.

(a) All labels of consumer commodities, as defined by this Article, shall conform with the requirement for the declaration of net quantity of contents of section 4 of the Federal Fair Packaging and Labeling Act (15 U.S.C. 1451, et seq.) and the regulations promulgated pursuant thereto: Provided, that consumer commodities exempted from such requirements of section 4 of the Federal Fair Packaging and Labeling Act shall also be exempt from this subsection.

(b) The label of any package of a consumer commodity which bears a representation as to the number of servings of such commodity contained in such package shall bear a statement of the net quantity (in terms of weight, measure, or numerical count) of each such serving.

(c) No person shall distribute or cause to be distributed in commerce any packaged consumer commodity if any qualifying words or phrases appear in conjunction with the separate statement of the net quantity of contents required by subsection (a) of this section, but nothing in this section shall prohibit supplemental statements, at other places on the package, describing in nondeceptive terms the net quantity of contents: Provided, that such supplemental statements of net quantity of contents shall not include any term qualifying a unit of weight, measure, or count that tends to exaggerate the amount of the commodity contained in the package. (1975, c. 614, s. 37.)

§ 106-140. Further powers of Commissioner of Agriculture for enforcement of Article; report by inspector to owner of establishment.

(a) For purposes of enforcement of this Article, the Commissioner or any of his authorized agents, are authorized upon presenting appropriate credentials and a written notice to the owner, operator or agent in charge,

(1) To enter at reasonable times any factory, warehouse or establishment in which food, drugs, devices or cosmetics are manufactured, processed, or packed or held for introduction into commerce or after such introduction or to enter any vehicle being used to transport or hold such food, drugs, devices or cosmetics in commerce; and

(2) To inspect at reasonable times and in a reasonable manner such factory, warehouse, establishment or vehicle and all pertinent equipment, finished or unfinished materials, containers and labeling therein, and to obtain samples necessary to the endorsement of this Article. In the case of any factory, warehouse, establishment, or consulting laboratory in which any food, drug, device or cosmetic is manufactured, processed, analyzed, packed or held, the inspection shall extend to all things therein (including records, files, papers, processes, controls and facilities) bearing on whether any food, drug, device or cosmetic which is adulterated or misbranded within the meaning of this Article or which may not be manufactured, introduced into commerce or sold or offered for sale by reason of any provision of this Article, has been or is being manufactured, processed, packed, transported or held in any such place or otherwise bearing on violation of this Article. No inspection authorized by the preceding sentence shall extend to

a. Financial data,
b. Sales data other than shipment data,
c. Personnel data (other than data as to qualifications of technical and professional personnel performing functions subject to this Article),
d. Pricing data, and
e. Research data (other than data relating to new drugs and antibiotic drugs, subject to reporting and inspection under lawful regulations issued pursuant to section 505(i) or (j) or section 507 (d) or (g) of the federal act, and data, relating to other drugs, which in the case of a new drug would be subject to reporting or inspection under lawful regulations issued pursuant to section 505(j) of the federal act).

Such inspection shall be commenced and completed with reasonable promptness. The provisions of the second sentence of this subsection shall not apply to such classes of persons as the Board may by regulation exempt from the application of this section upon a finding that inspection as applied to such classes of persons in accordance with this section is not necessary for the protection of the public health.

(3) To have access to and to copy all records of carriers in commerce showing the movement in commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper and consignee thereof: Provided, that evidence obtained under this subsection shall not be used in a criminal prosecution of the person from whom obtained; and provided further, that carriers shall not be subject to the other provisions of this Article by reason of their receipt, carriage, holding, or delivery of food, drugs, devices or cosmetics in the usual course of business as carriers.

(b) Upon completion of any such inspection of a factory, warehouse, consulting laboratory or other establishment and prior to leaving the premises, the authorized agent making the inspection shall give to the owner, operator, or agent-in-charge a report in writing setting forth any conditions or practices observed by him which in his judgment indicate that any food, drug, device or cosmetic in such establishment:

(1) Consists in whole or in part of any filthy, putrid, or decomposed substance; or

(2) Has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth or whereby it may have been rendered injurious to health.

(c) If the authorized agent making any such inspection of a factory, warehouse or other establishment has obtained any salable product samples in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall offer reasonable payment for any such product samples.

(d) It shall be the duty of the Commissioner of Agriculture to make or cause to be made examination of samples secured under the provisions of this section to determine whether or not any provision of this Article is being violated. (1939, c. 320, s. 21; 1975, c. 614, s. 38.)

§ 106-140.1. Registration of producers of prescription drugs and devices.

(a) On or before December 31 of each year, every person doing business in North Carolina and operating as a wholesaler, manufacturer, or repackager, as those terms are defined in subsection (j) of this section, shall register with the Commissioner his name and business location(s) in North Carolina. If said person has no business locations in North Carolina, he shall register his name and location of his corporate offices.

(b) Every person, upon first operating as a wholesaler, manufacturer or repackager in North Carolina shall immediately register with the Commissioner his name, place of business, and such establishment. If said person has no business locations in North Carolina, he shall register his name and location of his corporate offices.

(c) Every person duly registered in accordance with subsections (a) and (b) of this section shall register with the Commissioner any additional establishment that he owns or operates in the State of North Carolina prior to doing business as a manufacturer, wholesaler or repackager.

(d) The Commissioner may assign a registration number to any person or any establishment registered in accordance with this section.

(e) The Commissioner shall make available for inspection to any person so requesting any registration filed pursuant to this section.

(f) The following classes of people are exempt from the registration requirements of this section:

(1) Pharmacists as defined in G.S. 90-85.3(q) holding a valid permit as defined in G.S. 90-85.3(m);

(2) Practitioners licensed or registered by law to prescribe or administer drugs and who manufacture, prepare, compound, or process drugs or devices solely for use in the course of their professional practice.

(3) Persons who manufacture, prepare, compound, or process drugs solely for use in research, teaching, or chemical analysis and not for sale.

(4) Other classes of persons the Commissioner may by rule exempt from the application of this section upon a finding that registration by these classes of persons in accordance with this section is not necessary for the protection of the public health.

(5) Wholesale distributors of prescription drugs licensed under G.S. 106-145.3.

(g) Every establishment in the State of North Carolina registered with the Commissioner pursuant to this section shall be subject to inspection pursuant to G.S. 106-140.

(h) The Commissioner shall adopt rules to implement the registration requirements of this section. These rules may provide for an annual registra-

tion fee of up to five hundred dollars ($500.00) for companies operating as manufacturers, wholesalers, or repackagers. The Department of Agriculture and Consumer Services shall use these funds for the implementation of the North Carolina Food, Drug and Cosmetic Act.

(i) For the purposes of this act, name means the name of the partnership if a partnership and the name of the corporation if a corporation.

(j) As used in this section:

(1) The term "manufacturer" means a person who prepares, derives, or produces a prescription drug. Pharmacists are specifically excluded from this definition if they are acting in the course of their professional practice as defined in Chapter 90 and rules adopted pursuant to it.

(2) The term "prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement: "Caution: Federal law prohibits dispensing without a prescription."

(3) The term "repackager" means a person who repacks, relabels, or manipulates a prescription drug which was in a unit packaged and sealed by a manufacturer. Pharmacists are specifically exempted from this definition if they are acting in the course of their professional practice as defined in Chapter 90 and rules adopted pursuant to it.

(4) The term "wholesaler" means a person acting as a jobber, wholesale merchant, salvager, or broker, or agent thereof, who sells or distributes for resale a prescription drug. Pharmacists are specifically exempted from this definition if they are acting in the course of their professional practice as defined in Chapter 90 and rules adopted pursuant to it. (1987, c. 737, s. 2; 1989, c. 226, s. 2; 1989 (Reg. Sess., 1990), c. 1024, s. 20; 1991, c. 699, ss. 3, 4; 1997-261, s. 109.)

§ 106-141. Examinations and investigations.

(a) Repealed by Session Laws 1975, c. 614, s. 39.

(b) The Commissioner of Agriculture is authorized to conduct the examinations and investigations for the purposes of this Article through officers and employees of the Department or through any health, food or drug officer or employee of the State, or any political subdivision thereof: Provided, that when examinations and investigations are to be conducted through any officer or employee of any agency other than the Department of Agriculture and Consumer Services the arrangements for such examinations and investigations shall be approved by the directing head of such agency.

(c) The Commissioner of Agriculture is authorized to delegate embargo authority concerning food and drink pursuant to G.S. 106-125 to the Secretary of Health and Human Services and to local health directors. (1939, c. 320, s. 22; 1975, c. 614, s. 39; 1983, c. 891, s. 12; 1997-261, s. 109; 1997-443, s. 11A.118(a).)

§ 106-141.1. Inspections of donated food.

(a) The Department of Agriculture and Consumer Services is authorized to inspect for compliance with the provisions of Article 12 of Chapter 106 of the North Carolina General Statutes, food items donated for use or distribution by nonprofit organizations or nonprofit corporations, and may establish procedures for the handling of the food items, including reporting procedures concerning the donation of food.

(b) The Department of Agriculture and Consumer Services may apply to Superior Court for injunctive relief restraining the violation of this section.

(c) Nothing in this section shall limit the duties or responsibilities of the Commission for Health Services or the local boards of health. (1979, 2nd Sess., c. 1188, s. 3; 1997-261, s. 34.)

§ 106-142. Publication of reports of judgments, decrees, etc.

(a) The Commissioner of Agriculture may cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this Article, including the nature of the charge and the disposition thereof.

(b) The Commissioner of Agriculture may also cause to be disseminated such information regarding food, drugs, devices, and cosmetics as he deems necessary in the interest of public health and the protection of the consumer against fraud. Nothing in this section shall be construed to prohibit the Commissioner of Agriculture from collecting, reporting, and illustrating the results of the investigations of the Department. (1939, c. 320, s. 23.)

§ 106-143. Article construed supplementary.

Nothing in this Article shall be construed as in any way amending, abridging, or otherwise affecting the validity of any law or ordinance relating to the Commission for Health Services or the Department of Environment and Natural Resources or any local health department in their sanitary work in connection with public and private water supplies, sewerage, meat, milk, milk products, shellfish, finfish, or other foods, or food products, or the production, handling, or processing of these items. (1939, c. 320, s. 24½; 1973, c. 476, s. 128; 1975, c. 19, s. 31; 1997-443, s. 11A.41.)

§ 106-144. Exemptions.

Meats and meat products subject to the Federal Meat Inspection Act of March 4, 1907 (34 Stat. 1260), as amended and extended (21 U.S.C. 71 et seq.), and poultry and poultry products subject to the Federal Poultry Products Inspection Act (21 U.S.C. 451 et seq.) are exempted from the provisions of this Article so long as such meat, meat products, poultry, and poultry products remain in the possession of the processor. (1939, c. 320, s. 24⅔; 1975, c. 614, s. 40.)

§ 106-145. Effective date.

This Article shall be in full force and effect from and after January 1, 1940: Provided, that the provisions of G.S. 106-139 shall become effective on April 3, 1939, and thereafter the Commissioner of Agriculture is authorized hereby to conduct hearings, and the Board is authorized to promulgate regulations which shall become effective on and after the effective date of this Article as the Board shall direct. (1939, c. 320, s. 25.)

ARTICLE 12A.

Wholesale Prescription Drug Distributors.

§ 106-145.1. Purpose and interpretation of Article.

This Article establishes a State licensing program for wholesale distributors to enable wholesale distributors to comply with federal law. This Article shall be construed to do only that required for compliance with 21 U.S.C. § 353(e) and 21 C.F.R. Part 205. This Article shall be interpreted to be consistent with 21 C.F.R. Part 205, Guidelines for State Licensing of Wholesale Prescription

Drug Distributors. In the event of a conflict, the federal law controls. (1991, c. 699, s. 2.)

§ 106-145.2. Definitions.

The following definitions apply in this Article:

(1) Blood. — Whole blood collected from a single donor and processed either for transfusion or further manufacturing.

(2) Blood component. — That part of blood separated by physical or mechanical means.

(3) Commissioner. — The Commissioner of Agriculture.

(4) Common control. — The power to direct or cause the direction of the management and policies of a person, whether by ownership of stock, by voting rights, by contract, or otherwise.

(5) Department. — The Department of Agriculture and Consumer Services.

(6) Drug sample. — A unit of a prescription drug that is not intended to be sold and is intended to promote the sale of the drug.

(7) Manufacturer. — A person who is engaged in manufacturing, preparing, propagating, compounding, processing, packaging, repackaging, or labeling a prescription drug.

(8) Person. — An individual, a corporation, a partnership, or any other entity.

(9) Prescription drug. — A human drug required by federal law or regulation to be dispensed only by a prescription, including finished dosage forms and active ingredients subject to 21 U.S.C. § 353(b).

(10) Wholesale distribution. — Distribution of a prescription drug to a person who is not a consumer or patient, other than any of the following types of distributions:

a. Intracompany sales. An intracompany sale is a transaction or transfer between any divisions, subsidiary and parent companies, or affiliated companies under common control of the same corporate entity.

b. The purchase or other acquisition of a prescription drug by a hospital or other health care entity that is a member of a group purchasing organization for its own use from the group purchasing organization or from other hospitals or other health care entities that are members of these organizations.

c. The sale, purchase, or trade of a prescription drug or an offer to sell, purchase, or trade a prescription drug by a charitable organization described in section 501(c)(3) of the Internal Revenue Code to a nonprofit affiliate of the organization to the extent otherwise permitted by law.

d. The sale, purchase, or trade of a prescription drug or an offer to sell, purchase, or trade a prescription drug among hospitals or other health care entities that are under common control.

e. The sale, purchase, or trade of a prescription drug or an offer to sell, purchase, or trade a prescription drug for emergency medical reasons. Emergency medical reasons include transfers of prescription drugs by a retail pharmacy to another retail pharmacy to alleviate a temporary shortage when the gross dollar value of the transfers does not exceed five percent (5%) of the total prescription drug sales revenue of either the transferor or transferee pharmacy during any 12-consecutive-month period.

f. The sale, purchase, or trade of a prescription drug; an offer to sell, purchase, or trade a prescription drug; or the dispensing of a prescription drug pursuant to a prescription.

g. The distribution of drug samples by a representative of a manufacturer or a wholesale distributor.

h. The sale, purchase, or trade of blood and blood components intended for transfusion.

(11) Wholesale distributor. — A person who is engaged in the wholesale distribution of prescription drugs. The term includes manufacturers, repackers, own-label distributors, private-label distributors, jobbers, brokers, warehouses, independent wholesale drug traders, and retail pharmacies that conduct wholesale distributions. The term does not include a person who acquires prescription drugs commingled with other goods as part of a recovery operation and who disposes of such drugs under the supervision of the Department. A warehouse includes a warehouse of a manufacturer or wholesale distributor, a chain drug warehouse, and a wholesale drug warehouse. (1991, c. 699, s. 2; 1997-261, s. 35.)

§ 106-145.3. Wholesale distributor must have license.

(a) Requirement. — Every wholesale distributor engaged in the wholesale distribution of prescription drugs in interstate commerce in this State shall obtain a license from the Commissioner for each location from which prescription drugs are distributed and shall renew each license annually. A license may cover multiple buildings and multiple operations at a single location, at the wholesale distributor's discretion. A license expires on December 31 of the year in which it is issued. A wholesale distributor licensed under this section is not required to register under G.S. 106-140.1. In lieu of licensing under this section, a wholesale distributor who has no facilities in this State may register under G.S. 106-140.1 if the wholesale distributor possesses a valid license granted by another state that has requirements substantially similar to this Article.

(b) Reciprocity. — The Commissioner may license an out-of-State wholesale distributor on the basis of reciprocity with another state when the following conditions apply:

(1) The out-of-State wholesale distributor possesses a valid license granted by another state pursuant to requirements substantially equivalent to the license requirements of this State.

(2) The other state extends reciprocal treatment under its own laws to wholesale distributors licensed in this State. (1991, c. 699, s. 2.)

§ 106-145.4. Application and fee for license.

(a) Application. — An application for a wholesale distributor license or for renewal of a wholesale distributor license shall be on a form prescribed by the Commissioner and shall include the following information:

(1) The name, full business address, and telephone number of the applicant.

(2) All trade or business names used by the applicant.

(3) Addresses, telephone numbers, and names of contact persons for all facilities used by the applicant for the storage, handling, and distribution of prescription drugs.

(4) The type of ownership or operation of the applicant, such as a partnership, a corporation, or a sole proprietorship.

(5) The name of each owner and operator of the applicant, including:

a. If the applicant is an individual, the individual's name.

b. If the applicant is a partnership, the name of each partner and the name of the partnership.

c. If the applicant is a corporation, the name and title of each corporate officer and director, the corporate name of the corporation, and the state of incorporation.

d. If the applicant is a sole proprietorship, the full name of the sole proprietor and the name of the business entity.

(6) Any other information required by the Commissioner to determine if the applicant is qualified to receive a license.

When a change occurs in any information listed in this subsection after a license is issued, the license holder shall report the change to the Commissioner within 90 days after the change.

(b) Fee. — An application for an initial license or a renewed license as a wholesale distributor shall be accompanied by a nonrefundable fee of five hundred dollars ($500.00) for a manufacturer or three hundred fifty dollars ($350.00) for any other person. (1991, c. 699, s. 2.)

§ 106-145.5. Review of application and qualifications of applicant.

The Commissioner shall determine whether to issue or deny a wholesale distributor license within 90 days after an applicant files an application for a license with the Commissioner. In reviewing an application, the Commissioner shall consider the factors listed in this subsection. In the case of a partnership or corporation, the Commissioner shall consider the factors as applied to each individual whose name is required to be included in the license application.

The factors to be considered are:

(1) Any convictions of the applicant under any federal, state, or local law relating to drug samples, wholesale or retail drug distribution, or distribution of controlled substances.

(2) Any felony convictions of the applicant under federal, state, or local law.

(3) The applicant's past experience in the manufacture or distribution of controlled substances and other prescription drugs.

(4) Whether the applicant has previously given any false or fraudulent information in an application made in connection with drug manufacturing or distribution.

(5) Suspension or revocation by the federal government or a state or local government of any license currently or previously held by the applicant for the manufacture or distribution of any controlled substances or other prescription drugs.

(6) Compliance with the licensing requirements under any previously granted license.

(7) Compliance with the requirements to maintain or make available to the Commissioner or to a federal, state, or local law enforcement official those records required under G.S. 106-145.8.

(8) Whether the applicant requires employees of the applicant who are involved in any prescription drug wholesale distribution activity to have education, training, experience, or any combination of these factors sufficient to enable the employee to perform assigned functions in a manner that ensures that prescription drug quality, safety, and security will be maintained at all times as required by law.

(9) Any other factors or qualifications the Commissioner considers relevant to and consistent with the public health and safety.

The Commissioner shall inspect the facility of an applicant at which prescription drugs will be stored, handled, or distributed before issuing the applicant a license. (1991, c. 699, s. 2.)

§ 106-145.6. Denial, revocation, and suspension of license; penalties for violations.

(a) Adverse Action. — The Commissioner may deny a license to an applicant if the Commissioner determines that granting the applicant a license would not be in the public interest. Public interest considerations shall be limited to factors and qualifications that are directly related to the protection of public health and safety. The Commissioner may deny, suspend, or revoke a license for substantial or repeated violations of this Article or for conviction of a violation of any other federal, state, or local prescription drug law or regulation. Chapter 150B of the General Statutes governs the denial, suspension, or revocation of a license under this Article.

(b) Criminal Sanctions. — It is unlawful to engage in wholesale distribution in this State without a wholesale distributor license or to violate any other provision of this Article. A person who violates this Article commits a Class H felony. A fine imposed for a violation of this Article may not exceed two hundred fifty thousand dollars ($250,000).

(c) Civil Penalty. — The Commissioner may assess a civil penalty of not more than ten thousand dollars ($10,000) against a person who violates any provision of this Article. In determining the amount of a civil penalty, the Commissioner shall consider the degree and extent of harm caused by the violation. Chapter 150B of the General Statutes governs the assessment of a civil penalty under this subsection. If a civil penalty is not paid within 30 days after the completion of judicial review of a final agency decision by the Commissioner, the penalty may be collected in any manner by which a debt may be collected. The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1991, c. 699, s. 2; 1993, c. 539, s. 1294; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 7.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, in subsection (c), substituted the present final sentence for "Penalties collected shall be credited to the General Fund."

§ 106-145.7. Storage, handling, and records of prescription drugs.

(a) Facilities. — All facilities at which prescription drugs are stored, warehoused, handled, held, offered, marketed, or displayed for wholesale distribution shall meet the following requirements:

(1) Be of suitable size and construction to facilitate cleaning, maintenance, and proper operations.

(2) Have storage areas designed to provide adequate lighting, ventilation, temperature, sanitation, humidity, space, equipment, and security conditions.

(3) Have a quarantine area for the storage of prescription drugs that are outdated, damaged, deteriorated, misbranded, or adulterated, or that are in immediate or sealed secondary containers that have been opened.

(4) Be maintained in a clean and orderly condition.

(5) Be free from infestation by insects, rodents, birds, or vermin of any kind.

(b) Security. — All facilities used for wholesale distribution shall be secure from unauthorized entry. Access from outside the premises shall be kept to a minimum and be well-controlled. The outside perimeter of the premises shall be well-lighted. Entry into areas where prescription drugs are held shall be

limited to authorized personnel. The facilities shall be equipped with the following:

(1) An alarm system to detect entry after hours.

(2) A security system that will provide suitable protection against theft and diversion. When appropriate, the security system shall provide protection against theft or diversion that is facilitated or hidden by tampering with computers or electronic records.

(c) Storage. — All prescription drugs for wholesale distribution shall be stored at appropriate temperatures and under appropriate conditions in accordance with any requirements stated in the labeling of the prescription drugs or with requirements in the current edition of an official compendium, such as the United States Pharmacopeia/National Formulary (USP/NF). If the labeling of a prescription drug or a compendium do not establish storage requirements for a prescription drug, the drug may be held at "controlled" room temperature, as defined in an official compendium, to help ensure that its identity, strength, quality, and purity are not adversely affected.

(d) Examination of Materials. — A wholesale distributor shall visually examine each outside shipping container upon receipt for identity and to prevent the acceptance of contaminated prescription drugs or prescription drugs that are otherwise unfit for distribution. The examination shall be adequate to reveal container damage that would suggest possible contamination or other damage to the contents. A wholesale distributor shall carefully inspect each outgoing shipment for identity of the prescription drugs and to ensure that no prescription drugs that have been damaged in storage or held under improper conditions are delivered.

(e) Returned, Damaged, and Outdated Prescription Drugs. — A wholesale distributor shall quarantine and physically separate prescription drugs that are outdated, damaged, deteriorated, misbranded, or adulterated from other prescription drugs until their destruction or their return to their supplier. A prescription drug whose immediate or sealed outer or sealed secondary container has been opened or used shall be identified as having been opened or used and shall be treated in the same manner as outdated prescription drugs.

If the conditions under which a prescription drug has been returned to a wholesale distributor cast doubt on the drug's safety, identity, strength, quality, or purity, then the drug shall be destroyed or returned to its supplier unless examination, testing, or other investigation proves that the drug meets appropriate standards of safety, identity, strength, quality, and purity. In determining whether the conditions under which a prescription drug has been returned cast doubt on the drug's safety, identity, strength, quality, or purity, the wholesale distributor shall consider, among other things, the conditions under which the drug has been held, stored, or shipped before or during its return and the condition of the drug and its container, carton, or labeling as a result of storage or shipping. (1991, c. 699, s. 2.)

§ 106-145.8. Records of prescription drugs.

(a) Records. — A wholesale distributor shall establish and maintain inventories and records of all transactions regarding the receipt and distribution or other disposition of prescription drugs, including all stored prescription drugs, all incoming and outgoing prescription drugs, and all outdated, damaged, deteriorated, misbranded, or adulterated prescription drugs. A wholesale distributor is not required, however, to keep a record of the lot number or expiration date of a prescription drug disposed of or distributed by the distributor.

A record of a prescription drug shall include all of the following information:

(1) The source of the prescription drug, including the name and principal address of the seller or transferor and the address of the location from which the drug was shipped.

(2) The identity and quantity of the prescription drug received and distributed or disposed of through another method.
(3) The date the wholesale distributor received the prescription drug and the date the wholesale distributor distributed or otherwise disposed of the drug.
(4) Documentation of the proper storage of prescription drugs. Documentation may be by manual, electromechanical, or electronic temperature and humidity recording equipment, devices, or logs.

A wholesale distributor shall keep a record of a prescription drug for two years after its disposition.

(b) Inspection. — A wholesale distributor shall make inventories and records of prescription drugs available for inspection and photocopying by representatives of the Department or authorized federal, State, or local law enforcement officials. A wholesale drug distributor shall permit the Department or an authorized federal, State, or local law enforcement official to enter and inspect the distributor's premises and delivery vehicles and to audit the distributor's records and written operating procedures at reasonable times and in a reasonable manner.

A record that is kept at the inspection site or is immediately retrievable by computer or other electronic means shall be readily available for authorized inspection during the two-year retention period. A record kept at a central location apart from the inspection site and not electronically retrievable shall be made available for inspection within two working days of a request by an authorized official of a federal, State, or local law enforcement agency. (1991, c. 699, s. 2.)

§ 106-145.9. Written procedures concerning prescription drugs and lists of responsible persons.

(a) Procedures. — A wholesale distributor shall establish, maintain, and adhere to written procedures for the receipt, security, storage, inventory, and distribution of prescription drugs. These shall include all of the following:

(1) A procedure for identifying, recording, and reporting a loss or theft of a prescription drug.
(2) A procedure for correcting all errors and inaccuracies in inventories of prescription drugs.
(3) A procedure whereby the oldest approved stock of a prescription drug is distributed first. The procedure may permit deviation from this requirement, if the deviation is temporary and appropriate.
(4) A procedure for handling recalls and withdrawals of prescription drugs that adequately addresses recalls and withdrawals due to any of the following:
    a. An action initiated at the request of the Food and Drug Administration or other federal, State, or local law enforcement or other governmental agency, including the Department.
    b. Any voluntary action by the manufacturer to remove defective or potentially defective prescription drugs from the market.
    c. Any action undertaken to promote public health and safety by replacing existing prescription drugs with an improved product or new package design.
(5) A procedure to ensure that the wholesale distributor prepares for, protects against, and handles any crisis that affects security or operation of any facility in the event of a strike, a fire, flood, or other natural disaster, or another emergency.
(6) A procedure to ensure that any outdated prescription drugs are segregated from other prescription drugs and either returned to the manufacturer or destroyed.

(b) Responsible Persons. — A wholesale distributor shall establish and maintain lists of officers, directors, managers, and other persons in charge of the distribution, storage, or handling of prescription drugs. The lists shall include a description of the duties of those on the list and a summary of their qualifications. (1991, c. 699, s. 2.)

§ 106-145.10. Application of other laws.

A wholesale drug distributor shall comply with applicable federal, State, and local laws and regulations. A wholesale distributor that deals in controlled substances shall register with the federal Drug Enforcement Administration (DEA) and shall comply with all applicable federal, State, and local laws and regulations. A wholesale drug distributor is subject to any applicable federal, State, or local laws or regulations that relate to prescription drug salvaging or reprocessing. (1991, c. 699, s. 2.)

§ 106-145.11. Wholesale Distributor Advisory Committee.

(a) Organization. — The Wholesale Distributor Advisory Committee is created in the Department. The Committee shall consist of five members appointed by the Commissioner as follows:

(1) Two members shall be representatives of wholesale distributors.
(2) One member shall be a representative of a manufacturer.
(3) One member shall be a representative of practicing pharmacists.
(4) One member shall be a representative of the consuming public not included in the three categories above.

The Committee shall elect a chair and other officers it finds necessary. The committee shall meet at the call of the chair or upon written notice to all Committee members signed by at least three members. A majority of the Committee is a quorum for the purpose of conducting business. The Department shall provide administrative and clerical support services to the Committee. Members shall be entitled to per diem and reimbursement of expenses as provided in Chapter 138 of the General Statutes.

(b) Duties. — The Committee shall do the following:

(1) Review all rules to implement this Article that are proposed for adoption by the Commissioner.
(2) Advise the Commissioner on the implementation and enforcement of this Article. (1991, c. 699, s. 2.)

§ 106-145.12. Enforcement and implementation of Article.

The Commissioner shall enforce this Article by using employees of the Department. The Commissioner may enter into agreements with federal, State, or local agencies to facilitate enforcement of this Article. The Commissioner may adopt rules to implement this Article. (1991, c. 699, s. 2.)

Article 13.

Canned Dog Foods.

§§ 106-146 through 106-158: Repealed by Session Laws 1973, c. 771, s. 19.

Cross References. — For present provisions covering the subject matter of the repealed sections, see §§ 106-284.30 through 106-284.46.

Article 14.

State Inspection of Slaughterhouses.

§§ 106-159 through 106-168: Repealed by Session Laws 1981, c. 284.

Article 14A.

Licensing and Regulation of Rendering Plants and Rendering Operations.

§ 106-168.1. Definitions.

For the purposes of this Article, unless the context or subject matter otherwise clearly requires,

(1) "Collector" means any person, as defined in this section, who collects raw material for the purpose of selling the same to any renderer for further processing.

(2) "Person" means any individual, partnership, firm, association or corporation.

(3) "Raw material" means inedible whole or portion of animal or poultry carcasses.

(4) "Rendering operation" means the processing of inedible whole or portion of animal or poultry carcasses and includes collection of such raw material for the purpose of processing.

(5) "Rendering plant" means the building or buildings in which raw material is processed and the premises upon which said building or buildings used in connection with such processing are located. (1953, c. 732.)

§ 106-168.2. License required.

No person shall engage in rendering operations unless such person shall hold a valid license to do so issued as hereinafter provided. (1953, c. 732.)

§ 106-168.3. Exemptions.

Nothing in this Article shall apply to the premises or the rendering operations on the premises of any establishment operating under a numbered permit from the North Carolina Department of Agriculture and Consumer Services as provided by the North Carolina Meat Inspection Act, or under United States government inspection. (1953, c. 732; 1997-261, s. 109.)

§ 106-168.4. Application for license.

Application for license shall be made to the Commissioner of Agriculture, hereinafter called the "Commissioner," on forms provided by him. The application shall set forth the name and residence of the applicant, his present or proposed place of business, the particular method which he intends to employ or employs in the processing of raw material, and such other information as the Commissioner may require, except that the Commissioner shall not require the submission of blueprints, plans, or specifications of the existing plant or equipment of any person owning and operating a rendering plant in North Carolina on January 1, 1953. The applicant shall pay a fee of fifty dollars

($50.00) with each application, which said fee shall be the only charge made in connection with licensure. (1953, c. 732.)

§ 106-168.5. Duties of Commissioner upon receipt of application; inspection committee.

Upon receipt of the application, the Commissioner shall promptly cause the rendering plant and equipment, or the plans, specifications, and selected site, of the applicant to be inspected by an inspection committee hereinafter called the "committee," which shall be composed of three members: One member who shall be designated by the Commissioner of Agriculture and who shall be an employee of the Department of Agriculture and Consumer Services, one member who shall be designated by the Secretary of Health and Human Services and who shall be an employee of the Department of Health and Human Services, and one member who shall be designated by the director of the North Carolina Division of the Southeastern Renderers Association, and who shall be a person having practical knowledge of rendering operations. Each member may be designated and relieved from time to time at the discretion of the designating authority. No State employee designated as a member of the committee shall receive any additional compensation therefor and no compensation shall be paid by the State to any other member. (1953, c. 732; 1957, c. 1357, s. 13; 1973, c. 476, s. 128; 1989, c. 727, s. 219(31); 1997-261, s. 109; 1997-443, s. 11A.42.)

§ 106-168.6. Inspection by committee; certificate of specific findings.

The committee upon notification by the Commissioner shall promptly inspect the plans, specifications, and selected site in the case of proposed rendering plants and shall inspect the buildings, grounds, and equipment of established rendering plants. If the committee finds that the plans, specifications, and selected site in the case of proposed plants, or the buildings, grounds, and equipment in the case of established plants, comply with the requirements of this Article and the rules and regulations promulgated by the Commissioner not inconsistent therewith, it shall certify its findings in writing and forward same to the Commissioner. If there is a failure in any respect to meet such requirements, the committee shall notify the applicant in writing of such deficiencies and the committee shall within a reasonable time to be determined by the Commissioner make a second inspection. If the specified defects are remedied, the committee shall thereupon certify its findings in writing to the Commissioner. Not more than two inspections shall be required of the committee under any one application. (1953, c. 732.)

§ 106-168.7. Issuance of license.

Upon receipt of the certificate of compliance from the committee, the Commissioner shall issue a license to the applicant to conduct rendering operations as specified in the application. A license shall be valid until revoked for cause as hereinafter provided. (1953, c. 732.)

§ 106-168.8. Minimum standards for conducting rendering operations.

The following minimum standards shall be required for all rendering operations subject to the provisions of this Article:

(1) Buildings utilized in connection with the rendering plant shall be of sufficient size and shape to accommodate all phases of actual or intended processing. Adequate partitions shall be installed therein so as to eliminate any contact between raw materials and finished products and so as to preclude contamination of finished products. The buildings shall be constructed in a manner and of materials which will insure adequate drainage and sanitation in all phases of operation.

(2) Raw material upon arrival at the rendering plant shall be unloaded into a building for processing. All raw material shall be processed by approved methods within 24 hours after delivery to the rendering plant.

(3) Processing equipment shall be airtight, except for proper escapes for vapors caused by the cooking process.

(4) Cooking vapors shall be controlled and disposed of by approved methods.

(5) Vehicles used to transport raw material shall be so constructed as to prevent any drippings or seepings from such material from escaping from the truck. Such vehicles shall have body sides of sufficient height that no portion of any raw material transported therein shall be visible. All vehicles shall be provided with suitable top or covering to prevent the spread of disease by flies or other agents during the transportation of raw material.

(6) All vehicles and containers used in transporting raw material shall be disinfected at the earliest practicable time after unloading, and shall, in any event, be disinfected before again being taken upon a public highway or before leaving the rendering plant. Approved facilities and materials for disinfection shall be carried on vehicles transporting carcasses. Employees shall be required to wear rubber boots which shall be disinfected prior to entry to a farm.

(7) Approved facilities, means and methods for disinfection shall be available at the rendering plant at all times. Employees and employees' clothing coming in contact with raw material shall be disinfected before coming in contact with any finished products, or any portion of the plant in which the same are located. Rodent and fly control measures shall be practiced as a further means of prevention of the spread of disease. (1953, c. 732.)

§ 106-168.9. Transportation by licensee.

Any person holding a license under the provisions of this Article, or acting as a collector as herein defined, may haul and transport raw material, except such material as may be specifically prohibited by law or by the rules and regulations promulgated by the Commissioner, when such transporting and hauling is done in accordance with the provisions of this Article. (1953, c. 732.)

§ 106-168.10. Disposal of diseased animals.

Any person holding a license under the provisions of this Article is authorized to kill diseased, sick, old or crippled animals on the premises of the owner upon his request; provided that no animal known to have tuberculosis, Bang's disease, anthrax, or any other disease for which quarantine may be imposed, shall be removed from any premises placed under quarantine without permission of the State Veterinarian, or his authorized agent. The licensee shall keep and make available to the Commissioner, upon request, such records as the Commissioner may require with respect to the collection and disposal of dead animals. (1953, c. 732.)

§ 106-168.11. Authority of agents of licensee.

Authority granted to any person holding a valid license under the provisions of this Article shall extend also to the agents and employees of such person while acting within the scope of their authority. All such agents and employees shall comply with the provisions of this Article and rules and regulations not inconsistent therewith, and shall display evidence of such employment or agency upon proper request at any time while so acting. (1953, c. 732.)

§ 106-168.12. Commissioner authorized to adopt rules and regulations.

The Commissioner of Agriculture is hereby authorized to make and establish reasonable rules and regulations, not inconsistent with the provisions of this Article, after consulting the committee, for the proper administration and enforcement thereof. (1953, c. 732.)

§ 106-168.13. Effect of failure to comply.

Failure to comply with the provisions of this Article or rules and regulations not inconsistent therewith shall be cause of revocation of license, if such failure shall not be remedied within a reasonable time after notice to the licensee. Any person whose license is revoked may reapply for a license in the manner provided in this Article for an initial application, except that the Commissioner shall not be required to cause the rendering plant and equipment of the applicant to be inspected by the committee until the expiration of 30 days from the date of revocation. (1953, c. 732.)

§ 106-168.14. Collectors subject to certain provisions.

Any collector, as defined in this Article, shall be subject to the provisions of subdivision (5) and subdivision (6) of G.S. 106-168.8 and the provisions of G.S. 106-168.9, and any rules and regulations adopted by the Commissioner pursuant thereto. (1953, c. 732.)

§ 106-168.15. Violation a misdemeanor.

Any person conducting rendering operations or collecting raw material in violation of the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1953, c. 732; 1993, c. 539, s. 745; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-168.16. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 7; 1998-215, s. 8.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

Article 15.

Inspection of Meat and Meat Products by Counties and Cities.

§§ 106-169 through 106-173: Repealed by Session Laws 1997-74, s. 8.

Article 15A.

Meat Grading Law.

§§ 106-173.1 through 106-173.16: Repealed by Session Laws 1983, c. 248, s. 2.

Article 16.

Bottling Plants for Soft Drinks.

§§ 106-174 through 106-184.1: Repealed by Session Laws 1975, c. 614, s. 42.

Article 17.

Marketing and Branding Farm Products.

§ 106-185. Scope of Article; federal-State cooperation.

(a) Scope. — This Article gives the Department of Agriculture and Consumer Services the authority to investigate marketing conditions for and establish and maintain standard grades, packages, and State brands for farm products. As used in this Article, the term "farm products" means farm crops, horticultural crops, and animal products.

(b) Cooperation. — The Commissioner of Agriculture may enter into agreements with the United States Department of Agriculture that require State and federal cooperation in performing the duties imposed by this Article. (1919, c. 325, s. 1; C.S., s. 4781; 1921, c. 140; 1993, c. 223, s. 1; 1997-261, s. 36.)

§ 106-186. Power to employ agents and assistants.

The Board of Agriculture is charged with the execution of the provisions of this Article, and has authority to employ such agents and assistants as may be necessary, fix their compensation and define their duties, and may require bonds in such amount as they may deem advisable, conditioned upon the faithful performance of duties by any employee or agent. (1919, c. 325, s. 2; C.S., s. 4782.)

§ 106-187. Board of Agriculture to investigate marketing of farm products.

It shall be the duty of the Board of Agriculture to investigate the subject of marketing farm products, to diffuse useful information relating thereto, and to furnish advice and assistance to the public in order to promote efficient and economical methods of marketing farm products, and authority is hereby given

to gather and diffuse timely information concerning the supply, demand, prevailing prices, and commercial movement of farm products, including quantities in common and cold storage, and may interchange such information with the United States Department of Agriculture. (1919, c. 325, s. 3; C.S., s. 4783.)

§ 106-188. Promulgation of standards for receptacles, etc.

After investigation, and from time to time as may be practical and advisable, the Board shall have authority to establish and promulgate standards of opened and closed receptacles for, and standards for the grade and other classification of farm products, by which their quantity, quality, and value may be determined, and prescribe and promulgate rules and regulations governing the marks, brands, and labels which may be required for receptacles for farm products, for the purpose of showing the name and address of the producer or packer; the quantity, nature and quality of the product, or any of them, and for the purpose of preventing deception in reference thereto, and for the purpose of establishing a State brand for any farm product produced in North Carolina: Provided, that any standard for any farm product or receptacle therefor, or any requirement for marking receptacles for farm products, now or hereafter established under authority of the Congress of the United States, shall forthwith, as far as applicable, be established or prescribed and promulgated as the official standard or requirement in this State: Provided, that no standard established or requirement for marking prescribed under this Article shall become effective until the expiration of 30 days after it shall have been promulgated. (1919, c. 325, s. 4; C.S., s. 4784.)

§ 106-189. Sale and receptacles of standardized products must conform to requirements.

Whenever any standard for the grade or other classification of any farm product becomes effective under this Article no person thereafter shall pack for sale, offer to sell, or sell within this State any such farm product to which such standard is applicable, unless it conforms to the standard, subject to such reasonable variations therefrom as may be allowed in the rules and regulations made under this Article: Provided, that any farm product may be packed for sale, offered for sale, or sold, without conforming to the standard for grade or other classification applicable thereto, if it is especially described as not graded or plainly marked as "Not graded." This proviso shall not apply to peaches. (It is the intent and purpose of this exemption to exempt peaches from the requirements of Article 17 of Chapter 106 that ungraded peaches, when sold or offered for sale, shall be marked "ungraded," "field run," "not graded," "grade not determined" or "unclassified," or words of similar import.) The Board of Agriculture, or the Commissioner of Agriculture, and their authorized agents, are authorized to issue "stop-sale" orders which shall prohibit further sale of the products if they have reason to believe such products are being offered, or exposed, for sale in violation of any of the provisions of this Article until the law has been complied with or said violations otherwise legally disposed of.

Whenever any standard for an open or closed receptacle for a farm product shall be made effective under this Article no person shall pack for sale in and deliver in a receptacle, or sell in and deliver in a receptacle, any such farm product to which such standard is applicable, unless the receptacle conforms to the standard, subject to such variations therefrom as may be allowed in the rules and regulations made under this Article, or unless the receptacle be of a capacity twenty-five percent (25%) less than the capacity of the minimum

standard receptacle for the product: Provided, that any receptacle for such farm product of a capacity within twenty-five percent (25%) of, or larger than, the minimum standard receptacle for the product may be used if it be specifically described as not a standard size, or be conspicuously marked with the phrase, "Not standard size," in addition to any other marking which may be prescribed for such receptacles under authority given by this Article.

Whenever any requirement for marking a receptacle for a farm product shall have been made effective under this Article no person shall sell and deliver in this State any such farm product in a receptacle to which such requirement is applicable unless the receptacle be marked according to such requirements. (1919, c. 325, s. 5; C.S., s. 4785; 1943, c. 483; 1969, c. 849.)

Legal Periodicals. — For comment on the 1943 amendment, see 21 N.C.L. Rev. 329 (1943).

§ 106-189.1: Repealed by Session Laws 1983, c. 248, s. 3.

§ 106-189.2. Sale of immature apples.

(a) Notwithstanding any other provision of law, the Board of Agriculture shall adopt requirements for apple grade standards. The apple grade standards shall include the requirements for maturity of the United States standards for grades of apples and may employ the use of the refractometer to determine the sugar content and maturity of apples and the pressure test to determine the maturity of apples. All apples sold, offered for sale, or shipped into this State shall meet these requirements.

(b) Any person, firm or corporation violating the provisions of this section shall be guilty of a Class 3 misdemeanor and shall be punished only by a fine of not less than one hundred dollars ($100.00). Each day on which apples are sold or offered for sale in violation of the provisions of this section shall constitute a separate violation. (1973, c. 973; 1985, c. 585; 1993, c. 539, s. 746; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-190. Inspectors or graders authorized; revocation of license.

The Board is authorized to employ, license, or designate persons to inspect and classify farm products and to certify as to the grade or other classification thereof, in accordance with the standards made effective under this Article, and shall fix, assess and collect, or cause to be collected, fees for such services. Whenever, after opportunity for a hearing is afforded to any person employed, licensed, or designated under this section, it is determined that such person has failed to classify farm products correctly in accordance with the standards established therefor under this Article, or has violated any provision of this Article, or of the rules and regulations made hereunder, the Board may suspend or revoke the employment, license, or designation of such person. Pending investigation the person in charge of this work may suspend or revoke any such appointment, license, or designation temporarily without hearing. (1919, c. 325, s. 6; C.S., s. 4786.)

§ 106-190.1. Aggregate State service credit for graders.

All fruit, vegetable, grain, poultry, egg and egg products graders employed by the Board in positions in fact permanent and full-time, but who were inadvertently or incorrectly classified as temporary until January 1, 1974,

shall be given aggregate State service credit for the period of employment before January 1, 1974. This credit shall be given only to persons employed on a full-time, year-round basis during which time they were classified as temporary. Credit shall be given for purposes of determining the amount of leave earned by the employee, eligibility for and amount of longevity pay, and any other determinations for which the length of State service is relevant. Employees given retroactive aggregate State service credit under this section shall receive retroactive longevity pay, to the extent for which they would have been eligible for longevity pay if they had been correctly classified from the date of their initial employment, for all service beginning January 1, 1974, until August 1, 1977, with any longevity pay actually paid to be subtracted therefrom. (1977, c. 1038, s. 1.)

§ 106-191. Appeal from classification.

The owner or person in possession of any farm product classified in accordance with the provisions of this Article may appeal from such classification under such rules and regulations as may be prescribed. (1919, c. 325, s. 7; C.S., s. 4787.)

§ 106-192. Certificate of grade prima facie evidence.

A certificate of the grade or other classification of any farm product issued under this Article shall be accepted in any court of this State as prima facie evidence of the true grade or other classification of such farm product at the time of its classification. (1919, c. 325, s. 8; C.S., s. 4788.)

§ 106-193. Unwholesome products not classified; health officer notified.

Any person employed, licensed, or designated shall neither classify nor certify as to the grade or other classification of any farm product which, in his judgment, is unwholesome or unfit for food of man or other animal. If, in the performance of his official duties, he discovers any farm product which is unwholesome or unfit for food of man or for other animal for which it is intended, he shall promptly report the fact to a health officer of the State or of any county or municipality thereof. (1919, c. 325, s. 9; C.S., s. 4789.)

§ 106-194. Inspection and sampling of farm products authorized.

Agents and employees are authorized from time to time to ascertain the amount of any farm products in this State, to inspect the same in the possession of any person engaged in the business of marketing them in this State, and to take samples of such products. In carrying out these purposes agents and employees are authorized to enter on any business day, during the usual hours of business, any storehouse, warehouse, cold storage plant, packing house, stockyard, railroad yard, railroad car, or any other building or place where farm products are kept or stored by any person engaged in the business of marketing farm products. (1919, c. 325, ss. 10, 11; C.S., s. 4790.)

§ 106-194.1. Farm Product Inspection Account.

The Farm Product Inspection Account is established as a nonreverting account within the Department of Agriculture and Consumer Services. Interest and other investment income earned by the Account shall be credited to it.

Fees collected under this Article shall be credited to the Account and applied to the costs of administering this Article. Fees credited to the Account from grading and inspection services provided under a cooperative agreement with the United States Department of Agriculture are subject to any restrictions on use set out in the cooperative agreement. (1993, c. 223, s. 2; 1997-261, s. 109.)

§ 106-195. Rules and regulations; how prescribed.

The Board of Agriculture is authorized to make and promulgate such rules and regulations as may be necessary to carry out the provisions of this Article. Such rules and regulations shall be made to conform as nearly as practicable to the rules and regulations of the Secretary of Agriculture of the United States, prescribed under any act of Congress of the United States relating to the marketing of farm products. (1919, c. 325, s. 12; C.S., s. 4791.)

CASE NOTES

Cited in Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

§ 106-196. Violation of Article or regulations a misdemeanor.

Any person who violates any provision of this Article, or of the rules and regulations made under the Article for carrying out its provisions, or fails or refuses to comply with any requirement thereof, or who wilfully interferes with agents or employees in the execution, or on account of the execution, of his or their duties, shall be guilty of a Class 3 misdemeanor. (1919, c. 325, ss. 13, 14; C.S., s. 4792; 1993, c. 539, s. 747; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 18.

Shipper's Name on Receptacles.

§ 106-197: Repealed by Session Laws 1997-74, s. 9.

ARTICLE 19.

Trademark for Standardized Farm Products.

§§ 106-198 through 106-202: Repealed by Session Laws 1987, c. 244, s. 1(g).

§§ 106-202.1 through 106-202.5: Reserved for future codification purposes. ion purposes.

ARTICLE 19A.

Records of Sales of Farm Products.

§ 106-202.6. Dated sales confirmation slips; inapplicable to consumers.

(a) In every sales transaction of farm or horticultural crops, or animal products, the buyer, broker, or authorized agent shall give to the seller a sales confirmation slip bearing the date of the sales transaction.

(b) This section shall not apply if the buyer is a natural person and/or the farm or horticultural crops, or animal products are purchased primarily for a personal, family, or household purpose. (1979, c. 363.)

§§ 106-202.7 through 106-202.11: Reserved for future codification purposes.

Article 19B.

Plant Protection and Conservation Act.

§ 106-202.12. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Board" means the North Carolina Plant Conservation Board as provided in this Article.

(2) "Commissioner" means the Commissioner of Agriculture.

(3) "Conserve" and "conservation" mean to use, and the use of, all methods and procedures for the purposes of increasing the number of individuals of resident species of plants up to adequate levels to assure their continuity in their ecosystems. These methods and procedures include all activities associated with scientific resource conservation such as research, census, law enforcement, habitat protection, acquisition and maintenance, propagation, and transplantation into unoccupied parts of historic range. With respect to endangered and threatened species, the terms mean to use, and the use of, methods and procedures to bring any endangered or threatened species to the point at which the measures provided for the species are no longer necessary.

(4) "Endangered species" means any species or higher taxon of plant whose continued existence as a viable component of the State's flora is determined to be in jeopardy by the Board; also, any species of plant determined to be an "endangered species" pursuant to the Endangered Species Act.

(5) "Endangered Species Act" means the Endangered Species Act of 1973, Public Law 93-205 (87 Stat. 884), as it may be subsequently amended.

(6) "Exotic species" means a species or higher taxon of plant not native or naturalized in North Carolina but appearing in the Federal Endangered and Threatened Species List or in the appendices to the International Treaty on Endangered and Threatened Species.

(7) "Plant" means any member of the plant kingdom, including seeds, roots and other parts or their propagules.

(8) "Protected plant" means a species or higher taxon of plant adopted by the Board to protect, conserve, and/or enhance the plant species and includes those the Board has designated as endangered, threatened, or of special concern.

(9) "Resident plant or resident species" means a native species or higher taxon of plant growing in North Carolina.

(10) "Scientific committee" means the North Carolina Plant Conservation Scientific Committee.

(11) "Special concern species" means any species of plant in North Carolina which requires monitoring but which may be collected and sold under regulations adopted under the provisions of this Article.

(12) "Threatened species" means any resident species of plant which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, or one that is

designated as threatened by the Federal Fish and Wildlife Service. (1979, c. 964, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.13. Declaration of policy.

The General Assembly finds that the recreational needs of the people, the interests of science, and the economy of the State require that threatened and endangered species of plants and species of plants of special concern be protected and conserved, that their numbers should be enhanced and that propagative techniques be developed for them; however, nothing in this Article shall be construed to limit the rights of a property owner, without his consent, in the management of his lands for agriculture, forestry, development or any other lawful purpose. (1979, c. 964, s. 1.)

§ 106-202.14. Creation of Board; membership; terms; chairman; quorum; board actions; compensation.

(a) The North Carolina Plant Conservation Board is created within the Department of Agriculture and Consumer Services.

(b) The Board shall consist of seven members who are residents of North Carolina, one of whom represents each of the following:

(1) The North Carolina Botanical Garden of The University of North Carolina at Chapel Hill;
(2) The botanical, scientific community in North Carolina;
(3) The Division of Forest Resources, Department of Environment and Natural Resources;
(4) A North Carolina citizens conservation organization;
(5) The commercial plant production industry in North Carolina;
(6) The Department of Agriculture and Consumer Services;
(7) The North Carolina public at large.

The Governor shall appoint the first four members enumerated above; the Commissioner shall appoint the remaining three members.

(c) Initial appointments to the Board shall be made by October 1, 1979. Of the terms of initial appointees, the representatives of the North Carolina Botanical Garden of The University of North Carolina at Chapel Hill, the commercial plant production industry in North Carolina, and a North Carolina citizens conservation organization shall serve two-year terms; all other members shall serve four-year terms. All subsequent terms shall be for four-year terms.

(d) All members shall hold their offices until their successors are appointed and qualified. Any vacancy occurring in the membership of the Board prior to the expiration of the term shall be filled for the remainder of the unexpired term. The Commissioner may at any time remove any member from the Board for cause. Each appointment to fill a vacancy in the membership of the Board shall be of a person having the proper credentials for that vacancy and appointed by the proper appointing agency.

(e) The Board shall select its chairman from its own membership to serve for a term of two years. The chairman shall have a full vote. Any vacancy occurring in the chairmanship shall be filled by the Board for the remainder of the term. The Board may select other officers as it deems necessary.

(f) Any action of the Board shall require at least four concurring votes.

(g) Members of the Board who are not State employees shall receive per diem, subsistence and travel allowances authorized by G.S. 138-5; members who are State employees shall receive the subsistence and travel allowances authorized by G.S. 138-6; and members who are also members of the General Assembly shall receive subsistence and travel allowances authorized by G.S. 120-3.1. (1979, c. 964, s. 1; 1989, c. 727, s. 218(45); 1997-261, ss. 37, 38; 1997-443, s. 11A.119(a).)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.15. Powers and duties of the Board.

The Board shall have the following powers and duties:

(1) To adopt and publish by July 1, 1980, an endangered species list, a threatened species list and a list of species of special concern, as provided for in G.S. 106-202.16, identifying each entry by the common name and scientific name and cross-referencing by family, genus, and species number as found in the current edition of "The Manual of the Vascular Flora of the Carolinas," or if not found in this edition, as identified by the American Society of Plant Taxonomists;

(2) To reconsider and revise the lists from time to time in response to public proposals and as the Board deems necessary;

(3) To conserve and to regulate the collection and shipment of those plant species or higher taxa that are of such similarity to endangered and threatened species that they cannot be easily or readily distinguished from an endangered or threatened species;

(4) To regulate within the State any exotic species, in the same manner as a resident species if the exotic species is on the Federal Endangered and Threatened Species List or it is listed in the Appendices to the International Treaty to Conserve Endangered and Threatened Species;

(5) To determine that certain plant species growing in North Carolina, whether or not they are on the endangered or threatened species list, are of special concern and to limit, regulate or forbid sale or collection of these plants;

(6) To conduct investigations to determine whether a plant should be on the protected plant lists and the requirements for survival of resident species of plants;

(7) To adopt regulations to protect, conserve and enhance resident and exotic species of plants on the lists, or to otherwise affect the intent of this Article;

(8) To develop, establish and coordinate conservation programs for endangered species and threatened species of plants, consistent with the policies of the Endangered Species Act, including the acquisition of rights to land or aquatic habitats;

(9) To enter into and administer cooperative agreements through the Commissioner of Agriculture, in concert with the North Carolina Botanical Garden and other agencies, with the U.S. Department of Interior or other federal, State or private organizations concerning endangered and threatened species of plants and their conservation and management;

(10) To cooperate or enter into formal agreements with any agency of any other state or of the federal government for the purpose of enforcing any of the provisions of this Article;

(11) Through the Commissioner, to receive funds, donations, grants or other moneys, issue grants, enter contracts, employ personnel and purchase supplies and materials necessary to fulfill its duties;

(12) To promulgate regulations under which the Department of Agriculture and Consumer Services may issue permits to licensed nurserymen, commercial growers, scientific supply houses and botanical gardens for the sale or distribution of plants on the protected list provided that the plants are nursery propagated and grown horticulturally from seeds or by vegetative propagation of cuttings, meristems or other similar materials and that the plants bear the grower's permit number.

(13) To stop the sale of or to seize any endangered, threatened, or special concern plant species, or part thereof possessed, transported, or moved within this State or brought into this State from any place outside the State if such is found by the Board or its duly authorized agent to be in violation of this Article or rules adopted pursuant to this Article. Such plants shall be moved or disposed of at the direction of the Board or its agent or by court order. (1979, c. 964, s. 1; 1989, c. 508, s. 1; 1997-261, s. 39.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.16. Criteria and procedures for placing plants on protected plant lists.

(a) All native or resident plants which are on the current federal lists of endangered or threatened plants pursuant to the Endangered Species Act have the same status on the North Carolina Protected Plants lists.

(b) The Board, the Scientific Committee, or any resident of North Carolina may propose to the Department of Agriculture and Consumer Services that a plant be added to or removed from a protected plant list.

(c) If the Board, with the advice of the Scientific Committee, finds that there is any substance to the proposal, it shall publish notice of the proposal in a Department of Agriculture and Consumer Services news release.

(d) The Board shall collect relevant scientific and economic data, concerning any substantial proposal, necessary to determine:

(1) Whether or not any other State or federal agency or private entity is taking steps to protect the plant under consideration;

(2) The present or threatened destruction, modification or curtailment of its habitat;

(3) Over-utilization for commercial, scientific, educational or recreational purposes;

(4) Critical depletion from disease or predation;

(5) The inadequacy of existing regulatory mechanisms; or

(6) Other natural or man-made factors affecting its continued existence in North Carolina.

If the Board, with the advice of the Scientific Committee, finds that the plant should be added to or removed from a protected plant list the Board shall instigate rule-making procedures to add or remove the plant from the list.

(e), (f) Repealed by Session Laws 1987, c. 827, s. 31, effective August 13, 1987. (1979, c. 964, s. 1; 1987, c. 827, s. 31; 1997-261, s. 109.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.17. Creation of committee; membership; terms; chairman; meetings; committee action; quorum; compensation.

(a) The North Carolina Plant Conservation Scientific Committee is created within the Department of Agriculture and Consumer Services.

(b) The Scientific Committee shall consist of the Directors of The University of North Carolina at Chapel Hill Herbarium, the North Carolina State University Herbarium, the North Carolina Botanical Garden of The University of North Carolina at Chapel Hill, the North Carolina State Museum of Natural Sciences and the North Carolina Natural Heritage Program of the Department of Environment and Natural Resources or their designees, a representative of the North Carolina Association of Nurserymen, Inc., appointed by the Commissioner, and a representative of the Garden Club of North Carolina, Incorporated, the North Carolina Chapter of the Nature Conservancy or the North Carolina Wild Flower Preservation Society, Inc., appointed by the Commissioner. Members shall serve for three-year terms and may succeed themselves.

(c) The Board shall select a chairman of the Scientific Committee from the Scientific Committee's membership to serve for three years.

(d) The Scientific Committee may hold its meetings at the North Carolina Botanical Garden of The University of North Carolina at Chapel Hill.

(e) Any action of the Scientific Committee shall require at least four concurring votes.

(f) Members of the Scientific Committee who are not State employees may receive per diem, subsistence and travel allowances authorized by G.S. 138-5 if they so request; members who are State employees may receive the subsistence and travel allowances authorized by G.S. 138-6 if they so request; and members who are also members of the General Assembly may receive subsistence and travel allowances authorized by G.S. 120-3.1 if they so request. (1979, c. 964, s. 1; 1989, c. 727, s. 218(46); 1993, c. 561, s. 116(i); 1997-261, s. 109; 1997-443, s. 11A.119(a).)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.18. Powers and duties of the Scientific Committee.

The Scientific Committee shall have the following powers and duties:

(1) To gather and provide information and data and advise the Board with respect to all aspects of the biology and ecology of endangered and threatened plant species;

(2) To develop and present to the Board management and conservation practices for preserving endangered or threatened plant species;

(3) To recommend habitat areas for acquisition to the extent that funds are available or expected;

(4) To investigate and make recommendations to the Board as to the status of endangered, threatened plant species, or species of special concern;

(5) To make recommendations to the Board concerning regulation of the collection and shipment of endangered or threatened plant species within North Carolina;
(6) To review and comment on botanical aspects of environmental impact statements prepared by North Carolina agencies or other agencies as appropriate; and
(7) To advise the Board on matters submitted to the Scientific Committee by the Board or the Commissioner which involve technical questions and the development of pertinent rules and regulations, and make any recommendations as deemed by the Scientific Committee to be worthy of the Board's consideration. (1979, c. 964, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 106-202.19. Unlawful acts; penalties; enforcement.

(a) It is unlawful:
(1) To uproot, dig, take or otherwise disturb or remove for any purpose from the lands of another, any plant on a protected plant list without a written permit from the owner which is dated and valid for no more than 180 days and which indicates the species or higher taxon of plants for which permission is granted; except that the incidental disturbance of protected plants during agricultural, forestry or development operations is not illegal so long as the plants are not collected for sale or commercial use;
(2) To sell, barter, trade, exchange, export, offer for sale, barter, trade, exchange or export or give away for any purpose including advertising or other promotional purpose any plant on a protected plant list, except as authorized according to the rules and regulations of the Board;
(3) To violate any rule of the Board promulgated under this Article;
(4) To dig ginseng on another person's land, except for the purpose of replanting, between the first day of April and the first day of September;
(5) To buy ginseng outside of a buying season as provided by the Board without obtaining the required documents from the person selling the ginseng;
(6) To buy ginseng for the purpose of resale or trade without holding a currently valid permit as a ginseng dealer;
(7) To fail to keep records as required under this Article, to refuse to make records available for inspection by the Board or its agent, or to use forms other than those provided for the current year or harvest season by the Department of Agriculture and Consumer Services;
(8) To provide false information on any record or form required under this Article;
(9) To make false statements or provide false information in connection with any investigation conducted under this Article;
(10) To possess any protected plant, or part thereof, which was obtained in violation of this Article or any rule adopted hereunder; or
(11) To violate a stop sale order issued by the Board or its agent.

(a1) Any person convicted of violating this Article, or any rule of the Board adopted pursuant to this Article shall be guilty of a Class 3 misdemeanor, and for a first violation shall only be fined not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00); and upon a subsequent

conviction shall only be fined not less than five hundred dollars ($500.00) and not more than one thousand dollars ($1,000). Each illegal movement or distribution of a protected plant shall constitute a separate violation. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Board, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(a2) A civil penalty of not more than two thousand dollars ($2,000) may be assessed by the Board against any person guilty of violating this Article a second or subsequent time. The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(b) The Commissioner or any employee of the Department of Agriculture and Consumer Services designated by the Commissioner to enforce the provisions of this Article, may enter any place within the State at all reasonable times where plant materials are being grown, transported or offered for sale and require the presentation for inspection of all pertinent papers and records relative to the provisions of this Article, after giving notice in writing to the owner or custodian of the premises to be entered. If he refuses to consent to the entry, the Commissioner may apply to any district court judge and the judge may order, without notice, that the owner or custodian of the place permit the Commissioner to enter the place for the purposes herein stated and failure by any person to obey the order may be punished as for contempt.

(c) The Commissioner of Agriculture is authorized to apply to the superior court for, and the court shall have jurisdiction upon hearing and, for cause shown, to grant a temporary or permanent injunction restraining any person from violating any provision of G.S. 106-202.19(a), regardless of whether there exists an adequate remedy at law. (1979, c. 964, s. 1; 1989, c. 508, s. 2; 1993, c. 539, s. 749; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, ss. 40, 41; 1998-215, s. 9.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second sentence in subsection (a2).

§ 106-202.20. Forfeiture of illegally possessed plants; disposition of plants.

Upon conviction of any defendant for a violation of G.S. 106-202.19, the court, in its discretion, may order the defendant to forfeit any plant or plant parts which he possesses in violation of G.S. 106-202.19. The court shall direct disposition of any forfeited plant or plant part by destruction or sale. The clear proceeds of forfeitures and sales pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1989, c. 508, s. 3; 1997-261, s. 109; 1998-215, s. 10.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, substituted the final sentence for "The proceeds from such a sale shall be paid to the North Carolina Department of Agriculture and Consumer Services for use in the enforcement of this Article."

§ 106-202.21. Ginseng dealer permits.

(a) No person shall act in the capacity of a ginseng dealer, or shall engage, or offer to engage in the business of, advertise as, or assume to act as a ginseng dealer unless that person holds a currently valid permit as provided in this Article.

(b) Applications for a ginseng dealer permit shall be on a form and shall contain information as prescribed by the Board. All permits issued under this section shall expire on 30 June of the fiscal year for which they are issued.

(c) A ginseng dealer permit may be renewed annually upon application to the Board.

(d) A ginseng dealer shall notify the Board of any change of address or business location within 30 days of such change.

(e) The Board shall issue to each applicant who satisfies the requirements of this Article a permit which entitles the applicant to conduct the business described in the application during the harvest season for which the permit is issued, unless the permit is suspended or revoked. (1989, c. 508, s. 3.)

§ 106-202.22. Denial, suspension, or revocation of permit.

(a) The Board may deny, suspend, revoke, or modify any permit issued under this Article if it finds that the applicant or permit holder has violated this Article or rules adopted pursuant to this Article.

(b) Suspension of any permit under this Article shall be for not less than one year. Any permit holder whose permit has been revoked shall not be eligible to reapply until two years after the final decision of the Board or two years after his permit is surrendered pursuant to such revocation, whichever is earlier. The expiration or voluntary surrender of a permit shall not deprive the Board of jurisdiction to suspend, revoke or modify such permit. A person whose permit has been suspended or revoked shall not engage in business as an employee, partner, or associate of another permit holder during the period of such revocation or suspension.

(c) If a permit is suspended or revoked, the permit holder shall, within five days of such suspension or revocation, surrender such permit to the Commissioner or his authorized representative. (1989, c. 508, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

Article 20.

Standard Weight of Flour and Meal.

§§ 106-203 through 106-209: Repealed by Session Laws 1945, c. 280, s. 2.

Cross References. — As to act establishing uniform weights and measures generally, see § 81A-1 et seq.

Article 21.

Artificially Bleached Flour.

§§ 106-210 through 106-219: Repealed by Session Laws 1975, c. 614, s. 42.

Article 21A.

Enrichment of Flour, Bread, Cornmeal and Grits.

§§ 106-219.1 through 106-219.9: Repealed by Session Laws 1975, c. 614, s. 42.

Article 22.

Inspection of Bakeries.

§§ 106-220 through 106-232: Repealed by Session Laws 1975, c. 614, s. 42.

Article 23.

Oleomargarine.

§ 106-233: Repealed by Session Laws 1975, c. 614, s. 42.

§ 106-234: Repealed by Session Laws 1949, c. 978, s. 2.

§ 106-235: Repealed by Session Laws 1963, c. 1135.

§§ 106-236 through 106-238: Repealed by Session Laws 1975, c. 614, s. 42.

Article 24.

Excise Tax on Certain Oleomargarines.

§ 106-239: Repealed by Session Laws 1975, c. 614, s. 42.

Article 25.

North Carolina Egg Law.

§§ 106-240 through 106-245: Repealed by Session Laws 1955, c. 213, s. 14.

§§ 106-245.1 through 106-245.12: Repealed by Session Laws 1965, c. 1138, s. 3.

ARTICLE 25A.

North Carolina Egg Law.

§ 106-245.13. Short title; scope; rule of construction.

This Article is named and may be cited as the North Carolina Egg Law and relates to eggs sold in the State of North Carolina. Words used in the singular form in this Article shall include the plural, and vice versa as the cause may require. (1965, c. 1138, s. 1.)

Editor's Note. — The act which enacted this Article repealed former Article 25, which was also entitled "North Carolina Egg Law." Where former provisions were similar to the new provisions, the historical citations to the repealed sections were added to the current sections.

§ 106-245.14. Definitions.

The following words, terms, and phrases shall be construed for the purpose of this Article as follows:

(1) "Authorized representative" means the Commissioner or any duly authorized agent or employee who is assigned to carry out the provisions of this Article.

(2) "Candling and grading" means selecting eggs as to their conformity to the standards of quality and size or weight class preparatory to marketing them as a specific grade and size or weight class.

(3) "Commissioner" means the North Carolina Commissioner of Agriculture.

(4) "Consumer" means any person who purchases eggs for his or her use or his or her own family use or consumption and not for resale.

(5) "Container" means any box, case, basket, carton, sack, bag, or other receptacle containing eggs. "Subcontainer" means any container used within another container.

(6) "Distributor" means any person, producer, firm or corporation offering for sale or distributing eggs in the State to a retailer, cafe, restaurant, or any other establishment offering for sale to consumers, including but not limited to institutional consumers as defined in this Article. Distributors also shall include any person, producer, firm or corporation distributing eggs to his or its own retail outlets or stores but shall not include any person, firm or corporation engaged only to haul or transport eggs.

(7) "Eggs" means product of a domesticated chicken in the shell or as further processed egg products.

(8) "Facilities" means any room, compartment, refrigerator or vehicle used in handling eggs in any manner.

(9) "Grades" shall mean and include specifications defining the limit of variation in quality of two or more eggs.

(10) "Institutional consumer" means a restaurant, hotel, licensed boarding house, commercial bakery or any other institution in which eggs are prepared as food for use by its patrons, residents or patients.

(11) "Law" means the provisions of this Article and all rules and regulations issued hereunder.

(12) "Lots" means a physical grouping of eggs or containers with eggs therein, as determined by the North Carolina Department of Agriculture and Consumer Services.

(13) "Marketing of eggs" or "market" means the sale, offer for sale, gift, barter, exchange, advertising, branding, marking, labeling, grading, or other preparatory operation or distribution in any manner of eggs or containers of eggs as defined in this Article.
(14) "Packer" means any person that is engaged in grading, shell treating or packing eggs for sale to consumers, direct or through distribution outlets of stores.
(15) "Person" means and includes any individual, producer, firm, partnership, exchange, association, trustee, receiver, corporation, or any other business organization and any member, officer, or employee thereof.
(16) "Retailer" means any person who markets eggs to consumers.
(17) "Size or weight class" means a classification of eggs based on weight at the rate per dozen.
(18) "Standards for quality" means specifications of the physical characteristics of any or all of the component parts or the individual egg. (1965, c. 1138, s. 1; 1997-261, s. 42.)

§ 106-245.15. Designation of grade and class on containers required; conformity with designation; exemption.

No person shall market to consumers, institutional consumers or retailers or expose for that purpose any eggs unless there is clearly designated therewith on the container the grade and size or weight class established in accordance with the provisions of this Article and such eggs shall conform to the designated grade and size or weight class (except when sold on contract to a United States governmental agency); provided, however, a producer marketing eggs of his own production shall be exempt from this section when such marketing occurs on the premises where the eggs are produced, processed, or when ungraded sales do not exceed 30 dozen per week. (1955, c. 213, s. 7; 1965, c. 1138, s. 1; 1973, c. 739, s. 1.)

§ 106-245.16. Standards, grades and weight classes.

The Board of Agriculture shall establish and promulgate such standards of quality, grades and weight classes for eggs sold or offered for sale in this State as will protect the consumer and the institutional consumer from eggs which are injurious or likely to be injurious to health by reason of the condition of the shell, or contents thereof, or by reason of the manner in which eggs are processed, handled, shipped, stored, displayed, sold or offered for sale. Such standards of quality, grades and weight classes as are promulgated and established by the Board shall also promote honesty and fair dealings in the poultry industry. Such standards, grades and weight classes may be modified or altered by the Board whenever it deems it necessary. (1955, c. 213, s. 9; 1965, c. 1138, s. 1; 1969, c. 139, s. 1.)

§ 106-245.17. Stop-sale orders.

If an authorized representative of the North Carolina Department of Agriculture and Consumer Services shall determine, after inspection, that any lot of eggs is in violation of this Article, he may issue a "stop-sale order" as to such lot or lots of eggs and forthwith notify the owner or custodian of such eggs. Such order shall specify the reason for its issuance. A stop-sale order shall prohibit the further marketing of the eggs subject to it until such eggs are released by the State agency. (1965, c. 1138, s. 1; 1997-261, s. 109.)

§ 106-245.18. Container labeling.

(a) Any container or subcontainer in which eggs are marketed shall bear on the outside portion of the container, but not be limited to, the following:

(1) The applicable consumer grade provided for in this Article.
(2) The applicable size or weight class provided for in this Article.
(3) The word "eggs."
(4) The numerical count of the contents.
(5) The name and address of the packer or distributor. Words and numerals used to designate the grade and size shall be in clearly legible bold-faced type at least three-eighths inch in height. Any person intending to reuse a container shall obscure any inappropriate labeling thereon and relabel the container in accordance with this section prior to refilling the container with eggs. In any case, the address of the packer or distributor shall be shown in letters not exceeding three-eighths inch in height.

(b) The term "fresh" may only be applied to eggs conforming to the specifications for Grade A or better. No other descriptive term other than applicable grade and size may be applied. (1965, c. 1138, s. 1; 1973, c. 739, s. 2.)

§ 106-245.19. Invoices.

(a) Any person, except a producer marketing eggs to another person for candling and grading, when marketing eggs to a retailer, institutional consumer, or other person shall furnish to the purchaser at the time of delivery an invoice showing date of sale, name and address of the seller, name of purchaser, quantity, grade and size-weight classification.

(b) A copy of such invoice shall be kept on file by both the person selling and the purchaser at their respective places of business for a period of at least 30 days. (1955, c. 213, s. 7; 1965, c. 1138, s. 1.)

§ 106-245.20. Advertisements.

No person shall advertise eggs for sale at a given price unless the unabbreviated grade or quality and size-weight are conspicuously designated in block letters at least half as high as the tallest letter in the word "eggs" or the tallest figure in the price, whichever is larger. (1955, c. 213, s. 7; 1965, c. 1138, s. 1.)

§ 106-245.21. Rules and regulations.

The North Carolina Board of Agriculture is authorized to make and amend, from time to time, such rules and regulations as may be necessary to administer and enforce the provisions of this Article. Such rules and regulations shall be published and copies thereof made available to interested parties upon request therefor. (1955, c. 213, s. 8; 1965, c. 1138, s. 1.)

§ 106-245.22. Sanitation.

(a) Any person engaged in the marketing of or the processing of eggs for marketing shall, in addition to maintaining egghandling facilities in a manner commensurate with laws governing food establishments, keep the eggs in a proper environment, in accordance with regulations promulgated by the North Carolina Board of Agriculture, to maintain quality. In addition, any container, including the packaging material therein, when used for the marketing of eggs

shall be clean, unbroken and free from foreign odor. In all instances eggs shall, so far as possible and by use of all reasonable means, be protected from being soiled or dirtied by foreign matter. When cleaning is necessary a sanitary method approved by the Commissioner shall be employed.

(b) Repealed by Session Laws 1973, c. 739, s. 3. (1965, c. 1138, s. 1; 1973, c. 739, s. 3.)

§ 106-245.23. Power of Commissioner.

The Commissioner, or his authorized agents or representatives, may enter, during the regular business hours, any establishment or facility where eggs are bought, stored, offered for sale, or processed, in order to inspect and examine eggs, egg containers, and the premises, and to examine the records of such establishments or facilities relating thereto. (1955, c. 213, s. 10; 1965, c. 1138, s. 1.)

§ 106-245.24. Penalties for violations; enjoining violations; venue.

(a) Any person who violates any provision of this Article shall be guilty of a Class 3 misdemeanor.

(b) In addition to the criminal penalties provided for above, the Commissioner of Agriculture may apply by equity to a court of competent jurisdiction, and such court shall have jurisdiction and for cause shown to grant temporary or permanent injunction, or both, restraining any person from violating, or continuing to violate, any provisions of this Article.

(c) Any proceeding for a violation of this Article may be brought in the county where the violator resides, has a place of business or principal office or where the act or omission or part thereof, complained of occurred. (1955, c. 213, s. 12; 1965, c. 1138, s. 1; 1993, c. 539, s. 750; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-245.25. Warnings in lieu of criminal prosecutions.

Nothing in this Article shall be construed as requiring the Commissioner to report for criminal prosecution violations of this Article whenever he believes that the public interest will be adequately served and compliance with the Article obtained by a suitable written notice or warning. (1965, c. 1138, s. 1.)

§ 106-245.26. Remedies cumulative.

Each remedy provided in this Article shall be in addition to and not exclusive of any other remedy provided for in this Article. (1965, c. 1138, s. 1.)

§ 106-245.27. Persons punishable as principals.

(a) Whoever commits any act prohibited by any section of this Article or aids, abets, induces, or procures its commission, is punishable as a principal.

(b) Whoever causes an act to be done which if directly performed by him or another would be a violation of the provisions of this Article, is punishable as a principal. (1965, c. 1138, s. 1.)

§ 106-245.28. Act of agent as that of principal.

In construing and enforcing the provisions of this Article, the act, omission, or failure, of any agent, officer or other person acting for or employed by an individual, association, partnership, corporation, or firm, within the scope of

his employment or office shall be deemed to be the act, omission, or failure to [of] the individual, association, partnership, corporation, or firm as well as that of the person. (1965, c. 1138, s. 1.)

§ 106-245.29: Reserved for future codification purposes.

ARTICLE 25B.

Egg Promotion Tax.

§ 106-245.30. Legislative findings; purpose of Article.

The General Assembly finds and declares that eggs are important to the prosperity of this State and are a major source of income to a large segment of the State's population. Additional research, education, publicity, advertising and other means of promoting the sale and use of eggs are required to enhance the economical production and marketing of eggs and will be beneficial to the State as a whole. (1987, c. 815, s. 1.)

§ 106-245.31. Definitions.

As used in this Article:

(1) "Board" means the North Carolina Board of Agriculture.
(2) "Commissioner" means the Commissioner of Agriculture.
(3) "Department" means the North Carolina Department of Agriculture and Consumer Services. (1987, c. 815, s. 1; 1997-261, s. 43.)

§ 106-245.32. Levy of tax; rules.

An excise tax is levied on eggs and processed eggs sold for use in this State. The tax on eggs is five cents (5¢) for each case of 30 dozen eggs. The tax on processed eggs is eleven cents (11¢) for each 100 pounds of processed eggs sold for use in this State. The tax imposed by this section is payable only once on the same eggs or processed eggs.

Processed eggs include frozen eggs, liquid eggs, and hard-cooked eggs. "Use" means consumption by the consumer. The Board may adopt rules necessary to administer this tax. (1987, c. 815, s. 1; 1989 (Reg. Sess., 1990), c. 1001, s. 1.)

§ 106-245.33. Report and payment of tax by handler; definition and functions of handler.

(a) The tax imposed by this Article is payable monthly to the Department by the handler of eggs or processed eggs. The tax is due when a report is required to be filed. A handler shall file a report with the Department on a form provided by the Department within 20 days after the end of each month. The report shall state the volume of eggs or processed eggs handled by the handler during the preceding month.

(b) The term "handler" means any person who operates a grading station in North Carolina, a packer, huckster, or distributor who handles eggs in North Carolina, a farmer who packs, processes, or otherwise performs the functions of a handler in North Carolina, or a distributor or seller of processed eggs. The term "handler" includes any person in North Carolina who purchases eggs for sale or distribution or any farmer in North Carolina who sells or distributes eggs to anyone other than a registered handler.

For purposes of this Article, the functions of a handler of eggs or processed eggs include the sale, distribution, or other disposition of eggs or processed eggs in North Carolina regardless of where the eggs or processed eggs were produced or purchased.

The term "registered handler" means any person who has registered with the Department to receive monthly return forms for reporting the tax levied by this Article.

Every person, whether inside or outside the State, who engages in business in North Carolina as a handler is required to register and to collect and pay the tax due on all eggs or processed eggs sold for use in this State. A handler shall maintain a certificate of registration, file returns, and perform all other duties required of handlers. (1987, c. 815, s. 1; 1989 (Reg. Sess., 1990), c. 1001, s. 2.)

§ 106-245.34. Exemptions.

Eggs sold by a handler who sells less than 500 cases a year are exempt from the tax levied under this Article. Processed eggs sold by a handler who sells less than 1,000 pounds of processed eggs a year are exempt from the tax levied under this Article. The Board shall establish a procedure for returning taxes paid on exempt eggs or processed eggs. (1987, c. 815, s. 1; 1989 (Reg. Sess., 1990), c. 1001, s. 3.)

§ 106-245.34A. Additional exemption.

The tax provided for herein shall not be levied upon any eggs which are assessed under the Agricultural Marketing Agreement Act of 1937 (7 USC 601 et seq.). (1987, c. 815, s. 2.)

§ 106-245.35. Records to be kept by handler.

The handler shall keep a complete record of the eggs or processed eggs handled by him for a period of not less than two years from the time the eggs or processed eggs were handled. These records shall be open for inspection by the Commissioner or his duly authorized agents and shall be established and maintained as required by the Commissioner. (1987, c. 815, s. 1; 1989 (Reg. Sess., 1990), c. 1001, s. 4.)

§ 106-245.36. Interest on tax; collection of delinquent tax.

The tax imposed under the provisions of this Article and unpaid on the date on which the tax was due and payable shall bear interest at the rate determined in accordance with G.S. 105-241.1(i) from and after such due date until paid. If any person defaults in any payment of the tax or interest thereon, the amount shall be collected by a civil action in the name of the State and the person adjudged in default shall pay the cost of such action. The Attorney General, at the request of the Commissioner, shall institute such action in the proper court for the collection of the amount of any tax past due under this Article including interest thereon. (1987, c. 815, s. 1.)

§ 106-245.37. North Carolina Egg Fund.

All moneys levied and collected under the provisions of this Article shall be deposited with the State Treasurer to a fund to be known as the "North Carolina Egg Fund". All moneys credited to the "North Carolina Egg Fund" are hereby appropriated to the North Carolina Egg Association, a North Carolina nonprofit corporation, for research, education, publicity, advertising, and other

promotional activities for the benefit of producers of eggs sold in North Carolina. Moneys in the North Carolina Egg Fund are held in trust for the benefit of producers of eggs sold in North Carolina and such moneys shall not be or become part of the General Fund. (1987, c. 738, s. 138(a); c. 815, s. 1.)

§ 106-245.38. Violations.

(a) It shall be a Class 1 misdemeanor for any handler knowingly to report falsely to the Department the quantity of eggs or processed eggs handled by him during any period, to falsify the records of the eggs or processed eggs handled by him, to fail to keep a complete record of the eggs or processed eggs handled by him, or to fail to preserve the records for a period of not less than two years from the time the eggs or processed eggs are handled.

(b) It shall be a violation of the North Carolina Egg Law, Article 25A of this Chapter, for a handler to fail to register as required by this Article. Any eggs transported, sold, or offered for sale by a handler who is not a registered handler shall be subject to the stop-sale and penalty provisions of the North Carolina Egg Law. (1987, c. 815, s. 1; 1989 (Reg. Sess., 1990), c. 1001, s. 5; 1993, c. 539, s. 751; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-245.39. Effect on Article 50 of Chapter 106.

After October 1, 1987, no egg assessment shall be collected under Article 50 of Chapter 106 of the General Statutes. (1987, c. 815, s. 3.)

Article 26.

Inspection of Ice Cream Plants, Creameries, and Cheese Factories.

§ 106-246. Cleanliness and sanitation required; washrooms and toilets, living and sleeping rooms; animals.

For the protection of the health of the people of the State, all places where ice cream, milk shakes, milk sherbet, sherbet, water ices and other similar frozen or semifrozen food products are made for sale, all creameries, butter and cheese factories, when in operation, shall be kept clean and in a sanitary condition. The floors, walls, and ceilings of all workrooms where the products of plants named herein are made, mixed, stored or handled shall be such that same can be kept in a clean and sanitary condition. All windows, doors, and other openings shall be effectively screened during fly season. Suitable washrooms shall be maintained, and if a toilet is attached, it shall be of sanitary construction and kept in a sanitary condition. No person shall be allowed to live or sleep in such factory unless rooms so occupied are separate and apart from the work or storage rooms. No horses, cows, or other animal shall be kept in such factories or close enough to contaminate products of same unless separated by impenetrable wall without doors, windows or other openings. (1921, c. 169, s. 1; C.S., s. 7251(a); 1933, c. 431, s. 1; 1959, c. 707, s. 1.)

§ 106-247. Cleaning and sterilization of vessels and utensils.

Suitable means or appliances shall be provided for the proper cleaning or sterilizing of freezers, vats, mixing cans or tanks, conveyors, and all utensils,

tools and implements used in making or handling cream, ice cream, butter or cheese and all such apparatus shall be thoroughly cleaned as promptly after use as practicable. (1921, c. 169, s. 2; C.S., s. 7251(b).)

§ 106-248. Purity of products.

All cream, ice cream, butter, cheese or other product produced in places named herein shall be pure, wholesome and not deleterious to health, and shall comply with the standards of purity, sanitation, and rules and regulations of the Board of Agriculture provided for in G.S. 106-253; and whole milk, sweet cream, ice cream mix, and other mixes shipped into this State from other states and used in the manufacture of frozen or semifrozen dairy products processed or sold in this State shall meet the same requirements and be subject to the same regulations and shall carry a tag or label showing name of product, name and address of processor and date of pasteurization. (1921, c. 169, s. 3; C.S., s. 7251(c); 1933, c. 431, s. 2; 1959, c. 707, s. 2.)

§ 106-249. Receivers of products to clean utensils before return.

Every person, company, or corporation who shall receive milk, cream, or ice cream which is delivered in cans, bottles, or other receptacles, shall thoroughly clean same as soon as practicable after the contents are removed and before the said receptacles are returned to shipper or person from whom the same was received or before such receptacles are delivered to any carrier to be returned to shipper. (1921, c. 169, s. 4; C.S., s. 7251(d).)

§ 106-250. Correct tests of butterfat; tests by Board of Agriculture.

Creameries and factories that purchase milk and cream from producers of same on a butterfat basis, and pay for same on their own test, shall make and pay on correct test, and any failure to do so shall constitute a violation of this Article. The Board of Agriculture, under regulations provided for in G.S. 106-253, shall have such test made of milk and cream sold to factories named herein that will show if dishonest tests and practices are used by the purchasers of such products. (1921, c. 169, s. 5; C.S., s. 7251(e).)

§ 106-251. Department of Agriculture and Consumer Services to enforce law; examinations.

It shall be the duty of the Department of Agriculture and Consumer Services to enforce this Article, and the Board of Agriculture shall cause to be made by the experts of the Department such examinations of plants and products named herein as are necessary to insure the compliance with the provisions of this Article. For the purpose of inspection, the authorized experts of the Department shall have authority, during business hours, to enter all plants or storage rooms where cream, ice cream, butter, or cheese or ingredients used in the same are made, stored, or kept, and any person who shall hinder, prevent, or attempt to prevent any duly authorized expert of the Department in the performance of his duty in connection with this Article shall be guilty of a violation of this Article. (1921, c. 169, s. 6; C.S., s. 7251(f); 1997-261, s. 44.)

§ 106-252. Closure of plants for violation of Article; certificate to district attorney of district.

If it shall appear from the examinations that any provision of this Article has been violated, the Commissioner of Agriculture shall have authority to order

the plant or place of manufacture closed until the law is complied with. If the owner or operator of the place refuses or fails to comply with the order, law or regulations, the Commissioner shall then certify the facts in the case to the district attorney in the district in which the violation was committed. (1921, c. 169, s. 7; C.S., s. 7251(g); 1973, c. 47, s. 2.)

§ 106-253. Standards of purity and sanitation; regulating trade or brand names of frozen or semifrozen desserts.

The Board of Agriculture is authorized to make such definitions and to establish such standards of purity for products and sanitation for plants or places of manufacture named herein with such regulations, not in conflict with this Article, as shall be necessary to make provisions of this Article effective and insure the proper enforcement of same, and the violation of said standards of purity or regulations shall be deemed to be a violation of this Article. The Board is authorized to require the posting of inspection certificates. It shall be unlawful for any person, firm or corporation to use the words "cream," "milk," or "ice cream," or either of them, or any similar sounding word or terms, as a part of or in connection with any product, trade name or brand of any frozen or semifrozen dessert manufactured, sold or offered for sale and not in fact made from dairy products under and in accordance with regulations, definitions or standards approved or promulgated by the Board of Agriculture. (1921, c. 169, s. 8; C.S., s. 7251(h); 1933, c. 431, s. 3; 1945, c. 846; 1959, c. 707, s. 3; 1981 (Reg. Sess., 1982), c. 1359, s. 1.)

§ 106-254. Inspection fees; wholesalers; retailers and cheese factories.

For the purpose of defraying the expenses incurred in the enforcement of this Article, the owner, proprietor or operator of each ice cream factory where ice cream, milk shakes, milk sherbet, sherbet, water ices, mixes for frozen or semifrozen desserts and other similar frozen or semifrozen food products are made or stored, or any cheese factory or butter-processing plant that disposes of its products at wholesale to retail dealers for resale in this State shall pay to the Commissioner of Agriculture each year an inspection fee of forty dollars ($40.00). Each maker of ice cream, milk shakes, milk sherbet, sherbet, water ices and/or other similar frozen or semifrozen food products who disposes of his product at retail only, and cheese factories, shall pay to the Commissioner of Agriculture an inspection fee of ten dollars ($10.00) each year. The inspection fee of ten dollars ($10.00) shall not apply to conventional spindle-type milk-shake mixers, but shall apply to milk-shake dispensing and vending machines, which operate on a continuous or automatic basis. (1921, c. 169, s. 9; C.S., s. 7251(i); 1933, c. 431, s. 4; 1959, c. 707, s. 4; 1961, c. 791; 1989, c. 544, s. 15.)

§ 106-255. Violation of Article a misdemeanor; punishment.

Any person, firm, or corporation who shall violate any of the provisions of this Article shall be guilty of a Class 3 misdemeanor, and upon conviction thereof shall only be fined not to exceed twenty-five dollars ($25.00) for the first offense, and for each subsequent offense in the discretion of the court. (1921, c. 169, s. 10; C.S., s. 7251(j); 1993, c. 539, s. 752; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 27.

Records of Purchases of Milk Products.

§§ 106-256 through 106-259: Repealed by Session Laws 1987, c. 244, s. 1(h).

Article 28.

Records and Reports of Milk Distributors and Processors.

§ 106-260. "Milk" defined.

Wherever the word "milk" appears hereinafter in this Article, it shall be construed to include all whole milk, cream, chocolate milk, buttermilk, skim milk, special milk and all flavored milk, including flavored drinks, skim condensed, whole condensed, dry milks and evaporated. (1941, c. 162, s. 1; 1951, c. 1133, s. 1.)

§ 106-261. Reports to Commissioner of Agriculture as to milk purchased and sold.

Every person, firm or corporation that purchases milk for processing or distribution or sale, or that purchases milk for processing and distribution and sale, in North Carolina shall, not later than the twentieth of each month following the month such business is carried on, furnish information to the Commissioner of Agriculture, upon blanks to be furnished by him which will show a detailed statement of the quantities of the various classifications of milk purchased and the class in which milk was distributed or sold. Such report shall include all milk purchased from the producers and other sources, imported, all milk sold to consumers, sold or transferred between plants, distributors, affiliates and subsidiaries, and all milk used in the manufacture of other dairy products; provided, however, that every person, firm or corporation engaged in purchasing milk and/or dairy products as defined in G.S. 106-260, for processing and manufacturing purposes only and who is not engaged in distributing and/or selling milk or milk products in fluid form, shall be required to report only the receipts of such milk or milk products and the quantities of dairy products manufactured. Provided, further, that the provisions of this section shall not apply to retail stores unless the same are owned, controlled or operated by milk processors and/or distributors. (1947, c. 162, s. 2; 1951, c. 1133, s. 2.)

§ 106-262. Powers of Commissioner of Agriculture.

The Commissioner of Agriculture is hereby authorized and empowered:

(1) To require such reports as will enable him to determine the quantities of milk purchased and the classification in which it was used or disposed;

(2) To designate any area of the State as a natural marketing area for the sale or use of milk or milk products;

(3) To set up classifications for the sale or use of milk or milk products for each marketing area after full, complete and impartial hearing. Due notice of such hearing shall be given.

(4) To make rules and regulations and issue orders necessary to carry out and enforce the provisions of this Article, including the supervision of

producer bases and other production incentive plans; methods of uniform and equitable payments to all producers selling milk to the same firm, person or corporation; uniform methods of computing weights of milk and/or milk products; and maximum handling and transportation charges for milk sold and/or transferred between plants. (1941, c. 162, s. 3; 1951, c. 1133, s. 3.)

§ 106-263. Distribution of milk in classification higher than that in which purchased.

It shall be unlawful for any operator of a milk processing plant or any milk distributor, required to make reports under this Article, or their affiliates or subsidiaries, to sell, use, transfer, or distribute any milk in a classification higher than the classification in which it was purchased, except in an emergency declared and approved in writing by the local board of health having supervision of operators and distributors on such market for a period of two weeks, and such period may be extended if, in the opinion of the local board of health, an emergency still exists at the end of such two weeks' period. (1941, c. 162, s. 4.)

§ 106-264. Inspections and investigations by Commissioner.

For the purpose of administering this Article the Commissioner of Agriculture or his agent is hereby authorized to enter at all reasonable hours all places where milk is being stored, bottled, or processed, or where milk is being bought, sold, or handled, or where books, papers, records, or documents relating to such transactions are kept, and shall have the power to inspect and copy the same in any place within the State, and may take testimony for the purpose of ascertaining facts which in the judgment of the Commissioner are necessary to administer this Article. The Commissioner shall have the power to determine the truth and accuracy of said books, records, papers, documents, accounts, and reports required to be furnished by milk distributors, their affiliates or subsidiaries in accordance with the provisions of this Article. (1941, c. 162, s. 5.)

§ 106-265. Failure to file reports, etc., made unlawful.

It shall be unlawful for any person, firm or corporation engaged in the business herein regulated to fail to furnish the information and file the reports required by this Article, and each day's failure to furnish the reports required hereunder shall constitute a separate offense. (1941, c. 162, s. 6.)

§ 106-266. Violation made misdemeanor.

Any person, firm, or corporation violating any of the provisions of this Article and/or any rule, regulation or order promulgated in accordance with the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1941, c. 162, s. 7; 1951, c. 1133, s. 4; 1993, c. 539, s. 753; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 28A.

Regulation of Milk Brought into North Carolina from Other States.

§§ 106-266.1 through 106-266.5: Repealed by Session Laws 1979, c. 157, s. 1.

Article 28B.

Regulation of Production, Distribution, etc., of Milk and Cream.

§ 106-266.6. Definitions.

As used in this Article, unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

(1) "Affiliate" means any person and/or subsidiary thereof, who has, either directly or indirectly, actual control or legal control over a distributor, whether by stock ownership or any other manner.

(2) "Books and records" means books, records, accounts, contracts, memoranda, documents, papers, correspondence, or other data, pertaining to the business of the person in question.

(3) "Commission" means the North Carolina Milk Commission created by this Article.

(4) "Distributor" or "subdistributor" means any of the following persons engaged in the business of distributing, marketing, or in any manner handling fluid milk, in whole or in part, in fluid form for consumption in the State of North Carolina, but shall not mean any distributor who sells 25 gallons or less of milk per day which is produced on his own farm:

a. Persons, irrespective of whether any such person is a producer:

1. Who pasteurize or bottle milk or process milk into fluid milk;
2. Who sell and/or market fluid milk at wholesale or retail:
   I. To hotels, restaurants, stores or other establishments for consumption on the premises,
   II. To stores or other establishments for resale, or
   III. To consumers;
3. Who operate stores or other establishments for the sale of fluid milk at retail for consumption off the premises.

b. Persons wherever located or operating, whether within or without the State of North Carolina, who purchase, market or handle milk for resale as fluid milk in the State.

(5) "Health authorities" includes the Department of Health and Natural Resources, the Department of Environment and Natural Resources, the North Carolina Department of Agriculture and Consumer Services, the Commissioner of Agriculture, and the local health authorities.

(6) "Licensee" means a licensed milk distributor.

(7) "Market" means any city, town, or village of the State, or any two or more cities and/or towns and/or villages and surrounding territory designated by the Commission as a natural marketing area.

(8) "Milk" means the lacteal secretion obtained by the milking of one or more cows and reconstituted milk products derived from the recombining of dry milk solids, evaporated or condensed milk with water,

and which is pasteurized, standardized or otherwise processed with a view of selling it as fluid milk in its several forms, whether cultured or with added bacteria or other ingredients, regardless of grade or fat content, including whole milk, lowfat milk, cream, chocolate milk, plain buttermilk, cream buttermilk, skim milk, special or premium milk, flavored milk or drinks, concentrated milk, sterile milk, dietary modified milk, liquid milk shake mix, half and half, eggnog, other milk-cream mixtures and the milk portion of any imitation milk. Said term excludes the lacteal secretion of one or more dairy cows where the secretion is to be sold for any other purpose.

(9) "Person" means any person, firm, corporation or association.

(10) "Producer" means any person, irrespective of whether such person is a member of a producer association or a distributor, who operates to produce milk for sale as fluid milk in the State.

(11) "Sanitary regulations" includes all laws and ordinances relating to the production, handling, transportation, distribution and sale of milk and, so far as applicable thereto, the State Sanitary Code and lawful regulations adopted by the dairy and food divisions, or by the board of health of any county or municipality.

(12) "Subdistributor" as distinguished from a "distributor" means one who does not process milk but purchases its milk from a licensed distributor for distribution.

(13) "Subsidiary" means any person or officer over whom or which a distributor or an affiliate of a distributor has, or several distributors have either directly or indirectly, actual or legal control, whether by stock ownership or in any other manner. (1953, c. 1338, s. 1; 1971, c. 779, s. 1; 1973, c. 476, s. 128; 1977, c. 426, s. 1; 1989, c. 727, s. 219(32); 1997-261, s. 45; 1997-443, s. 11A.43.)

CASE NOTES

The Milk Commission has no regulatory authority except such as is conferred upon it by this Article. In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

No Conflict with Federal Law. — There is no conflict between the North Carolina Milk Commission law and regulations and the federal procurement statute, nor is there conflict with the Capper-Volstead Act. Southeast Milk Sales Ass'n v. Swaringen, 290 F. Supp. 292 (M.D.N.C. 1968), decided prior to the 1971 revision of this Article and subsequent amendments.

Regulations. — Control over the business of producing or dealing in milk and milk products is within the police power of the State, and reasonable regulation of the industry does not violate the constitutional right of equal protection. Southeast Milk Sales Ass'n v. Swaringen, 290 F. Supp. 292 (M.D.N.C. 1968), decided prior to the 1971 revision of this Article and subsequent amendments.

Applied in State ex rel. North Carolina Milk Comm'n v. National Food Stores, 270 N.C. 323, 154 S.E.2d 548 (1967); Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983).

Cited in Halsey v. Choate, 27 N.C. App. 49, 217 S.E.2d 740 (1975).

§ 106-266.7. Milk Commission continued; membership; chairman; compensation; quorum; cooperation of other agencies; official acts; meetings; principal office.

(a) There is hereby continued a Milk Commission of the Department of Commerce, consisting of 10 members, three of whom shall be appointed by the Governor, four of whom shall be appointed by the General Assembly in accordance with G.S. 120-121 (two upon the recommendation of the President Pro Tempore of the Senate and two upon the recommendation of the Speaker

of the House of Representatives) and three of whom shall be appointed by the Commissioner of Agriculture. Appointments by the General Assembly shall be in accordance with G.S. 120-121.

The three members appointed by the Governor shall be two public members and a person who operates a store or other establishment for the sale of fluid milk at retail for consumption off the premises. The two members appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall be a Grade A producer, who primarily markets with a cooperative plant and whose primary interest is operating a dairy farm, and a public member. The two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be a dairy processor-distributor or an employee of a dairy processor-distributor, who primarily operates a proprietary plant, and a public member. The three members appointed by the Commissioner of Agriculture shall be a dairy processor-distributor or an employee of a dairy processor-distributor who primarily operates a cooperative plant and a Grade A producer who primarily markets with a proprietary plant and whose primary interest is operating a dairy farm, and a public member.

The public members appointed pursuant to this subsection shall have no financial interest in, or be directly or indirectly involved in, the production, processing or distribution of milk or products derived therefrom.

Of the Commission members appointed following March 27, 1975, the Commissioner of Agriculture shall appoint three for a term ending June 30, 1976, the Governor shall appoint three for a term ending June 30, 1977, the General Assembly shall appoint upon the recommendation of the Speaker of the House of Representatives one for a term ending June 30, 1984 and one for a term ending June 30, 1985, and the General Assembly shall appoint upon the recommendation of the President of the Senate one for a term ending June 30, 1986, and one for a term ending June 30, 1987. Thereafter appointments of Commission members shall be made by the same appointing authorities for terms of four years, ending on June 30 of the appropriate year: provided that subsequent appointments by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for terms of two years, ending on June 30 of the appropriate year. Provided, however, that all members appointed pursuant to this subsection shall serve until either they are reappointed and requalified or their successors are appointed and qualified. Any member of the Milk Commission may be removed for physical or mental incapacity, or for misfeasance or nonfeasance. In cases of removal from the Commission, the removal must be initiated by the person holding the office that originally made the appointment of such member, and subsequent appointments to fill such vacancies will be made in the normally prescribed manner for the remainder of the unexpired term by the person holding the office that originally made the appointment. If the office that originally made the appointment is vacant, the successor to such office shall fill such vacancy. In case of death, resignation, disqualification, or other physical or mental incapacity which prevents a Commission member from performing his official duties prior to the expiration of his term of office, his successor shall be appointed as provided in this subsection to fill out the unexpired term. Notwithstanding the above, persons appointed by the General Assembly may be removed by the General Assembly, and vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122.

(b) At the first meeting of the Commission held after the effective date of this act, the Commission shall elect one of its members as its chairman to serve through June 30 of the next following year. Thereafter, at its first meeting held on or after July 1 of each year, the Commission shall elect one of its members to serve as chairman through June 30 of the next following year.

(c) The Commission is hereby authorized and empowered to employ an administrator and such other personnel, including but not limited to, the services of any agency or agencies, either inside or outside the State, as may be deemed necessary in assembling information on costs and other factors needed to carry out the provisions of this Article.

(d) Members of the Commission shall receive per diem and allowances as provided in G.S. 138-5.

(e) The compensation of the administrator shall be set according to law.

(f) All sums required for the operation of the Commission — salaries, per diem, and expenses — shall be paid out of special assessments collected from producers and distributors as set forth in G.S. 106-266.11.

(g) Six members of the Commission shall constitute a quorum.

(h) The Commission may call upon the Commissioner of Agriculture, the Director of Agricultural Research, the Director of the Agricultural Extension Service, or any other agency or department of the State for such information or services as such agency or department can provide, and such agency or department shall furnish such information or services, without compensation therefor, as in its opinion is practicable.

(i) The Commission shall, subject to the limitations herein contained and the rules and regulations of the Commission, enforce the provisions of this Article; but no official act shall be taken, rule or regulation be promulgated, or official order be made or enforced, with respect to the provisions of this Article without the due approval of the Commission.

(j) The Commission shall, by rule or otherwise, fix the time for holding regular meetings. The chairman, or any two members of the Commission, may at any time call a special meeting of the Commission. Such call shall designate the time and place of the meeting, and shall give not less than five days' written notice to each member by first-class mail to the address designated for said member on the records of the Commission. Notice of special meeting shall be signed by the person or persons calling the meeting and shall give a brief description of the business to be considered at said meeting. In addition, a special meeting of the Commission may be held at any time or place, either within or without the State, with the unanimous consent of all members of the Commission.

(k) The principal office of the Commission shall be in the City of Raleigh, North Carolina, in rooms assigned by the Department of Administration. (1953, c. 1338, s. 2; 1955, c. 406, ss. 2, 3; c. 1287, s. 1; 1965, c. 213; 1971, c. 779, s. 1; 1975, c. 78, ss. 1, 1.5, 2; 1983, c. 717, ss. 22, 93-98; 1995, c. 490, s. 35.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

State Government Reorganization. — The Milk Commission was transferred to the Department of Commerce by former § 143A-182, enacted by Session Laws 1971, c. 864. The Department of Commerce is now the Department of Economic and Community Development.

CASE NOTES

The purpose of the act creating the Milk Commission was to protect the public interest in a sufficient, regularly flowing supply of wholesome milk and, to that end, to provide a fair price to the milk producer for his product. State ex rel. North Carolina Milk Comm'n v. National Food Stores, 270 N.C. 323, 154 S.E.2d 548 (1967), decided prior to the 1971 revision of this Article and subsequent amendments.

Applied in Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983).

§ 106-266.8. Powers of Commission.

The Commission is hereby declared to be an instrumentality of the State of North Carolina, vested with power:

(1) To confer with the legally constituted authorities of other states of the United States, with a view of securing a uniformity of milk control, with respect to milk coming into the State of North Carolina and going out of the said State in interstate commerce, with a view of accomplishing the purpose of this Article, and to enter into a compact or compacts for such uniform system of milk control.

(2) To investigate all matters pertaining to the production, processing, storage, distribution, and sale of milk for consumption in the State of North Carolina.

(3) To supervise and regulate the transportation, processing, storage, distribution, delivery and sale of milk for consumption; provided that nothing in this Article shall be interpreted as giving the Commission any power to limit the quantity of milk that any producer can produce nor the power to prohibit or restrict the admission of new producers. To classify milk on the basis of use or form; to adopt or approve base plans for allocating classes of milk and to provide for the pooling on a market-wide or statewide plan the total utilization of licensed distributors, or may assign base and/or milk in order to obtain the highest utilization possible for producers and/or associations of producers supplying milk to the market; and the Commission may provide for an equalization payment in order that producer milk will not be paid for in a lower class through the recombining of water and milk constituents.

(4) To act as mediator or arbiter in any controversial issue that may arise among or between milk producers and distributors as between themselves, or that may arise between them as groups.

(5) To cause examination into the business, books, and accounts of any milk producer, association of producers or milk distributors, their affiliates or subsidiaries; to issue subpoenas to milk producers, associations of producers, and milk distributors, and require them to produce their records, books, and accounts; to subpoena any other person from whom information is desired.

(6) To take depositions of witnesses within or without the State. Any member of the Commission or any employee of the Commission, so designated, may administer oaths to witnesses and sign and issue subpoenas.

(7) To make, adopt, and enforce all rules, regulations and orders necessary to carry out the purposes of this Article. Every rule, regulation and order of the Commission shall be posted for inspection in the main office of the Commission. A certified copy of all general administrative rules and regulations or rules of practice and procedure shall be filed as required by Chapter 150B of the General Statutes, and a certified copy thereof shall likewise be mailed in a sealed envelope, with postage prepaid, to all licensed distributors and associations of producers in the State. Such filing and mailing shall constitute due and sufficient notice to all persons affected by such rule, regulation or order. A order which applies only to a person or persons named therein shall be served on the person or persons affected. An order, herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby, or in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served.

(8) The operation and effect of any provision of this Article conferring a general power upon the Commission shall not be impaired or qualified by the granting to the Commission by this Article of a specific power or powers.

(9) The Commission shall not exercise its power in any market until a public hearing has been held for such market, and the Commission determines that it will be to the public interest that it shall so exercise its power in such market. The Commission may, on its own motion, call such a hearing, and shall call such a hearing upon the written application of a producers' association organized under the laws of the State, supplying in the judgment of the Commission, a substantial proportion of the milk consumed in such market, but if no such producers' organization exists on said market, the Commission shall call such hearing upon the written application of producers supplying a substantial proportion of the milk consumed in said market; and shall call such hearing upon the written application of distributors, distributing a substantial proportion of the milk consumed in such market. Such hearing may be held at the time and place and after such notice as the Commission may determine.

The Commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the Commission determines that it will be to the public interest to withdraw the exercise of its powers from such market.

(10)a. The Commission may fix prices to be paid producers and/or associations of producers by distributors in any market or markets, and may also fix different prices for different grades or classes of milk. Notwithstanding the provisions of G.S. 150B-59(a), such rules shall become effective when approved by the Commission. The Commission shall file any rule with the Director of the Office of Administrative Hearings within two working days of its adoption by the Commission.

b. The Commission, after investigation and public hearing and finding as a fact that it is in the public interest, may fix the maximum and minimum wholesale and retail prices to be charged for milk in any market area by any person subject to this section and may fix different prices for different grades or classes of milk. The Commission may take into consideration the type of service rendered, the quantity delivered and the cost of the container.

c. Prices fixed under this subdivision (10) shall not become effective until 10 days after the mailing of notice of the action of the Commission. Prices fixed under b above shall remain in effect for at least 30 days and until the Commission finds it is in the public interest to remove said prices.

d. In determining the reasonableness of prices to be paid or charged in any market, the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operating, processing, storage and delivery charges, the prices of other foods and other commodities, and the welfare of the general public. The Commission may adopt a formula incorporating such of these economic factors as well as other pertinent economic factors relevant to the production of milk which will determine automatically the prices to be paid producers or associations of producers by distributors in any market or markets, and then provide for the periodic automatic readjustment of such prices according to the result obtained by the use of this formula. Public

hearings shall be held for adoption, or amendment of the formula itself, but shall not be required for price adjustments which are made based upon use of the formula.

e. In establishing producer prices for milk moving into other states, the Commission shall consider prevailing producer prices established by state or federal authority in such states.

(11) The Commission may require all distributors in any market designated by the Commission to be licensed by the Commission for the purpose of carrying out the provisions of this Article. One who purchases milk from a licensed distributor for the purpose of retail sales shall not be required to be licensed hereunder. The Commission may decline to grant a license, or may suspend or revoke a license already granted upon due notice and after a hearing, whenever said applicant or licensee shall have violated the regulations adopted by the Commission or failed to comply with the requirements of this Article 28B, or upon any of the following grounds:

a. Where the distributor has failed to account and make payment for any milk purchased or received on consignment or otherwise from a producer or association of producers, or has, if a subdistributor, failed to account and make payment for any milk purchased or received on consignment or otherwise from a distributor; provided, however, that it be shown there was reasonable cause for any such failure to account and make payment, and that such accounting and payment can and will be made promptly, the Commission shall not suspend or revoke a license solely for such failure until a reasonable opportunity has been afforded to make such accounting and payment.

b. Where the applicant or distributor has made a general assignment for the benefit of creditors, or has been adjudged a bankrupt or there has been entered against him a judgment upon which an execution remains wholly or partly unsatisfied, or where it is shown that the applicant or distributor has insufficient financial responsibility, personnel or equipment properly to conduct the milk business.

c. Where the applicant or distributor has engaged in a course of action such as to satisfy the Commission of an intent on his part to deceive or defraud customers, producers or consumers.

d. Where the applicant or distributor has failed to maintain such records as are required by the rules and regulations of the Commission or has failed to furnish the statements or information required by the Commission under this Article 28B or has kept false records or furnished false statements with respect to such information.

e. Where the applicant or distributor has rejected, without reasonable cause, any milk purchased from a producer, or has refused to accept, without either reasonable cause or reasonable advance notice, milk delivered by or on behalf of a producer in ordinary continuance of a previous course of dealing, except when the contract has been lawfully terminated.

In any case where the Commission shall suspend a license, the Commission may, in its discretion, accept from the licensee an offer in compromise of not less than fifty dollars ($50.00) and not more than five thousand dollars ($5,000) as a penalty in lieu of such suspension, and thereupon rescind the suspension. All receipts from such penalties shall be paid by the Commission to the State Treasurer for disposition in the same manner as assessments, as provided by G.S.

106-266.12. The Commission may classify licenses, and may issue licenses to distributors to process or store or sell milk to a particular city or village or to a market or markets within the State of North Carolina.

(12) Any member of the Commission, or any person designated for the purpose, shall have access to, and may enter at all reasonable hours, all places where milk is processed, stored, bottled or manufactured into food products. Any member of the Commission or designated employee shall have the power to inspect and copy books and records in any place within the State for the purpose of ascertaining facts to enable the Commission to administer this Article. The Commission may combine such information for any market or markets and make it public.

(13) The Commission may define after a public hearing what shall constitute a natural-market area and define and fix limits of the milk shed or territorial area within which milk shall be produced to supply any such market area: Provided, that producers, producer-distributors or their successors now shipping milk to any market may continue to do so until they voluntarily discontinue shipping to the designated milk market.

(14) Each licensee shall from time to time, as required by the Commission, submit verified reports containing such information as the Commission may require. (1953, c. 1338, s. 3; 1955, c. 1287, s. 2; 1959, c. 1292; 1963, c. 797, ss. 1-3; 1965, c. 936, s. 1; 1971, c. 779, s. 1; 1973, c. 811; c. 1331, s. 3; 1975, c. 69, s. 4; 1977, c. 426, ss. 2, 3; c. 629; 1987, c. 285, s. 18; c. 827, s. 23.)

Editor's Note. — Section 150B-59(a), referred to in subsection (10)a, was repealed by Session Laws 1991, c. 418, § 5, effective October 1, 1991.

Legal Periodicals. — For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1971 revision of this Article and subsequent amendments.*

Constitutionality. — That part of subdivision (3) conferring upon the Commission power to require a distributor of milk, reconstituted from milk powder produced in another state, to make "equalization" payments for the benefit of North Carolina milk producers, with whom it has no dealings, violates N.C. Const., Art. I, § 19, and the commerce clause of the U.S. Constitution. In re Arcadia Dairy Farms, Inc., 43 N.C. App. 459, 259 S.E.2d 368 (1979), appeal dismissed, 299 N.C. 328, 265 S.E.2d 393 (1980).

Former Provisions Held Constitutional. — See State ex rel. North Carolina Milk Comm'n v. Galloway, 249 N.C. 658, 107 S.E.2d 631 (1959).

Regulation of Milk Prices. — The Commission was established as a state agency to protect the interest of the public in a regularly flowing supply of wholesome milk and is authorized, for that purpose, and that purpose only, to regulate, under proper circumstances and to a proper degree, the price of milk. State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

U.S. Const., Amend. XIV does not forbid a state to confer upon an administrative agency the power to fix minimum and maximum retail prices to be charged for the sale of milk in grocery stores to consumers for the purpose of assuring the steady flow of an adequate supply of clean, wholesome milk from the producing farms to the consumer. State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

Regulation and Fixing of Transportation Rates. — See State ex rel. North Carolina Milk Comm'n v. Galloway, 249 N.C. 658, 107 S.E.2d 631 (1959).

An order of the Milk Commission pursuant to this section prescribing a uniform hauling charge per cwt. upon all producers delivering milk to a certain distributor, regardless of the distance or route, is not arbitrary or discriminatory and is relevant to the legislative purpose of the Milk Commission Act. It does not deny a producer the equal protection of the laws or

deprive him of property without due process of law, even though he is subject under the regulation to a higher charge than he was under a former system, and does not violate former N.C. Const., Art. I, §§ 17 and 37 (see now N.C. Const., Art. I, §§ 19 and 29), nor U.S. Const., Amend. XIV. State ex rel. North Carolina Milk Comm'n v. Galloway, 249 N.C. 658, 107 S.E.2d 631 (1959).

Neither N.C. Const., Art. I, § 32, nor N.C. Const., Art. I, § 19, forbids the legislature of this State to confer upon the Milk Commission authority to fix a uniform rate for the transportation of milk from the farm to the processing plant so as to enable the producers of milk to secure a fair price for their product. State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

Regulation of Competition Among Retail Grocery Stores Not Intended. — The Milk Commission was not established as an agency to regulate competition among retail grocery stores per se. State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

Sections of Milk Marketing Order Held Constitutional. — Sections IV-A-1, IV-B-2, IV-C-1, IV-C-2, IV-E-1A, V-C-2, and V-C-4 of Milk Marketing Order Number Two of the North Carolina Milk Commission were held not to constitute a burden on interstate commerce, conflict with federal regulation of interstate commerce as provided in the Capper-Volstead Act, deny equal protection of the law and due process of law, or impair the obligations of contract. Southeast Milk Sales Ass'n v. Swaringen, 290 F. Supp. 292 (M.D.N.C. 1968).

Applied in State ex rel. North Carolina Milk Comm'n v. Pet, Inc., 68 N.C. App. 701, 315 S.E.2d 529 (1984); Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983).

Cited in Biltmore Co. v. Hawthorne, 32 N.C. App. 733, 233 S.E.2d 606 (1977).

§ 106-266.9. Distributors to be licensed; prices and practices of distributors regulated.

No distributor in a market in which the provisions of this Article are in effect shall buy milk from producers, or others, for sale within the State, or sell or distribute milk within the State, unless such distributor is duly licensed under the provisions of this Article. It shall be unlawful for a distributor to buy from or sell milk to a distributor who is not licensed as required by this Article. It shall be unlawful for any distributor to deal in, or handle milk if such distributor has reason to believe that the milk has been previously dealt in, or handled, in violation of the terms and provisions of this Article. No distributor shall violate the prices as established by or filed with the Commission or offer any discounts or rebates without authority from the Commission; and the Commission may prohibit such practices as it may deem to be contrary to the welfare of the public and the dairy industry, such as the use of special prices or special inducements in any form or any unfair trade practices in order to vary from the established prices. The Commission may require each distributor to file with the Commission one complete schedule of his wholesale and retail prices for each marketing area and may require each distributor to charge his posted prices for all sales and to give 10 days' notice by certified mail to the Commission and every licensed distributor in each marketing area affected prior to the effective date of any changes in said posted prices. The requirements as to filing price schedules shall not apply to retail stores the principal business of which is selling other than dairy products and which do not maintain or control directly or indirectly a milk processing plant. The Commission may prohibit a distributor from selling or offering for sale milk in any market or county at prices less than the prices filed for the market or county in which such distributor's processing or bottling plant is located, except in such cases as such sales may be made at a lower price or prices in good faith to meet competition. (1953, c. 1338, s. 4; 1955, c. 406, s. 4; 1963, c. 797, ss. 2, 4, 4½; 1971, c. 779, s. 1.)

CASE NOTES

Cited in In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

§ 106-266.10. Licenses for distributors and subdistributors.

An application to the Commission for a license to operate as a distributor or subdistributor shall be made by mail or otherwise within 30 days after the provisions of this Article become effective in a market, and as to any distributor or subdistributor thereafter beginning business, before such distributor or subdistributor shall begin such business therein. The application shall be made on blanks furnished by the Commission for that purpose. Each distributor shall cooperate with the Commission in seeing to it that its subdistributors are informed concerning, and comply with, the provisions of this Article and the rules and regulations duly adopted by the Commission. (1953, c. 1338, s. 5; 1971, c. 779, s. 1.)

§ 106-266.11. Annual budget of Commission; collection of monthly assessments.

The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the distributors in the form of monthly assessments. The assessment so levied shall be fixed at a rate per hundredweight on the volume of all milk handled. The rate set shall not exceed one-half of one percent (½%) of the Statewide blend price paid to all North Carolina producers during the previous calendar year for three and one-half percent (3.5%) milk as computed by the North Carolina Milk Commission. One half of any such assessment shall be deducted from funds owed to a producer or any association of producers. (1953, c. 1338, s. 6; 1971, c. 779, s. 1; 1983 (Reg. Sess., 1984), c. 1062, s. 4.)

§ 106-266.12. Milk Commission Account; deductions by distributor from funds owed to producer.

All receipts from assessments collected under this Article shall be paid by the Commission to the State Treasurer and shall be placed by the State Treasurer in a general fund to the credit of an account to be known as the "Milk Commission Account" and such an amount as may be necessary, and no more, is hereby appropriated out of this Milk Commission Account, for the payment of all expenses incurred by the Commission in administering and enforcing this Article. The Commission shall require a distributor to make such deductions from funds owed to a producer as authorized by the producer. (1953, c. 1338, s. 7; 1971, c. 779, s. 1.)

§ 106-266.13. Injunctive relief.

In the event of violation of any provisions of this Article, or order promulgated under the provisions thereof, in addition to any other remedy, the Commission may apply to any court of record in the State of North Carolina for relief by injunction, if necessary, to protect the public interest without being compelled to allege or prove that any adequate remedy at law does not exist. (1953, c. 1338, s. 10; 1971, c. 779, s. 1.)

CASE NOTES

Applied in State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967).

§ 106-266.14. Penalties.

Any person violating any provisions of this Article, or order promulgated under the provisions thereof, or of any license issued by the Commission shall be guilty of a Class 1 misdemeanor, and each day during which such violation shall continue shall be deemed a separate violation. Prosecutions for violations of this Article shall be instituted by the Attorney General or otherwise, in any county or city of the State of North Carolina in which such violations occur. (1953, c. 1338, s. 11; 1971, c. 779, s. 1; 1993, c. 539, s. 754; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Stated in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 106-266.15. Judicial review.

Judicial review of the following may be had under Chapter 150B of the General Statutes:

(1) A rule, order, or regulation adopted by the Commission under this Article.

(2) A decision of the Commission under this Article to deny, suspend, revoke, or refuse to transfer or reissue a license.

(3) An order of the Commission under this Article to fix or amend the price or terms upon which milk may be bought or sold. (1953, c. 1338, s. 12; 1969, c. 44, s. 67; 1971, c. 779, s. 1; 1973, c. 1331, s. 3; 1987, c. 827, s. 24.)

CASE NOTES

Right of Appeal and Hearing De Novo. — A person aggrieved by a decision of the Commission in North Carolina has a right of appeal and to be heard de novo in the superior court. Southeast Milk Sales Ass'n v. Swaringen, 290 F. Supp. 292 (M.D.N.C. 1968), decided prior to the 1971 revision of this Article and subsequent amendments.

A sedulous protection against abuse of power by the Milk Commission is provided in this section, which requires that when an appeal is taken from an order of the Milk Commission, the proceeding shall be heard de novo in the superior court. State ex rel. North Carolina Milk Comm'n v. Galloway, 249 N.C. 658, 107 S.E.2d 631 (1959), decided prior to the 1971 revision of this Article and subsequent amendments.

Applied in State ex rel. North Carolina Milk Comm'n v. Pet, Inc., 68 N.C. App. 701, 315 S.E.2d 529 (1984).

Cited in Arcadia Dairy Farms, Inc. v. North Carolina Milk Comm'n, 289 N.C. 472, 223 S.E.2d 333 (1976).

§ 106-266.16. Saving clause.

No provisions of this Article shall apply or be construed to apply to foreign or interstate commerce, except insofar as the same may be effective pursuant to the United States Constitution and to the laws of the United States enacted pursuant thereto. (1953, c. 1338, s. 13; 1971, c. 779, s. 1.)

§ 106-266.17. Marketing agreements not to be deemed illegal or in restraint of trade; conflicting laws.

The making of marketing agreements between producers' cooperative marketing associations and distributors and producer-distributors under the provisions of this Article shall not be deemed a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition or fix prices arbitrarily nor shall the marketing contract or agreements between the association and the distributors and producer-distributors, or any agreements authorized in this Article, be considered illegal or in restraint of trade. All laws and clauses of laws in conflict with the provisions of this Article are hereby repealed to the extent necessary for the full operation of this Article. No provisions of this Article shall be deemed in conflict with Articles 28 and 28A of Chapter 106 of the General Statutes. No provisions of this Article shall be deemed in conflict with the authority granted to local boards of health by G.S. 130-19, 130-20, 130-66, to make and enforce rules and regulations governing milk sanitation or with the authority granted to the Department of Health and Human Services by G.S. 130-3 to make sanitary inquiries and investigations. (1953, c. 1338, s. 14; 1971, c. 779, s. 1; 1973, c. 476, s. 128; 1997-443, s. 11A.118(a); 1997-502, s. 7.)

Editor's Note. — Sections 130-3, 130-19, 130-20, and 130-66, referred to in this section, have been repealed. As to county and district boards of health, see now § 130A-34 et seq.

§ 106-266.18. Limitations upon power of Commission.

Nothing in this Article shall be interpreted as giving the Commission any power to limit the quantity of milk that any producer can produce, nor the power to prohibit or restrict the admission of new producers, nor the power to restrict the marketing area of any producer, except as provided in G.S. 106-266.8(3). (1953, c. 1338, s. 14½; 1971, c. 779, s. 1; 1977, c. 426, s. 4.)

§ 106-266.19. Sale below cost to injure or destroy competition prohibited.

The sale of milk by any distributor or producer-distributor or retailer below cost for the purpose of injuring, harassing or destroying competition is hereby prohibited; and the offering for sale of milk by a retailer at below-cost prices to induce the public to patronize his store, or what is commonly known in the trade as using milk as a "loss leader" is also hereby prohibited. However, milk may be sold below cost to meet competition if notice has been sent to the Commission by registered or certified mail identifying the competitor or competitors. At any hearing or trial on a complaint under this section, evidence of sale of milk by a distributor or subdistributor or retailer below cost shall constitute prima facie evidence of the violation or violations alleged, and the burden of rebutting the prima facie case thus made, by showing that the same was justified in that it was not, in fact, made below cost or that it was not for the purpose of injuring, harassing or destroying competition, or that it was sold below cost to meet competition after notice has been sent to the Commission by registered or certified mail identifying the competitor or competitors, or that it was not used as a "loss leader" or to induce the public to patronize his store, shall be upon the person charged with a violation of this section. As used herein the term "cost" for a distributor or producer-distributor shall be construed to mean the price paid for Grade A or Class I milk in the area where such sale is made plus a reasonable allocation of processing and marketing expenses. For a retailer the term "cost" shall be construed to mean the wholesale invoice price

paid for Grade A or Class I milk in the area where such sale is made, provided, however, in determining whether any sale has been made in violation of this section, the Commission shall consider all discounts, rebates, gratuities or any other matters which may have the effect of either directly or indirectly reducing the price paid by the retailer involved. The prima facie case of a violation of this section, made by proof of sale below cost, may be rebutted by proof of any of the following facts:

(1) The merchandise was damaged, or
(2) The milk was sold upon the final liquidation of a business, or
(3) The milk was sold to an organized charity or to a relief agency, or
(4) The milk was sold by an officer acting under the direction of any court. (1955, c. 406, s. 1; 1959, c. 1021; 1965, c. 936, s. 2; 1971, c. 779, s. 1; 1975, c. 815.)

Legal Periodicals. — For comment on this section, particularly as to its constitutionality, see 33 N.C.L. Rev. 524 (1955).

For an article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Constitutionality. — The provisions of this section making proof of the sale of milk by a retailer below cost prima facie evidence of a purpose to injure, harass or destroy competition in the marketing of milk held not beyond the constitutional power of the legislature. State ex rel. North Carolina Milk Comm'n v. National Food Stores, Inc., 270 N.C. 323, 154 S.E.2d 548 (1967), decided prior to the 1971 revision of this Article and subsequent amendments.

Applied in Flav-O-Rich, Inc. v. North Carolina Milk Comm'n, 593 F. Supp. 13 (E.D.N.C. 1983).

Cited in Coble Dairy Prods. Coop. v. State ex rel. North Carolina Milk Comm'n, 58 N.C. App. 213, 292 S.E.2d 750 (1982).

OPINIONS OF ATTORNEY GENERAL

Offering for sale of milk by a retailer at below-cost prices, as a loss leader, must be for the purpose of inducing the public to patronize his store in order to be violative of the statute. Opinion of Attorney General to Mr. Grady Cooper, Jr., N.C. Milk Commission, 44 N.C.A.G. 169 (1974).

§§ 106-266.20, 106-266.21: Repealed by Session Laws 1971, c. 779, s. 1.

ARTICLE 29.

Inspection, Grading and Testing Milk and Dairy Products.

§ 106-267. Inspection, grading and testing dairy products; authority of State Board of Agriculture.

The State Board of Agriculture shall have full power to make and promulgate rules and regulations for the Department of Agriculture and Consumer Services in its inspection and control of the purchase and sale of milk and other dairy products in North Carolina; to make and establish definitions, not inconsistent with the laws pertaining thereto; to qualify and determine the grade and contents of milk and of other dairy products sold in this State; to regulate the manner of testing the same and the handling, treatment and sale of milk and dairy products, to require processors of fortified milk and milk products to pay all costs for assays of vitamin-fortified products, to provide for the issuance of permits upon compliance with this Article and the rules and

regulations promulgated thereunder and to promulgate such other rules and regulations not inconsistent with the law as may be necessary in connection with the authority hereby given to the Commissioner of Agriculture on this subject. (1933, c. 550, ss. 1-3; 1951, c. 1121, s. 1; 1981, c. 338; c. 495, s. 5; 1997-261, s. 109.)

CASE NOTES

Cited in In re Arcadia Dairy Farms, Inc., 289 N.C. 456, 223 S.E.2d 323 (1976).

§ 106-267.1. License required; fee; term of license; examination required.

Every person who shall test milk or cream in this State by, or sample milk for, the Babcock method or otherwise for the purpose of determining the percentage of butterfat or milk fat contained therein, where such milk or cream is bought and paid for on the basis of the amount of butterfat contained therein, shall first obtain a license from the Commissioner of Agriculture. Any person applying for such license or renewal of license shall make written and signed application on blanks to be furnished by the Commissioner of Agriculture. The granting of a license shall be conditioned upon the passing by the applicant of an examination, to be conducted by or under the direction of the Commissioner of Agriculture. All licenses so issued or renewed shall expire on December 31 of each year, unless sooner revoked, as provided in G.S. 106-267.3. A license fee of five dollars ($5.00) for each license so granted or renewed shall be paid to the Commissioner of Agriculture by the applicant before any license is granted. (1951, c. 1121, s. 1; 1959, c. 707, s. 5; 1989, c. 544, s. 14.)

§ 106-267.2. Rules and regulations.

The Commissioner of Agriculture shall establish and promulgate rules and regulations not inconsistent with this Article that shall govern the granting of licenses under this Article and shall establish and promulgate rules and regulations not inconsistent with this Article that shall govern the manner of testing, including, but not in limitation thereof, the taking of samples, location where the testing of said samples shall be made and the length of time samples of milk or cream shall be held after testing. (1951, c. 1121, s. 1.)

§ 106-267.3. Revocation of license; hearing.

The Commissioner of Agriculture shall have power to revoke any license granted under the provisions of this Article, upon good and sufficient evidence that the provisions of this Article or the rules and regulations of the Commissioner of Agriculture are not being complied with: Provided, that before any license shall be revoked, an opportunity shall be granted the licensee, upon being confronted with the evidence, to show cause why such license should not be revoked. (1951, c. 1121, s. 1.)

§ 106-267.4. Representative average sample; misdemeanor, what deemed.

In taking samples of milk or cream from any milk can, cream can or any container of milk or cream, the contents of such milk can, cream can, or container of milk and cream shall first be thoroughly mixed either by stirring

or otherwise, and the sample shall be taken immediately after mixing or by any other method which gives a representative average sample of the contents, and it is hereby made a Class 2 misdemeanor to take samples by any method or to fraudulently manipulate such samples so as not to give an accurate and representative average sample where milk or cream is bought or sold and where the value of said milk or cream is determined by the butterfat contained therein. (1951, c. 1121, s. 1; 1993, c. 539, s. 755; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-267.5. Standard Babcock testing glassware; scales and weights.

In the use of the Babcock test all persons shall use the "standard Babcock testing glassware, scales, and weights." The term "standard Babcock testing glassware, scales and weights" shall apply to glassware, scales and weights. It shall be unlawful for any person, firm, company, association, corporation or agent thereof to falsely manipulate, underread or overread the Babcock test or any other contrivance used for determining the quality of value of milk or cream where the value of said milk or cream is determined by the percentage of butterfat contained in the same or to make a false determination by the Babcock test or otherwise, or to falsify the record of such test or to pay on the basis of any test, measurement or weight except the true test, measurement or weight. (1951, c. 1121, s. 1.)

§ 106-268. Definitions; enforcement of Article.

(a) The definitions set forth in this section shall apply to milk, dairy products, ice cream, frozen desserts, frozen confections or any other products which purport to be milk, dairy products or frozen desserts for which a definition and standard of identity has been established and when any of such products heretofore enumerated shall be sold, offered for sale or held with intent to sell by a milk producer, manufacturer or distributor, and insofar as practicable and applicable, the definitions contained in Article 12 of Chapter 106 of the General Statutes, as amended, shall be effective as to the products enumerated in this Article and section.

(b) The term "adulteration" means:

(1) Failure to meet definitions and standards as established by the Board of Agriculture.

(2) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(3) If any substance has been substituted wholly or in part thereof.

(4) If it is adjudged to be unfit for human consumption.

(c) The term "misbranded" means:

(1) If its labeling is false or misleading in any particular.

(2) If it is offered for sale under the name of another dairy product or frozen dessert.

(3) If it is sold in package form unless it bears a prominent label containing the name of the defined product, name and address of the producer, processor or distributor and carries an accurate statement of the quantity of contents in terms of weight or measure.

(d) The Department of Agriculture and Consumer Services, through its agents or inspectors, shall have free access during business hours to all places of business, buildings, vehicles, cars, storage places, containers and vessels used in the production, testing, processing and distribution of milk, cream, butter, cheese, ice cream, frozen dessert or any dairy product for which standards of purity and of identity have been established, as well as any substance which purports to be milk, dairy products, frozen dessert or

confection for which a definition and standard of purity has been established; the Department acting through its duly authorized agents and inspectors, may open any box, carton, parcel, package or container holding or containing, or supposed to hold or contain any of the above-enumerated dairy products, as well as related products, and may take therefrom samples for analysis, test or inspection. If it appears that any of the provisions of this Article or of this section have been violated, or whenever a duly authorized agent of the Department has cause to believe that any milk, cream, butter, cheese, ice cream, frozen dessert or any dairy product for which standards of purity and of identity have been established or any substance which purports to be milk, a dairy product or a frozen dessert for which a definition and standard of identity has been established, is adulterated or misbranded or by reason of contamination with microorganisms has become deleterious to health during production, processing or distribution, and such products, or any of them, are in a stage of production, or are being exposed for sale, or are being held for processing or distribution or such products are being held with intent to sell the same, such agent or inspector is hereby authorized to issue a "stop-sale" order which shall prohibit further sale of any of the products above enumerated or which shall prohibit further processing, production or distribution of any of the products above enumerated. The agent or inspector shall affix to such product a tag or other appropriate marking giving notice that such product is, or is suspected of, being adulterated, misbranded or contaminated and that the same has been detained or embargoed, and warning all persons not to remove or dispose of such product, by sale or otherwise, until permission for removal or disposal is given by such agent or inspector, until the law or regulation has been complied with or said violation has otherwise been legally disposed of. It shall be unlawful for any person to remove or dispose of any embargoed product, by sale or otherwise, without such permission: Provided, that if such adulteration or misbranding can be corrected by proper labeling or processing of the products so that the products meet the definitions and standards of purity and identity, then with the approval of such agent or inspector, sale and removal may be made. Any milk, dairy products or any of the products enumerated in this Article or section not in compliance with this Article or section shall be subject to seizure upon complaint of the Commissioner of Agriculture, or any of the agents or inspectors of the Department of Agriculture and Consumer Services, to a court of competent jurisdiction in the area in which said products are located. In the event the court finds said products, or any of them, to be in violation of this Article or of this section, the court may order the condemnation of said products, and the same shall be disposed of in any manner consistent with the rules and regulations of the Board of Agriculture and the laws of the State and in such a manner as to minimize any loss or damage as far as possible: Provided, that in no instance shall the disposition of said products be ordered by the court without first giving the claimant or owner of same an opportunity to apply to the court for the release of said products or for permission to again process or relabel the same so as to bring the product in compliance with this Article or section. In the event any "stop-sale" order shall be issued under the provisions of this Article or section, the agents, inspectors or representatives of the Department of Agriculture and Consumer Services shall release the products, or any of them, so withdrawn from sale when the requirements of the provisions of this Article and section have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (1951, c. 1121, s. 1; 1997-456, s. 27; 1997-261, s. 46.)

Editor's Note. — The four undesignated paragraphs in this section were renumbered as subsections (a) through (d) pursuant to Session Laws 1997-456, s. 27, which authorized the

Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

§ 106-268.1. Penalties.

Any person, firm or corporation violating any of the provisions of this Article, or any of the rules, regulations or standards promulgated hereunder, shall be deemed guilty of a Class 2 misdemeanor. (1951, c. 1121, s. 1; 1993, c. 539, s. 756; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 30.

Board of Crop Seed Improvement.

§ 106-269. Creation and purpose.

There is hereby created a Board of Crop Seed Improvement. It shall be the duty and function of this Board, in cooperation with the Agricultural Experiment Station of North Carolina State College of Agriculture and Engineering, and the Seed Testing Division of the North Carolina Department of Agriculture and Consumer Services, to foster and promote the development and distribution of pure strains of crop seeds among the farmers of North Carolina. (1929, c. 325, s. 1; 1955, c. 330, s. 1; 1997-261, s. 109.)

Cross References. — For designation of North Carolina State College of Agriculture and Engineering as North Carolina State University at Raleigh, see § 116-2.

§ 106-270. Board membership.

The Board of Crop Seed Improvement shall consist of the Commissioner of Agriculture, the Dean of the School of Agriculture, President of the North Carolina Foundation Seed Producers Incorporated, and the Director of Research of the School of Agriculture of North Carolina State College of Agriculture and Engineering, the Head of the Seed Testing Division of the North Carolina Department of Agriculture and Consumer Services, and the President of the North Carolina Crop Improvement Association. (1929, c. 325, s. 2; 1955, c. 330, s. 2; 1997-261, s. 109.)

Cross References. — For designation of North Carolina State College of Agriculture and Engineering as North Carolina State University at Raleigh, see § 116-2.

§ 106-271. Powers of Board.

The said Board shall have control, management and supervision of the production, distribution and certification of purebred crop seeds under the provisions of this Article. (1929, c. 325, s. 3.)

§ 106-272. Cooperation of other departments with Board; rules and regulations.

Insofar as any of the State departments or agencies shall have to do with the testing, development, production, certification and distribution of farm crop seeds, such departments or agencies shall actively cooperate with the said Board in carrying out the purposes of this Article. The said Board shall have authority to make, establish and promulgate all needful rules and regulations, for certification necessary for the proper exercise of the duties conferred upon

said Board and for the carrying out the full purposes of this Article. (1929, c. 325, s. 4; 1983, c. 800, ss. 1, 2.)

§ 106-273. North Carolina Crop Improvement Association.

For the purpose of carrying out more fully the provisions of this Article and of fostering the development, certification and distribution of pure seeds the said Board shall have authority to promote the organization and incorporation of an association of farmers to be known as the North Carolina Crop Improvement Association, which said Association when so organized and incorporated shall, subject to the rules and regulations prescribed by said Board, adopt all necessary rules and regulations and collect from their members such fees as shall be necessary for the proper functioning of such organizations. (1929, c. 325, s. 5.)

State Government Reorganization. — The Board of Crop Seed Improvement was transferred to the Department of Agriculture by § 143A-64, enacted by Session Laws 1971, c. 864.

§ 106-274. Certification of crop seeds.

For the purposes of this Article the certification of seed, tubers, plants, or plant parts hereunder shall be defined as being produced, conditioned, and distributed under the rules and regulations for certification. (1929, c. 325, s. 6; 1983, c. 800, s. 3.)

§ 106-275. False certification of purebred crop seeds made misdemeanor.

It shall be a Class 1 misdemeanor for any person, firm, association, or corporation, selling seeds, tubers, plants, or plant parts in North Carolina, to use any evidence of certification, such as a blue tag or the word "certified" or both, on any package of seed, tubers, plants, or plant parts, nor shall the word "certified" be used in any advertisement of seeds, tubers, plants, or plant parts, unless such commodities used for plant propagation shall have been duly inspected and certified by the agency of certification provided for in this Article, or by a similar legally constituted agency of another state or foreign country. (1933, c. 340, s. 1; 1993, c. 539, s. 757; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-276. Supervision of certification of crop seeds.

Certification of crop seeds shall be subject to the supervision of the Board of Crop Seed Improvement. The North Carolina Crop Improvement Association is recognized as the official agency for seed certification. (1929, c. 325, s. 7; 1955, c. 330, s. 3.)

Article 31.

North Carolina Seed Law.

§ 106-277. Purpose.

The purpose of this Article is to regulate the labeling, possessing for sale, sale and offering or exposing for sale or otherwise providing for planting purposes of agricultural seeds, vegetable seeds and screenings; to prevent

misrepresentation thereof; and for other purposes. (1963, c. 1182; 1987 (Reg. Sess., 1988), c. 1034, s. 1.)

Legal Periodicals. — For article, "Damages and Problems of Proof with Planted Nonconforming Seeds," see 9 Campbell L. Rev. 63 (1986).

CASE NOTES

Protective Purpose of Article. — This Article has declared the policy of North Carolina to be one of protecting the farmer from the disastrous consequences of planting seed of one kind, believing he is planting another, and from the consequences of the sale and delivery to farmers of seed falsely labeled. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

This Article is not limited in its purpose or scope to the protection of the purchaser from fraud by the immediate vendor. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

The North Carolina Seed Law is aimed at protecting farmers by strict labeling, quality control inspections and branding regulations. The seed law has no effect on a nonconflicting disclaimer which governs activity beyond its scope. Billings v. Joseph Harris Co., 27 N.C. App. 689, 220 S.E.2d 361 (1975), aff'd, 290 N.C. 502, 226 S.E.2d 321 (1976).

This Article is not a safety statute; therefore, evidence of a violation of it is not necessarily evidence of negligence. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

Applied in Gore v. George J. Ball, Inc., 10 N.C. App. 310, 178 S.E.2d 237 (1971).

§ 106-277.1. Short title.

This Article shall be known by the short title of "The North Carolina Seed Law of 1963." (1941, c. 114, s. 1; 1945, c. 828; 1949, c. 725; 1963, c. 1182.)

§ 106-277.2. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) The term "advertisement" means all representations, other than those required on the label, disseminated in any manner or by any means, relating to seed within the scope of this Article.

(2) The term "agricultural seeds" shall include the seed of grass, forage, cereal, fiber crops and any other kinds of seeds commonly recognized within this State as agricultural or field seeds, lawn seeds and mixtures of such seeds, and may include noxious-weed seeds when the Commissioner determines that such seed is being used as agricultural seed.

(2a) — (2e) Reserved.

(2f) The term "blend" means a mechanical combination of varieties identified by a blend designation in which each component variety is equal to or above the minimum standard germination for its class; which is always present in the same percentage in each lot identified by the same "blend" designation; and for which research data supports an advantage of the "blend" over the singular use of either component variety. "Blend" designations shall be treated as variety names.

(3) The term "Board" means the North Carolina Board of Agriculture as established under G.S. 106-2.

(3a) Reserved.

(3b) The term "brand" means an identifying numeral, letter, word, or any combination of these, used with the word "brand" to designate source of seeds.

(3c) The term "buyer" means a person who buys agricultural or vegetable seed for the purpose of planting and growing the seed.

(4) The terms "certified seeds," "registered seeds" or "foundation seeds" mean seed that has been produced and labeled in accordance with the

procedures and in compliance with the requirements of an official seed-certifying agency.

(5) The term "clone" means all the individuals derived by vegetative propagation from a single, original individual.

(6) The term "code designation" means a series of numbers or letters approved by the United States Department of Agriculture and used in lieu of the full name and address of the person who labels seeds, as required in this Article in G.S. 106-277.5(10).

(7) The term "Commissioner" means the Commissioner of Agriculture of North Carolina or his designated agent or agents.

(8) The term "date of test" means the month and year the percentage of germination appearing on the label was obtained by laboratory test.

(9) The term "dealer" or "vendor" shall mean any person, not classified as a grower, who buys, sells or offers for sale any seed for seeding purposes and shall include any person who has seed grown under contract for resale for seeding purposes.

(9a) The term "Department" means the Department of Agriculture and Consumer Services as established in G.S. 106-2.

(9b) The term "distribute" means to provide seed for seeding purposes to more than five persons, but shall not include seed provided for educational purposes.

(10) The term "germination" means the percentages by count of seeds under consideration, determined to be capable of producing normal seedlings in a given period of time and under normal conditions.

(11) The term "grower" shall mean any person who produces seed, directly as a landlord, tenant, sharecropper or lessee, which are offered or exposed for sale.

(12) The term "hard seeds" means seeds which, because of hardness or impermeability, do not absorb moisture and germinate but remain hard during the normal period of germination.

(13) The term "hybrid" means the first generation seed of a cross produced by controlling cross-fertilization within prescribed limits and combining (i) two or more inbred lines or clones, or (ii) one or more inbred lines or clones with an open-pollinated variety, or (iii) two or more varieties or species, clonal or otherwise, except open-pollinated varieties of normally cross-fertilized species. The second-generation or subsequent-generation seed from such crosses shall not be designated as hybrids. Hybrid designations shall be treated as variety names. The Board of Agriculture shall prescribe minimum limits of pollination control (percent hybridity) for each hybridized species which will qualify to be labeled "hybrid".

(14) The term "inbred line" means a relatively stable and pure breeding strain resulting from not less than four successive generations of controlled self-pollination or four successive generations of backcrossing in the case of male sterile lines or their genetic equivalent.

(15) The term "in bulk" refers to loose seed in bins, or open containers, and not to seed in bags or packets.

(16) The term "inert matter" means all matter not seeds, including broken seeds, sterile florets, chaff, fungus bodies, stones and other substances found not to be seed when examined according to procedures prescribed by rules and regulations promulgated pursuant to the provisions of this Article.

(17) The term "kind" means one or more related species or subspecies which singly or collectively is known by one common name, for example, corn, wheat, striate lespedeza, alfalfa, tall fescue.

(18) The term "labeling" includes all labels and other written, printed or graphic representations in any manner whatsoever accompanying and pertaining to any seed whether in bulk or in containers and includes representations on invoices.

(19) The term "lot" means a definite quantity of seed, identified by a lot number or other identification, which shall be uniform throughout for the factors which appear on the label.

(20) The term "mixture" means seeds consisting of more than one kind or kind and variety, each present in excess of five per centum (5%) of the whole.

(21) The term "North Carolina seed analysis tag" shall mean the tag designed and prescribed by the Commissioner as the official North Carolina seed analysis tag, said tag to be purchased from the Commissioner.

(22) "Noxious-weed seeds" shall be divided into two classes:

a. "Prohibited noxious-weed seeds" are the seeds of weeds which, when established on the land, are highly destructive and are not controlled in this State by cultural practices commonly used, and shall include any crop seed found to be harmful when fed to poultry or livestock.

b. "Restricted noxious-weed seeds" are the seeds of weeds which are very objectionable in fields, lawns and gardens in this State and are difficult to control by cultural practices commonly used.

(23) The term "official certifying agency" means

a. An agency authorized under the laws of a state, territory, or possession to officially certify seed which has standards and procedures approved by the U.S. Secretary of Agriculture to assure the genetic purity and identity of the seed certified, or

b. An agency of a foreign country determined by the U.S. Secretary of Agriculture to adhere to procedures and standards for seed certification comparable to those adhered to generally by seed certifying agencies under a.

(24) The term "origin" means the state, District of Columbia, Puerto Rico, possession of the United States or the foreign country where the seed was grown.

(25) The term "other crop seeds" means seeds of kinds or varieties of agricultural or vegetable crops other than those shown on the label as the primary kind or kind and variety.

(26) The term "person" shall include any individual, partnership, corporation, company, society or association.

(27) The term "processing" means cleaning, scarifying or blending to obtain uniform quality and other operations which would change the purity or germination of the seed and therefore require retesting to determine the quality of the seed, but does not include operations such as packaging, labeling, blending together of uniform lots of the same kind or kind and variety without cleaning, or preparation of a mixture without cleaning, any of which would not require retesting to determine the quality of the seed.

(28) The term "pure seed" means agricultural or vegetable seeds, exclusive of inert matter, weed seeds and all other seeds distinguishable from the kind or kind and variety being considered when examined according to procedures prescribed by rules and regulations promulgated pursuant to the provisions of this Article.

(29) The term "purity" means the name or names of the kind, type or variety and the percentage or percentages thereof, the percentage of other crop seed; the percentage of weed seeds, including noxious-weed

seeds; the percentage of inert matter; and the name and rate of occurrence of each noxious-weed seed.

(30) The terms "recognized variety name" and "recognized hybrid designation" mean the name or designation which was first assigned the variety or hybrid by the person who developed it or the person who first introduced it for production or sale after legal acquisition. Such terms shall be used only to designate the varieties or hybrids to which they were first assigned.

(31) The term "screenings" includes seed, inert matter and other materials removed from agricultural or vegetable seed by cleaning or processing.

(32) The term "seed offered for sale" means any seed or grain, whether in bags, packets, bins or other containers, exposed in salesrooms, storerooms, warehouses or other places where seed is sold or delivered for seeding purposes, and shall be subject to the provisions of the seed law, unless clearly labeled "not for sale as seed."

(33) The term "seizure" means a legal process carried out by court order against a definite amount of seed.

(34) The term "stop-sale" means an administrative order provided by law restraining the sale, use, disposition and movement of a definite amount of seed.

(35) The term "treated" means given an application of a substance or subjected to a process designed to reduce, control or repel disease organisms, insects or other pests which attack seeds or seedlings growing therefrom, or to improve the planting value of the seed.

(36) The term "variety" means a subdivision of a kind characterized by growth, plant, fruit, seed or other constant characteristics by which it can be differentiated in successive generations from other sorts of the same kind; for example, Knox Wheat, Kobe Striate Lespedeza, Ranger Alfalfa, Kentucky 31 Tall Fescue.

(37) The term "vegetable seeds" shall include the seeds of those crops which are grown in gardens or on truck farms and are generally known and sold under the name of vegetable seed in this State.

(38) The term "weed seeds" means the seeds, bulblets or tubers of all plants generally recognized as weeds within this State or which may be classified as weed seed by regulations promulgated under this Article.

(39) The term "wholesaler" shall mean a dealer engaged in the business of selling seed to retailers or jobbers as well as to consumers.

(40), (41) Repealed by Session Laws 1998, c. 210, s. 1. (1941, c. 114, s. 3; 1943, c. 203, s. 1; 1945, c. 828; 1949, c. 725; 1953, c. 856, ss. 1-3; 1963, c. 1182; 1971, c. 637, s. 1; 1987 (Reg. Sess., 1988), c. 1034, ss. 2-4; 1998-210, s. 1.)

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, and applicable to agricultural and vegetable seed purchased on or after that date, redesignated former subdivision (40) as present subdivision (2a), redesignated former subdivision (41) as present subdivision (3b), and added subdivision (3c); added present subdivision (9a), and redesignated former subdivision (9a) as present subdivision (9b); and made stylistic changes.

CASE NOTES

Quoted in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.3. Label or tag requirements generally.

Each container of agricultural and vegetable seeds which is sold, offered or exposed for sale, or transported within or into this State for seeding purposes shall bear thereon or have attached thereto in a conspicuous place a plainly written or printed label or tag in the English language giving the information required under G.S. 106-277.4 through 106-277.7, which information shall not be modified or denied in the labeling or on another label attached to the container. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725; 1959, c. 585, s. 1; 1963, c. 1182.)

Editor's Note. — Section 106-277.4, referred to in this section, was repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1034, s. 5.

CASE NOTES

Indictment for Sale of Improperly Labeled Seed. — An indictment under this section charging the sale or offering for sale of seed not labeled in accordance with § 106-277.3 should allege the person to whom defendant sold or offered to sell seed not properly labeled, or that the purchaser was in fact unknown, the particulars in which the label failed to meet the statutory requirements, and where and how the seed was exposed to sale. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

An indictment under this section charging that defendant sold or offered for sale tobacco seed having a false or misleading label should allege the person to whom the seed was sold or offered for sale or that the purchaser was in fact unknown, and the intent to defraud. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.4: Repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1034, s. 5.

§ 106-277.5. Labels for agricultural seeds.

Agricultural seeds sold, offered or exposed for sale, transported for sale, or otherwise distributed within this State shall be labeled to show the following information:

(1) The commonly accepted name of the kind and the variety, or kind and the phrase "variety not stated" for each agricultural seed component, in excess of five percent (5%) of the whole, and the percentage by weight of each in order of its predominance. The Board of Agriculture may, pursuant to G.S. 106-277.15, require the variety to be stated on the labeling for certain kinds of agricultural seed, and the phrase "variety not stated" shall not be used on the labeling of such seed. When more than one component is required to be named, the word "mixture" or the word "mixed" shall be shown conspicuously on the label. Second generation from hybrid seeds, if sold, shall be labeled "second generation (of the parent), variety not stated." "F" designations on labels, unless used as a part of a variety name, will refer only to size and shape of corn seeds.
(2) Lot number or other lot identification.
(3) Net weight.
(4) Origin, if known. If the origin is unknown, the fact shall be stated.
(5) Percentage by weight of inert matter.
(6) Percentage by weight of agricultural seeds and/or vegetable seeds (which shall be designated as "other crop seeds") other than those named on the label. Different varieties of the same kind of seed, when in quantities of less than five percent (5%) will be considered as other crop seed.

(7) Percentage by weight of all weed seeds, including noxious-weed seeds.
(8) For each named agricultural seed:
a. Percentage of germination, exclusive of hard seed.
b. Percentage of hard seeds, if present.
c. The calendar month and year the test was completed to determine such percentages.
In addition to the individual percentage statement of germination and hard seed, the total percentage of germination and hard seed may be stated as such, if desired.
(9) The name and number per pound of each kind of restricted noxious-weed seed present.
(10) Name and address of person who labeled said seed or who sells, offers or exposes said seed for sale within this State. If the seeds are labeled by the shipper for a consignee within this State, the shipper may use his approved code designation with the name and address of the consignee.
(11) Such other information as the Board shall prescribe by rule. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725; 1959, c. 585, s. 1; 1963, c. 1182; 1971, c. 637, s. 3; 1987 (Reg. Sess., 1988), c. 1034, s. 6; 1995, c. 47, s. 1.)

§ 106-277.6. Labels for vegetable seeds in containers of one pound or less.

Labels for vegetable seeds in containers of one pound or less shall show the following information:
(1) Name of kind and variety of seed.
(2) Origin, for pepper seed in containers of one ounce or more. If unknown, so stated.
(3) The year for which the seed is packed, provided the words "packed for" shall precede the year, or the percentage of germination, month and year tested.
(4) For seeds which germinate less than the standards last established by the Commissioner and approved by the Board of Agriculture under the Article:
a. Percentage of germination, exclusive of hard seed.
b. Percentage of hard seed, if present.
c. The calendar month and year the test was completed to determine such percentage.
In addition to the individual percentage statement of germination and hard seed, the total percentage of germination and hard seed may be stated as such, if desired.
d. The words "Below Standard" in not less than eight-point type.
(5) Name and address of person who labeled said seed or who sells, offers or exposes said seed for sale within this State. If the seeds are labeled by the shipper for a consignee within this State, the shipper may use his approved code designation with the name and address of the consignee.
(6) Such other information as the Board shall prescribe by rule. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725; 1959, c. 585, s. 1; 1963, c. 1182; 1971, c. 637, s. 4; 1995, c. 47, s. 2.)

CASE NOTES

Cited in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.7. Labels for vegetable seeds in containers of more than one pound.

Vegetable seeds in containers of more than one pound shall be labeled to show the following information:

(1) The name of each kind and variety present in excess of five percent (5%) and the percentage by weight of each in order of its predominance.

(2) Lot number or other lot identification.

(3) Origin, for snap bean and pepper seed only. If unknown, so stated.

(4) For each named vegetable seed:

a. The percentage of germination exclusive of hard seed.

b. The percentage of hard seed, if present.

c. The calendar month and year the test was completed to determine such percentages.

In addition to the individual percentage statement of germination and hard seed, the total percentage of germination and hard seed may be stated as such, if desired.

(5) Net weight, except when in bulk as defined in this Article.

(6) Name and address of persons who labeled said seed or who sells, offers or exposes said seed for sale within this State. If the seeds are labeled by the shipper for a consignee within this State, the shipper may use his approved code designation with the name and address of the consignee.

(7) No tag or label shall be required, unless requested, on seeds sold directly to and in the presence of the purchaser and taken from a bag or container properly labeled.

(8) Such other information as the Board shall prescribe by rule. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725; 1959, c. 585, s. 1; 1963, c. 1182; 1971, c. 637, s. 5; 1995, c. 47, s. 3.)

CASE NOTES

Stated in Central Carolina Farmers, Inc. v. Hilliard, 54 N.C. App. 418, 283 S.E.2d 558 (1981).

§ 106-277.8. Responsibility for presence of labels.

(a) The immediate vendor of any lot of seed which is sold, offered or exposed for sale shall be responsible for the presence of the labels required to be attached to any lots of seed whether he is offering for sale or selling seed which bears labels of a previous vendor, with or without endorsement, or bears his own label.

(b) The labeler of any original or unbroken lot of seed shall be responsible for the presence of and the information on all labels attached to said lot of seed at the time he sells or offers for sale such lot of seed. (1963, c. 1182.)

CASE NOTES

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971); Central Carolina Farmers, Inc. v. Hilliard, 54 N.C. App. 418, 283 S.E.2d 558 (1981).

§ 106-277.9. Prohibitions.

It shall be unlawful for any person:

(1) To transport, to offer for transportation, to sell, distribute, offer for sale or expose for sale within this State agricultural or vegetable seeds for seeding purposes:

a. Unless a seed license has been obtained in accordance with the provisions of this Article.

b. Unless the test to determine the percentage of germination required by G.S. 106-277.5 through 106-277.7 shall have been completed within a nine-month period, exclusive of the calendar month in which the test was completed, immediately prior to sale, exposure for sale, or offering for sale or transportation; provided, the North Carolina Board of Agriculture may adopt after a public hearing, following public notice, rules and regulations to designate a longer period for any kind of agricultural or vegetable seed which is packaged in such container materials (hermetically sealed), and under such other conditions prescribed, that will, during such longer period, maintain the viability of said seed under ordinary conditions of handling.

c. Not labeled in accordance with the provisions of this Article or having a false or misleading labeling or claim.

d. Pertaining to which there has been a false or misleading advertisement.

e. Consisting of or containing prohibited noxious-weed seeds.

f. Containing restricted noxious-weed seeds, except as prescribed by rules and regulations promulgated under this Article.

g. Containing weed seeds in excess of two percent (2%) by weight unless otherwise provided in rules and regulations promulgated under this Article.

h. That have been treated and not labeled as required in this Article, or treated and not conspicuously colored.

i. Pepper seed in containers holding one ounce or more of seed, unless treated in accordance with a procedure approved by the North Carolina Commissioner of Agriculture and labeled to reflect the procedure used.

j. To which there is affixed names or terms that create a misleading impression as to the kind, kind and variety, history, productivity, quality or origin of the seeds.

k. Represented to be certified, registered or foundation seed unless it has been produced, processed and labeled in accordance with the procedures and in compliance with rules and regulations of an officially recognized certifying agency.

l. Represented to be a hybrid unless such seed conforms to the definition of a hybrid as defined in this Article.

m. Unless it conforms to the definition of a "lot."

n. Any variety, hybrid or blend of seeds not recorded with the Commissioner as required under rules and regulations promulgated pursuant to this Article.

o. Seed of any variety or hybrid that has been found by official variety tests to be inferior, misrepresented or unsuited to conditions within the State. The Commissioner may prohibit the sale or distribution of such seed by and with the advice of the director of research of the North Carolina agricultural experiment station.

p. Using a designation on seed tag in lieu of the full name and address of the person who labels or tags seed unless such designation qualifies as a code designation under this Article.

q. By variety name seed not certified by an official seed-certifying agency when it is a variety for which a certificate of plant variety protection under the Plant Variety Protection Act specifies sale only as a class of certified seed; provided, that seed from a certified lot may be labeled as to variety name when used in a mixture by, or with the approval of, the owner of the variety.

r. That employ a brand name on the label unless a variety or mixture of varieties is labeled as required in this Article. If a brand name other than a registered trademark is used, it must be a separate statement from the variety name or the statement of a mixture, or blend, of genetic variations.

s. Labeled as a "blend" unless the lot complies with the definition of "blend" in G.S. 106-277.2, and is registered with the Commissioner, as may be required in G.S. 106-277.9(1)n. Other mechanical combinations of varieties shall be labeled as a mixture according to the requirements in G.S. 106-277.5(1).

(2) To transport, offer for transportation, sell, offer for sale or expose for sale seeds, whole grain and screenings not for seeding purposes unless labeled "not for seeding purposes."

(3) To detach, alter, deface or destroy any label provided for in this Article or the rules and regulations promulgated thereunder, or to alter or substitute seed in any manner that defeats the purposes of this Article.

(4) To disseminate false or misleading advertisement in any manner concerning agricultural seeds, vegetable seeds or screenings.

(5) To hinder or obstruct in any manner an authorized agent of the Commissioner in the performance of his lawful duties.

(6) To fail to comply with or to supply inaccurate information in reply to a stop-sale order; or to remove tags attached to or to remove or dispose of seed or screenings held under a stop-sale order unless authorized by the Commissioner.

(7) To use the name of the Department of Agriculture and Consumer Services or the results of tests and inspections made by the Department for advertising purposes.

(8) To use the words "type" or "trace" in lieu of information required by G.S. 106-277.4 through 106-277.7.

(9) To label and offer for sale seed under the scope of this Article without keeping complete records as specified in G.S. 106-277.12. (1941, c. 114, s. 5; 1943, c. 203, s. 3; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 4; 1957, c. 263, s. 2; 1959, c. 585, s. 2; 1963, c. 1182; 1971, c. 637, s. 6; 1987 (Reg. Sess., 1988), c. 1034, ss. 7-9; 1997-261, s. 47.)

Editor's Note. — Section 106-277.4, referred to in this section, was repealed by Session Laws 1987 (Reg. Sess., 1988), c. 1034, s. 5.

Legal Periodicals. — For note on strict liability for breach of warranty, see 50 N.C.L. Rev. 697 (1972).

CASE NOTES

Indictment for Sale of Improperly Labeled Seed. — An indictment under this section charging the sale or offering for sale of seed not labeled in accordance with § 106-277.3 should allege the person to whom defendant sold or offered to sell seed not properly labeled, or that the purchaser was in fact unknown, the particulars in which the label failed to meet the statutory requirements, and where and how the seed was exposed to sale. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

An indictment under this section charging that defendant sold or offered for sale tobacco seed having a false or misleading label should allege the person to whom the seed was sold or offered for sale or that the purchaser was in fact unknown, and the intent to defraud. State v. Bissette, 250 N.C. 514, 108 S.E.2d 858 (1959).

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.10. Exemptions.

(a) When the required analysis and other information regarding the seed is present on a seedman's label or tag which bears an official North Carolina seed stamp or is accompanied by the North Carolina seed analysis tag on which is written, stamped or printed the words "See Attached Tag for Seed Analysis," the provisions of G.S. 106-277.5 through 106-277.7 shall be deemed to have been complied with.

(b) The official tag or label of the North Carolina Crop Improvement Association shall be considered an "official North Carolina seed analysis tag" when attached to containers of seed duly certified by the said Association or when it refers to an accompanying tag which carries the same information required in G.S. 106-277.5 to 106-277.7 and when fees applicable to the North Carolina seed analysis tag have been paid to the Commissioner.

(c) The label requirements for peanuts, cotton and tobacco seed may be limited to:

(1) Lot number or other identification.
(2) Origin, if known. If unknown, so stated.
(3) Commonly accepted name of kind and variety.
(4) Name and number per pound of noxious-weed seeds.
(5) Percentage of germination with month and year of tests.
(6) Name and address of person who labeled said seed or who sells, offers, or exposes said seed for sale.

(d) The provisions of G.S. 106-277.3 through 106-277.7 do not apply:

(1) To seed or grain sold or represented to be sold for purposes other than for seeding provided that said seed is labeled "not for seeding purposes" and that the vendor shall make it unmistakably clear to the purchaser of such seed or grain that it is not for seeding purposes.
(2) To seed for processing when consigned to, being transported to or stored in an approved processing establishment, provided that the invoice or labeling accompanying said seed bears the statement "seed for processing" and provided further that other labeling or representation which may be made with respect to the uncleaned or unprocessed seed shall be subject to this Article.
(3) To seed sold by a farmer grower to a seed dealer or processor, or to seed in storage in or consigned to a seed-cleaning or processing plant; provided that any labeling or other representation which may be made with respect to the uncleaned or unprocessed seed shall be subject to this Article.
(4) To any carrier in respect to any seed or screenings transported or delivered for transportation in the ordinary course of its business as a carrier; provided that such carrier is not engaged in producing, processing or marketing agricultural or vegetable seeds or screenings subject to provisions of this Article.

(e) No person shall be subject to the penalties of this Article for having sold, offered or exposed for sale in this State any agricultural or vegetable seeds which were incorrectly labeled or represented as to origin, kind or variety when such seeds cannot be identified by examination thereof unless such person has failed to obtain an invoice or grower's declaration giving origin, kind and variety or to take such other precautions as may be necessary to insure the identity to be that stated. (1941, c. 114, s. 4; 1943, c. 203, s. 2; 1945, c. 828; 1949, c. 725; 1959, c. 585, s. 1; 1963, c. 1182.)

CASE NOTES

Exemptions under this section are to be strictly construed. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

Exemption Does Not Apply to Breach of Contract. — Exemptions from the penalties imposed by this Article are not intended to absolve the vendor from liability to the purchaser for breach of contract. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

Mislabeled Seed. — The failure of a seed company to notify a customer, after receiving complaints from other customers that tomato seeds delivered to the customer were mislabeled, did not constitute negligence where the evidence disclosed that the defendant kept no records of the particular source of seed used to fill a given order, there being no duty to maintain such records, and defendant being unable to notify the customer in the absence of such data. Gore v. George J. Ball, Inc., 10 N.C. App. 310, 178 S.E.2d 237 (1971).

§ 106-277.11. Disclaimers, nonwarranties and limited warranties.

The use of a disclaimer, nonwarranty or limited warranty clause in any invoice, advertising [or] written, printed or graphic matter pertaining to any seed shall not constitute a defense, or be used as a defense in any way, in any prosecution or in any proceedings for confiscation of seeds brought under the provisions of this Article or rules and regulations made and promulgated thereunder. (1945, c. 828; 1949, c. 725; 1963, c. 1182.)

CASE NOTES

Effect of Warranty Limitation. — The provision of this section barring a defense based on a warranty limitation clause in any prosecution or in any proceedings for confiscation of seeds, does not have any bearing upon any other effect of such disclaimer or limitation clause. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

Warranty Limitation Does Not Bar Recovery of Full Damages. — The phrase, "to the extent of the purchase price," used in a limitation of warranty, relied on by the seller of mislabeled seed, is contrary to the public policy of this State as declared in this Article and is invalid. Such a provision, even if it otherwise be deemed a part of the contract of sale, does not bar the buyer from a recovery of the full damages which he would otherwise be entitled to recover for the breach of the contract by the seller. Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.12. Records.

All persons transporting or delivering for transportation, selling, offering or exposing for sale agricultural or vegetable seeds if their name appears on the label shall keep for a period of two years a file sample and a complete record of such seed, including invoices showing lot number, kind and variety, origin, germination, purity, treatment, and the labeling of each lot. The Commissioner or his duly authorized agents shall have the right to inspect such records in connection with the administration of this Article at any time during customary business hours. (1945, c. 828; 1949, c. 725; 1963, c. 1182.)

§ 106-277.13. Tolerances to be established and used in enforcement.

Due to variations which may occur between the analyses or tests and likewise between label statements and the results of subsequent analyses and tests, recognized tolerances shall be employed in the enforcement of the provisions of this Article, except as otherwise established by appropriate rules and regulations promulgated under authority of this Article. (1963, c. 1182.)

§ 106-277.14. Administration.

The duty of enforcing this Article and its rules and regulations and carrying out its provisions and requirements shall be vested in the Commissioner of Agriculture. (1963, c. 1182.)

§ 106-277.15. Rules, regulations and standards.

The Board of Agriculture, in accordance with the Administrative Procedure Act, may adopt such rules, regulations and standards which they may find to be advisable or necessary to carry out and enforce the purposes and provisions of this Article, which shall have the force and effect of law. The Board of Agriculture shall adopt rules, regulations and standards as follows:

(1) Prescribing the methods of sampling, inspecting, analyzing, testing and examining agricultural and vegetable seed, and determining the tolerance to be followed in the administration of this Article.
(2) Declaring a list of prohibited and restricted noxious weeds, conforming with the definitions stated in this Article, and to add to or subtract therefrom, from time to time, after a public hearing following due public notice.
(3) Declaring the maximum percentage of total weed seed content permitted in agricultural seed.
(4) Declaring the maximum number of "restricted" noxious-weed seeds per pound of agricultural seed permitted to be sold, offered or exposed for sale.
(5) Declaring the minimum percentage of germination permitted for sale as "Agricultural Seeds."
(6) Declaring germination standards for vegetable seeds.
(7) Prescribing the form and use of tags or stamps to be used in labeling seed.
(8) Prescribing such other rules and regulations as may be necessary to secure the efficient enforcement of this Article.
(9) Establishing fees and charges for agricultural and vegetable seed testing and analysis.
(10) Prescribing minimum hybrid percentage for labeling for each species hybridized.
(11) Prescribing labeling and coloring requirements for treated seed.
(12) Establishing a Tobacco Seed Committee which shall approve flue-cured tobacco varieties prior to registration with the Department.
(13) Prescribing labeling requirements for agricultural and vegetable seed. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182; 1981, c. 495, s. 6; 1987 (Reg. Sess., 1988), c. 1034, s. 10; 1995, c. 47, s. 4.)

§ 106-277.16. Seed-testing facilities.

The Commissioner is authorized to establish and maintain or make provision for seed-testing facilities, to employ educationally qualified persons, to make or provide for making purity and germination tests of seeds, upon request, for farmers or seedsmen, and to prescribe rules and regulations governing such testing, and to incur such expenses as may be necessary to comply with these provisions. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.17. Registration and variety testing.

The Commissioner is authorized to require the registration, after field testing for performance and trueness-to-variety, of any variety, blend, or hybrid

as a prerequisite to sale in this State and to promulgate rules and regulations pertaining to same. The Commissioner is further authorized to prohibit the sale of any variety, blend, or hybrid or any kind of crop, by and with the advice of the Director of the North Carolina Agricultural Research Service, that has been found by official field tests to be inferior, misrepresented or unsuited to conditions within the State. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182; 1987 (Reg. Sess., 1988), c. 1034, ss. 11, 12; 1989, c. 770, s. 24.)

§ 106-277.18. Registration and licensing of dealers.

It shall be the duty of the Commissioner and he is hereby authorized to require each seed dealer selling, offering or exposing for sale in, or exporting from, this State any agricultural or vegetable seeds for seeding purposes, including packet or package seeds, to register with the Commissioner and to obtain a license annually. (1941, c. 114, s. 7; 1945, c. 828; 1947, c. 928; 1949, c. 725; 1963, c. 1182.)

§ 106-277.19. Revocation or refusal of license for cause; hearing; appeal.

The Commissioner is authorized to revoke any seed license issued, or to refuse to issue a seed license to any person as hereinafter provided, upon satisfactory proof that said person has repeatedly violated any of the provisions of this Article or any of the rules and regulations made and promulgated thereunder; provided that no license shall be revoked or refused until the person shall have first been given an opportunity to appear at a hearing before the Commissioner. Any person who is refused a license, or whose license is revoked by any order of the Commissioner, may appeal within 30 days from said order to the Superior Court of Wake County or the superior court of the county of his residence. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.20. Right of entry for purposes of inspection; duty of vendors.

For the purpose of carrying out this Article the Commissioner or his agent is authorized to enter upon any public or private premises during regular business hours in order to have access to seeds subject to this Article and the rules and regulations thereunder. It shall be the duty of the dealer or vendor to arrange seed lots so as to be accessible for inspection, and to provide such information and records as may be deemed necessary. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.21. Sampling, inspecting and testing; notice of violations.

It shall be the duty of the Commissioner, who may act through his authorized agents, to sample, inspect, make analysis of and test agricultural and vegetable seeds transported, held in storage, sold, offered or exposed for sale within this State for sowing purposes at such time and place and to such extent as he may deem necessary to determine whether said seeds are in compliance with the provisions of this Article, and to notify promptly the person or persons who transported, had in his possession, sold, offered or

exposed the seeds for sale of any violation. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.22. Stop-sale orders; penalty covering expenses; appeal.

The Commissioner is authorized to issue and enforce a written or printed "stop-sale" order to the owner or custodian of any lot of agricultural or vegetable seeds which the Commissioner, or his authorized agent, finds is in violation of any of the provisions of this Article or the rules and regulations promulgated thereunder, which order shall prohibit further sale or movement of such seed until such officer has evidence that the law has been complied with and a written release has been issued to the owner or custodian of said seed by the enforcement officer. Any person violating the labeling requirements of the law shall be subject to a penalty covering all costs and expenses incurred in connection with the withdrawal from sale and the release of said seed. With respect to seeds which have been denied sale as provided in this section, the owner, custodian or the person labeling such seeds shall have the right to appeal from such order to the superior court of the county in which the seeds are found, praying for judgment as to the justification of said order and for discharge of such seed from the order prohibiting the same in accordance with the findings of the court; and provided, further, that the provisions of this section shall not be construed as limiting the right of the enforcement officer to proceed as authorized by other sections of this Article. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

CASE NOTES

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.23. Notice of violations; hearings, prosecutions or warnings.

It shall be the duty of the Commissioner to give notice of every violation of the provisions of this Article with respect to agricultural or vegetable seeds, mixtures of such seeds, or screenings to the person in whose hands such seeds or screenings are found, and to send copies of such notice to the shipper of such seed or screenings and to the person whose "analysis tag or label" is attached to the container of such seeds or screenings, in which notice he may designate a time and place for a hearing. The person or persons involved shall have the right to introduce evidence either in person or by agent or attorney. If, after hearing, or without such hearing in the event the person fails or refuses to appeal, the Commissioner is of the opinion that the evidence warrants prosecution he may institute proceedings in a court of competent jurisdiction in the locality which the violation occurred or, if he believes the public interest will be adequately served thereby, he may direct to the alleged violator a suitable written notice or warning. (1941, c. 114, s. 8; 1945, c. 828; 1949, c. 725; 1963, c. 1182.)

§ 106-277.24. Penalty for violations.

Any person, firm or corporation violating any provision of this Article or any rule or regulation adopted pursuant thereto shall be guilty of a Class 3 misdemeanor and upon conviction thereof shall only pay a fine of not more

than five hundred dollars ($500.00). (1941, c. 114, s. 8; 1945, c. 828; 1949, c. 725; 1963, c. 1182; 1993, c. 539, s. 758; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.25. Seizure and disposition of seeds violating Article.

Any lot of agricultural or vegetable seeds, mixtures of such seeds or screenings being sold, exposed for sale, offered for sale or held with intent to sell in this State contrary to the provisions of this Article shall be subject to seizure on complaint of the Commissioner to the resident judge of the superior court in the county in which the seeds, mixtures of such seeds or screenings are located. In the event the court finds the seeds or screenings to be in violation of the provisions of this Article and orders the condemnation thereof, such seeds or screenings shall be denatured, processed, destroyed, relabeled, or otherwise disposed of in compliance with the laws of this State; provided that in no instance shall such disposition be ordered by the court without first having given the claimant an opportunity to apply to the court for the release of the seeds, mixtures of such seeds or screenings with permission to process or relabel to bring them into compliance with the provisions of this Article. (1945, c. 828; 1949, c. 725; 1963, c. 1182.)

CASE NOTES

Stated in Gore v. George J. Ball, Inc., 279 N.C. 192, 182 S.E.2d 389 (1971).

§ 106-277.26. Publication of test results and other information.

The Commissioner is authorized to publish the results of analyses, tests, examinations, studies and investigations made as authorized by this Article, together with any other information he may deem advisable. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.27. Cooperation with United States Department of Agriculture.

The Commissioner is authorized to cooperate with the United States Department of Agriculture in seed law enforcement and testing seed for trueness as to kind and variety. (1941, c. 114, s. 6; 1943, c. 203, s. 4; 1945, c. 828; 1949, c. 725; 1953, c. 856, s. 5; 1957, c. 263, s. 3; 1963, c. 1182.)

§ 106-277.28. License and inspection fees.

For the purpose of providing a fund to defray the expense of inspection, examination, and analysis of seeds and the enforcement of this Article:

(1) Repealed by Session Laws 1991, c. 588, s. 1.

(2) Each seed dealer who offers for sale any agricultural, vegetable, or lawn or turf seeds for seeding purposes shall register with the Commissioner and shall obtain an annual license, for each location

where activities are conducted, by January 1 of each year and shall pay the following license fee:

a. Wholesale or combined wholesale and retail seed dealer $100.00
b. Retail seed dealer with sales of no more than $500.00 ..... 5.00
c. Retail seed dealer with sales of more than $500.00 but no more than $1,000 ..... 15.00
d. Retail seed dealer with sales of more than $1,000 ..... 25.00.

(3) Each seed dealer or grower who has seed, whether originated or labeled by the dealer or grower, that is offered for sale in this State shall report the quantity of seed offered for sale and pay an inspection fee of two cents (2¢) for each container of seeds weighing 10 pounds or more. Seed shall be subject to the inspection fee and reporting requirements only once in any 12-month period. This fee does not apply to seed grown by a farmer and offered for sale by the farmer at the farm where the seed was grown.

Each seed dealer or grower shall keep accurate records of the quantity of seeds and container weights offered for sale from each distribution point in the State. These records shall be available to the Commissioner or an authorized representative of the Commissioner at any and all reasonable hours for the purpose of verifying the quantity of seed offered for sale and the fees paid. Each seed dealer or grower shall report quarterly on forms furnished by the Commissioner the quantity and container weight of seeds first offered for sale that quarter. The reports shall be made on the first day of January, April, July, and October, or within 10 days thereafter. Inspection fees shall be due and paid with the next quarterly report filed after the seed is first offered for sale. If the report is not filed and the inspection fees paid to the Department of Agriculture and Consumer Services by the tenth day following the date due, or if the report of the quantity or container weights is false, the Commissioner may issue a stop-sale order for all seed offered for sale by the dealer or grower. If the inspection fees are unpaid more than 15 days after the due date, the amount due shall bear a penalty of ten percent (10%) which shall be added to the inspection fees due. (1941, c. 114, s. 7; 1945, c. 828; 1947, c. 928; 1949, c. 725; 1963, c. 1182; 1969, c. 105; 1987 (Reg. Sess., 1988), c. 1034, s. 13; 1989, c. 37, s. 8; 1991, c. 98, s. 1; c. 588, s. 1; 1995, c. 47, s. 5; 1997-261, s. 48.)

§ 106-277.29: Repealed by Session Laws 1998-210, s. 2, effective January 1, 1999.

§ 106-277.30. Filing complaint; investigation; referral to Seed Board.

(a) Complaint by Buyer. — When a buyer believes that he or she has suffered damages due to the failure of agricultural or vegetable seed to produce or perform as labeled or as warranted, or as the result of negligence, the buyer may make a sworn complaint against the dealer from whom the seeds were purchased, alleging the damages sustained or to be sustained, and file the complaint with the Commissioner within such time as to permit inspection of the seed, crops, or plants. The buyer shall send a copy of the complaint to the dealer by registered or certified mail. A filing fee of one hundred dollars ($100.00) shall be paid to the Department with each complaint filed. This fee may be used by the Commissioner to offset the expenses of the Seed Board incurred under G.S. 106-277.32. Within 10 days after receipt of a copy of the

complaint, the dealer may file an answer to the complaint and, in that event, shall send a copy to the buyer by registered or certified mail.

(b) Investigation Requested by Dealer. — Any dealer who has received notice, either orally or in writing, that a buyer believes that he or she has suffered damage due to the failure of agricultural or vegetable seed sold by the dealer to perform as labeled or as warranted, or as a result of negligence, may request an investigation by the Seed Board pursuant to G.S. 106-277.32. A filing fee of one hundred dollars ($100.00) shall be paid to the Department by the party requesting the investigation. The dealer shall send a copy of the request to the buyer by registered or certified mail. The buyer may file a response to the request with the Commissioner within 10 days of receipt of the request for an investigation.

(c) Referral to Seed Board. — The Commissioner shall refer the complaint or request for investigation to the Seed Board to investigate and make findings and recommendations on the matters complained of pursuant to G.S. 106-277.32. (1998-210, s. 3.)

Editor's Note. — Session Laws 1998-210, s. 5, made this section effective January 1, 1999, and applicable to agricultural and vegetable seed purchased on or after that date.

Session Laws 1998-210, s. 4, effective October 30, 1998, provides that the Cooperative Extension Service shall make information about the alternative claims procedure available to the farmers of the State, and may consider using the publication of brochures, the inclusion of material in relevant education programs, and the use of routine contacts with farmers by county extension agents as means to do so.

§ 106-277.31. Notice required.

Dealers shall legibly print or type on each seed container or affix a label on each seed container a notice in the following form or using reasonably equivalent language:

"Notice of Claims Procedure for Defective Seed

North Carolina provides an opportunity for persons who believe that they have suffered damage from the failure of agriculture or vegetable seeds to perform as labeled or warranted, or as a result of negligence, to have the matter investigated and heard before a special seed board as an alternative to filing a court action. To take advantage of this procedure, a purchaser of seed must file a complaint with the North Carolina Commissioner of Agriculture in time for the seed, crop, or plants to be inspected. Failure to follow this procedure will limit the amount of damages you may be able to recover. Please contact the Commissioner of Agriculture for information about this claims procedure." (1998-210, s. 3.)

Editor's Note. — Session Laws 1998-210, s. 5, made this section effective January 1, 1999, and applicable to agricultural and vegetable seed purchased on or after that date.

§ 106-277.32. Seed Board created; membership; duties.

(a) The Commissioner shall appoint a Seed Board composed of five members, three of whom shall be appointed upon the recommendation of the following: Director of the Agricultural Research Service, North Carolina State University; Director of the North Carolina Cooperative Extension Service, North Carolina State University; and President of the North Carolina Seedsmen's Association. The other two members shall include: one farmer who is not connected in any way to selling seeds at retail or wholesale and one employee of the Department. An alternate for each member shall also be

appointed in the same manner as that member was appointed to serve whenever that member is unable or unwilling to serve. Each member of the Board shall serve a four-year term at the discretion of the Commissioner. The Board shall elect a chairperson. The chairperson shall conduct all meetings and deliberations and direct all other activities of the Board. Three members of the Board shall constitute a quorum and at least three board members must vote affirmatively for the Board to take any action.

(b) A clerk shall be appointed to serve the Board. The clerk shall be an employee of the Department. The clerk shall keep accurate and correct records of all meetings and deliberations and perform other duties for the Board as directed by the chairperson.

(c) The Department shall provide administrative support for the investigation under this section. The Board shall adopt rules to govern investigations and hearings. A copy of the rules shall be mailed to each party to a dispute upon receipt of a complaint.

(d) Members of the Board appointed by the Commissioner who are not governmental employees shall be entitled to receive reimbursement for necessary travel and subsistence expenses pursuant to G.S. 138-5. Members of the Board who are State employees shall be entitled to receive reimbursement for necessary travel and subsistence expenses pursuant to G.S. 138-6.

(e) The Attorney General shall represent the Board in any and all legal proceedings that may arise concerning or against the Board. (1998-210, s. 3.)

Editor's Note. — Session Laws 1998-210, s. 5, made this section effective October 30, 1998.

§ 106-277.33. Duties of Seed Board.

(a) In conducting its investigation of claims referred by the Commissioner, the Seed Board may engage in the following activities:

(1) Examine the buyer regarding the buyer's use of the seed of which the buyer complains and examine the dealer on the dealer's packaging, labeling, and selling of the seed alleged to be faulty.

(2) Grow a representative sample of the alleged faulty seed to production when such action is deemed by the Board to be necessary.

(3) Hold informal hearings at a time and place directed by the chairperson upon reasonable notice to the buyer and the dealer.

(4) Seek evaluations from authorities in allied disciplines, when deemed necessary by the Board.

(5) Visit and inspect the affected site and take samples, make plant counts, and take pictures of affected and unaffected areas.

(b) The Board shall keep a record of its activities and reports on file in the Department. The Department shall transmit all findings and recommendations to the buyer and to the dealer within 30 days of completion of the investigation.

(c) No investigation shall be made by less than the whole membership of the Board unless the chairperson directs such investigation in writing. Such investigation shall be summarized in writing and considered by the Board in reporting its findings and making its recommendations.

(d) The report of the investigation and the recommendations of the Seed Board shall be binding upon all parties to the extent, if any, that they have so agreed in writing subsequent to the filing of the complaint pursuant to G.S. 106-277.30. (1998-210, s. 3.)

Editor's Note. — Session Laws 1998-210, s. 5, made this section effective October 30, 1998.

§ 106-277.34. Actions regarding defective seed claims; evidence.

(a) In any court action involving a complaint that has been the subject of an investigation under G.S. 106-277.32, any party may introduce evidence of seed quality, cultivation practices and procedures, and scientific opinion contained in the report of the Seed Board. Statements of the parties and recommendations of the Seed Board as resolution of the dispute are not admissible as evidence unless such evidence is otherwise discoverable.

(b) In any court action where a buyer alleges that he or she suffered damages due to the failure of agricultural or vegetable seed to produce or perform as labeled or warranted, or as the result of negligence, and the buyer failed to make a sworn complaint against the dealer as set forth in G.S. 106-277.30, the buyer's right to recover damages shall be limited to actual expenditures paid by the buyer to other persons for the cost of seed, labor, equipment, fertilizer, insecticide, herbicide, land rent, or other expenses incurred in connection with the cultivation of the seed alleged to be defective, less any value received by the buyer arising from the sale or transfer of any crops grown from the seed in question. (1998-210, s. 3.)

Editor's Note. — Session Laws 1998-210, s. 5, made this section effective January 1, 1999, and applicable to agricultural and vegetable seed purchased on or after that date.

§§ 106-278 through 106-284.4: Reserved for future codification purposes.

Article 31A.

Seed Potato Law.

§§ 106-284.5 through 106-284.13: Repealed by Session Laws 1973, c. 294.

Article 31B.

Vegetable Plant Law.

§ 106-284.14. Title.

This Article shall be known as the "Vegetable Plant Law." (1959, c. 91, s. 1.)

§ 106-284.15. Purpose of Article.

The purpose of this Article is to improve vegetable production in North Carolina and to enable vegetable producers to secure vegetable plants for transplanting that are free from diseases and insects, and in order to prevent the spread of diseases and insects affecting the future stability of the vegetable industry and the general welfare of the public. (1959, c. 91, s. 2; 1973, c. 1370, s. 1.)

§ 106-284.16. Definitions.

For the purpose of this Article, the following terms shall be construed respectively to mean:

(1) "Certified vegetable plants for transplanting" shall mean plants which

have been tagged or labeled so as to indicate that such plants have been inspected by an authorized agent of an officially recognized State inspecting or certifying agency of some state, and found to conform to the appropriate standards set by the North Carolina Board of Agriculture.

(2) "Vegetable plants" shall mean such plants as asparagus, pepper, eggplant, sweet potato, onion, cabbage and other cole crops, tomato plants, white seed potatoes and onion sets intended for transplanting purposes and such other vegetable plants intended for transplanting purposes as the North Carolina Board of Agriculture may designate by regulation in order to protect the vegetable industry.

(3) As applied to vegetable plants "standards" include the qualities of color, freshness, firmness, strength, straightness, unbroken and undamaged condition, uniformity of size, and freedom from injurious insects, diseases, nematodes, snails, and other pests and means the standards with respect thereto as established and fixed in regulations adopted by the North Carolina Board of Agriculture. (1959, c. 91, s. 3; 1973, c. 1370, s. 2.)

§ 106-284.17. Unlawful to sell plants not up to standard and not appropriately tagged or labeled.

It shall be unlawful for any person, firm, or corporation to pack for sale, offer or expose for sale, or ship into this State any vegetable plants which do not meet the appropriate standards as set by the North Carolina Board of Agriculture and which have not been appropriately tagged or labeled as certified vegetable plants for transplanting. (1959, c. 91, s. 4; 1973, c. 1370, s. 3.)

§ 106-284.18. Rules and regulations.

The State Board of Agriculture is hereby authorized to adopt reasonable rules and regulations to carry out the intent, purposes and provisions of this Article. (1959, c. 91, s. 5; 1973, c. 1370, s. 4.)

§ 106-284.19. Inspection; interference with inspectors; "stop-sale" notice.

To enforce the provisions of this Article effectively, the Commissioner of Agriculture and his duly authorized agents are authorized to inspect vegetable plants, and may enter any place of business, warehouse, common carrier or other places where such vegetable plants are stored or being held, for the purpose of making such an inspection; and it shall be unlawful for any person, firm or corporation in custody of such vegetable plants or of the place in which the same are held to interfere with the Commissioner or his duly authorized agents in making such inspections. When the Commissioner or his authorized inspectors find vegetable plants being held, offered or exposed for sale in violation of any of the provisions of this Article or any rule or regulation adopted pursuant thereto, he may issue a "stop-sale notice" to the owner or custodian of any such vegetable plants and shall tag such plants as are in violation. It shall be unlawful for anyone after notice or receipt of such "stop-sale notice" to remove such notice from plants or from any location to which attached; or to plant, sell, give away, move or exchange for transplanting purposes any plants in respect to which such notice has been issued unless and

until so authorized by the Commissioner or his agent or a court of competent jurisdiction. (1959, c. 91, s. 6; 1973, c. 1370, s. 5.)

§ 106-284.20. Interference with Commissioner, etc., or other violation a misdemeanor; penalties.

If anyone shall interfere with or attempt to interfere with the Commissioner or any of his agents, while engaged in the performance of his duties under this law or shall violate any provision of this law or any rule or regulation of the Board of Agriculture adopted pursuant to this law, he shall be guilty of a Class 1 misdemeanor. Each day's violation shall constitute a separate offense. (1959, c. 91, s. 7; 1973, c. 1370, s. 6; 1993, c. 539, s. 759; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-284.21. Authority to permit sale of substandard plants.

Notwithstanding any other provision of this Article, the Commissioner of Agriculture is authorized when the public necessity, welfare, economy, or any emergency situation requires it, to permit for such periods of time as, in his discretion may seem necessary, the sale of vegetable plants for transplanting purposes which do not meet the standards referred to in G.S. 106-284.16. (1959, c. 91, s. 8.)

§ 106-284.22. When Article not applicable.

The provisions of this Article shall not apply:

(1) To the sale by a grower or retail merchant of vegetable plants grown within this State when such sale is made for home or garden or any noncommercial use; provided, however, the provisions shall apply to such sale when such plants are found to be infested with pests so that the exposure for sale or planting is deemed by the Commissioner or his agent to be a hazard to the commercial vegetable industry of North Carolina.

(2) To the sale of vegetable plants for commercial transplanting purposes in this State when grown within this State and sold by a plant producer to a planter having personal knowledge of the conditions under which such vegetable plants were grown or produced provided that such plants are transplanted within a 30-mile radius at which they were grown; but also provided, however, the provisions shall apply to such sale when such plants are found to be infested with pests so that the exposure for sale or planting is deemed by the Commissioner or his agent to be a hazard to the commercial vegetable industry of North Carolina. (1959, c. 91, s. 9; 1973, c. 1370, s. 7.)

§ 106-284.23: Not set out.

Editor's Note. — Section 106-284.23 is a severability clause. See Session Laws 1973, c. 1370, s. 8.

§§ 106-284.24 through 106-284.29: Reserved for future codification purposes.

Article 31C.

North Carolina Commercial Feed Law of 1973.

§ 106-284.30. Title.

This Article shall be known as the "North Carolina Commercial Feed Law of 1973." (1973, c. 771, s. 2.)

Cross References. — As to testing of animal feeds by Feed Advisory Service in Department of Agriculture, see § 106-21.1.

§ 106-284.31. Purpose.

The purpose of this Article is to regulate the manufacture and distribution of commercial feeds in the State of North Carolina and to protect a farmer-buyer from the manufacturer-seller of concentrated, commercial feed who might sell substandard or mislabeled feedstuff, and not to protect from himself a farmer who mixes his own feed. (1973, c. 771, s. 1.)

§ 106-284.32. Enforcing official.

This Article shall be administered by the Commissioner of Agriculture of the State of North Carolina, hereinafter referred to as the "Commissioner." (1973, c. 771, s. 3.)

§ 106-284.33. Definitions of words and terms.

When used in this Article:

(1) The term "Board" means the North Carolina State Board of Agriculture.

(2) The term "brand name" means any word, name, symbol, or device, or any combination thereof, identifying the commercial feed of a distributor or registrant and distinguishing it from that of others.

(3) The term "canned pet food" means any commercial feed packed in cans or hermetically sealed containers, and used or intended for use as food for pets.

(4) The term "commercial feed" means all materials, except whole unmixed seed such as corn, including physically altered entire unmixed seeds when not adulterated within the meaning of G.S. 106-284.38(1), which are distributed for use as feed or for mixing in feed; provided, that the Board by regulation may exempt from this definition, or from specific provisions of this Article, hay, straw, stover, silage, cobs, husks, hulls and individual chemical compounds or substances which are not intermixed or mixed with other materials, and are not adulterated within the meaning of G.S. 106-284.38(1).

(4a) The term "contract feeder" means a person who, as an independent contractor, feeds commercial feed to animals pursuant to a contract between that person and a manufacturer of commercial feeds whereby such commercial feed is supplied, furnished, or otherwise provided to such person by the said manufacturer and whereby such person's remuneration is determined all or in part by feed consumption, mortality, profits, or amount or quality of product produced by the independent contractor.

(5) The term "customer-formula feed" means commercial feed, each batch of which is mixed according to the formula of the customer, furnished

in writing over the signature of the customer or his designated agent with each batch moved directly from the manufacturer to the customer and not stocked or displayed in a dealer's warehouse or sales area and not resold or redistributed to any person.

(6) The term "distribute" means to offer for sale, sell, exchange, or barter, commercial feed.

(7) The term "distributor" means any person who distributes.

(8) The term "drug" means any article intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in animals other than man and articles other than feed intended to affect the structure or any function of the animal body.

(9) The term "feed ingredient" means each of the constituent materials making up a commercial feed.

(10) The term "label" means a display of written, printed, or graphic matter upon or affixed to the container in which a commercial feed is distributed, or on the invoice or delivery slip with which a commercial feed is distributed.

(11) The term "labeling" means all labels and other written, printed, or graphic matter (i) upon a commercial feed or any of its containers or wrapper or (ii) accompanying such commercial feed, or advertisement, brochures, posters, television and radio announcements used in promoting the sale of such commercial feed.

(12) The term "manufacture" means to grind, mix or blend, or further process a commercial feed for distribution.

(13) The term "mineral feed" means a commercial feed intended to supply primarily mineral elements or inorganic nutrients.

(14) The term "official sample" means a sample of feed taken by the Commissioner or his agent in accordance with the provisions of G.S. 106-284.42(a), (c) or (e).

(15) The terms "percent" or "percentage" means percentage by weight, except in G.S. 106-284.42 where these terms refer to the retail value of the lot of commercial feed.

(16) The term "permitted analytical variation" means allowance for the inherent variability in sampling and laboratory analysis in guaranteed components. Manufacturing variations and their effect on the guaranteed components are not included in such values.

(17) The term "person" means an individual, a partnership, a corporation, an association, and any other legal entity.

(18) The term "pet" means any domesticated animal normally maintained in or near the household(s) of the owner(s) thereof.

(19) The term "pet food" means any commercial feed prepared and distributed for consumption by pets.

(20) The term "product name" means the name of the commercial feed which identifies it as to kind, class, or specific use.

(21) The term "specialty pet" means any domesticated animal pet normally maintained in a cage or tank, such as, but not limited to, gerbils, hamsters, canaries, psittacine birds, mynahs, finches, tropical fish, goldfish, snakes and turtles.

(22) The term "specialty pet food" means any commercial feed prepared and distributed for consumption by specialty pets.

(23) The term "ton" means a net weight of 2,000 pounds avoirdupois. (1973, c. 771, s. 4; 1975, c. 900, s. 1; c. 961, s. 1.)

§ 106-284.34. Registration.

(a) No person shall manufacture or distribute a commercial feed in this State, unless he has filed with the Commissioner on forms provided by the Commissioner, his name, place of business, and location of each manufacturing facility in this State, if any, and made application to the Commissioner for a permit to report the quantity of commercial feed distributed in this State.

(b) Manufacturers of registered feeds may apply for, and the Commissioner at his discretion may issue, numbered permits authorizing manufacturers of registered feeds to purchase commercial feed as defined in G.S. 106-284.33(4), and the responsibility for the payment of the inspection fee assessed by the provisions of this Article will be assumed by the purchaser to whom such permit has been issued. The Commissioner may at his discretion, and without notice, cancel any permit issued under the provision of this section. The use of permits issued under the provisions of this section shall be governed by rules and regulations promulgated by the Commissioner.

(c) No person shall distribute in this State a commercial feed, except a customer-formula feed, which has not been registered pursuant to the provisions of this section. The application for registration shall be submitted in the manner prescribed by the Commissioner. Upon approval by the Commissioner or his duly designated agent the registration shall be issued to the applicant. All registrations expire on the thirty-first day of December of each year. An annual registration fee of three dollars ($3.00) for each commercial feed other than canned pet food shall accompany each request for registration. An annual registration fee of ten dollars ($10.00) for each canned pet food shall accompany each request for registration.

(d) The Commissioner is empowered to refuse registration of any commercial feed not in compliance with the provisions of this Article and to cancel any registration subsequently found not to be in compliance with any provisions of this Article: Provided, that no registration shall be refused or canceled unless the registrant shall have been given an opportunity to be heard before the Commissioner or his duly designated agent and to amend his application in order to comply with the requirements of this Article.

(e) The manufacturer of commercial feed that has not been registered and is found being distributed in the State shall pay a thirty-dollar ($30.00) delinquent registration fee in addition to the regular registration fee. (1973, c. 771, s. 5; 1989, c. 544, s. 7.)

§ 106-284.35. Labeling.

A commercial feed shall be labeled as follows:

(1) In case of commercial feed, except a customer-formula feed, it shall be accompanied by a label bearing the following information:
   a. The net weight.
   b. The product name and the brand name, if any, under which the commercial feed is distributed.
   c. The guaranteed analysis stated in such terms as the Board by regulation determines is required to advise the users of the composition of the feed or to support claims made in the labeling. In all cases the substances or elements must be determinable by laboratory methods such as the methods published by the Association of Official Analytical Chemists.
   d. The common or usual name of each ingredient used in the manufacture of the commercial feed: Provided, that the Board by regulation may permit the use of collective terms for a group of ingredients which perform a similar function, or the Board may

exempt such commercial feeds, or any group thereof, from this requirement of an ingredient statement if it finds that such statement is not required in the interest of consumers.

e. The name and principal mailing address of the manufacturer or the person distributing the commercial feed.

f. Adequate directions for use for all commercial feeds containing drugs and for such other feeds as the Board may require by regulations as necessary for their safe and effective use.

g. Such precautionary statements as the Board by regulation determines are necessary for the safe and effective use of the commercial feed.

(2) In the case of a customer-formula feed, it shall be accompanied by a label, invoice, delivery slip, or other shipping document to be presented to the purchaser at time of delivery, bearing the following information:

a. Name and address of the manufacturer.

b. Name and address of the purchaser.

c. Date of delivery.

d. The product name and brand name, if any, and the net weight of each registered commercial feed used in the mixture, and the net weight of each other ingredient used.

e. Adequate directions for use for all customer-formula feeds containing drugs and for such other feeds as the Board may require by regulation as necessary for their safe and effective use.

f. Such precautionary statements as the Board by regulation determines are necessary for the safe and effective use of the customer-formula feed. (1973, c. 771, s. 6.)

§ 106-284.36. Bag weights.

All commercial feed, except that in bags or packages of five pounds or less, shall be in such standard-weight bags or packages as the Board by regulation shall prescribe. (1973, c. 771, s. 7.)

§ 106-284.37. Misbranding.

A commercial feed shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular.

(2) If it is distributed under the name of another commercial feed.

(3) If it is not labeled as required in G.S. 106-284.35.

(4) If it purports to be or is represented as a commercial feed, or if it purports to contain or is represented as containing a commercial feed ingredient, unless such commercial feed or feed ingredient conforms to the definition, if any, prescribed by regulation by the Board.

(5) If any word, statement, or other information required by or under authority of this Article to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use. (1973, c. 771, s. 8.)

§ 106-284.38. Adulteration.

A commercial feed shall be deemed to be adulterated:

(1)a. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not

an added substance, such commercial feed shall not be considered adulterated under this subdivision if the quantity of such substance in such commercial feed does not ordinarily render it injurious to health; or

b. If it bears or contains any added poisonous, added deleterious, or added nonnutritive substance which is unsafe within the meaning of section 406 of the Federal Food, Drug and Cosmetic Act (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; or (ii) a food additive); or

c. If it is, or it bears or contains, any food additive which is unsafe within the meaning of section 409 of the Federal Food, Drug and Cosmetic Act; or

d. If it is a raw agricultural commodity and it bears or contains a pesticide chemical which is unsafe within the meaning of section 408(a) of the Federal Food, Drug and Cosmetic Act; provided, that where a pesticide chemical has been used in or on a raw agricultural commodity in conformity with an exemption granted or a tolerance prescribed under section 408 of the Federal Food, Drug and Cosmetic Act and such raw agricultural commodity has been subjected to processing such as canning, cooking, freezing, dehydrating, or milling, the residue of such pesticide chemical remaining in or on such processed feed shall not be deemed unsafe if such residue in or on the raw agricultural commodity has been removed to the extent possible in good manufacturing practice and the concentration of such residue in the processed feed is not greater than the tolerance prescribed for the raw agricultural commodity unless the feeding of such processed feed will result or is likely to result in a pesticide residue in the edible product of the animal, which is unsafe within the meaning of section 408(a), of the Federal Food, Drug and Cosmetic Act.

e. If it is, or it bears or contains, any color additive which is unsafe within the meaning of section 706 of the Federal Food, Drug and Cosmetic Act.

(2) If any valuable constituent has been in whole or in part omitted or abstracted therefrom or any less valuable substance substituted therefor.

(3) If its composition or quality falls below or differs from that which it is purported or is represented to possess by its labeling.

(4) If it contains a drug and the methods used in or the facilities or controls used for its manufacture, processing, or packaging do not conform to current good manufacturing practice regulations promulgated by the Board to assure that the drug meets the requirements of this Article as to safety and has the identity and strength and meets the quality and purity characteristics which its purports or is represented to possess. In promulgating such regulations, the Board shall adopt the current good manufacturing practice regulations for medicated feed premixes and for medicated feeds established under authority of the Federal Food, Drug and Cosmetic Act, unless it determines that they are not appropriate to the conditions which exist in this State.

(5) If it contains viable weed seeds in amounts exceeding the limits which the Board shall establish by rule or regulation. (1973, c. 771, s. 9.)

§ 106-284.39. Prohibited acts.

The following acts and the causing thereof within the State of North Carolina are hereby prohibited:

(1) The manufacture or distribution of any commercial feed that is adulterated or misbranded.
(2) The adulteration or misbranding of any commercial feed.
(3) The distribution of agricultural commodities such as whole seed, hay, straw, stover, silage, cobs, husks, and hulls, which are adulterated within the meaning of G.S. 106-284.38(1).
(4) The removal or disposal of a commercial feed in violation of an order under G.S. 106-284.43.
(5) The failure or refusal to register in accordance with G.S. 106-284.34.
(6) The violation of G.S. 106-284.44(f).
(7) Failure to pay inspection fees and file reports as required by G.S. 106-284.40.
(8) The use of metal fasteners as bag fasteners or for attaching labels to the containers of commercial feed. (1973, c. 771, s. 10.)

§ 106-284.40. Inspection fees and reports.

(a) An inspection fee at the rate of three cents (3¢) for each carton of 48 cans shall be paid on canned pet food distributed in this State by the person whose name appears on the label as the manufacturing distributor or guarantor subject to (b)(1), (2), (3), and (5) of this section.

(b) An inspection fee at the rate of twelve cents (12¢) per ton shall be paid on commercial feeds distributed in the State by the person whose name appears on the label of the commercial feed as the manufacturer, distributor or guarantor of the commercial feed, subject to the following:

(1) No fee shall be paid on a commercial feed if the payment has been made by a previous distributor.
(2) No fee shall be paid on customer-formula feeds if the inspection fee is paid on the commercial feeds which are used as ingredients therein.
(3) No fee shall be paid on commercial feeds which are used as ingredients or a base for the manufacture of commercial feeds which are registered, if the fee has already been paid. If the inspection fee has already been paid on such commercial feed, the amount paid shall be deducted from the gross amount due on the total feed produced.
(4) In the case of a commercial feed other than canned pet food which is distributed in the State only in packages of five pounds or less, an annual registration fee of thirty dollars ($30.00) shall be paid in lieu of the inspection fee specified above.
(5) The minimum inspection fee shall be ten dollars ($10.00) per quarter unless no feed was sold in the State during the quarter.
(6) Manufacturers of commercial feeds may appear before the Board, and after finding there exists a contract feeder relationship between a manufacturer of commercial feeds and an independent contractor, the Board may issue annual numbered permits exempting that manufacturer of commercial feed from paying the inspection fee assessed by the provisions of this law for that feed delivered to the contract feeder. The manufacturer of ingredients who sells such ingredients to manufacturers of commercial feeds under this subdivision shall have in his possession the exemption number of the permit referred to in G.S. 106-284.34(b) and/or the permit issued by the Board under this subdivision before the supplier may be relieved of the responsibility for payment of the inspection fee. The holder of a valid contract feeder exemption permit shall be exempt from paying the inspection fee on all ingredients purchased for its own use, provided that at least one-half of the ingredients purchased in the previous calendar year were used in feed delivered to contract feeders.

The holder of said permit may voluntarily return said permit to the Commissioner for cancellation at which time said holder may not apply for or receive another exemption permit under this subdivision for a period of 12 months. The exemption permits under this subdivision shall be renewable automatically every year by the Board without additional findings of fact unless it is brought to the Board's attention by the Commissioner or his duly designated officer or employee that there no longer exists the relationship of a contract feeder between the manufacturer of commercial feeds and an independent contractor. In the event the Commissioner or his duly designated officer or employee notifies the Board when the permit is to be automatically renewed or anytime the permit is in effect, that there no longer exists a contract feeder relationship for the permit holder, the Board shall determine the veracity of the notification and revoke said permit if the facts are found to be true by the Board.

Commercial feeds exempt from inspection fees under this subdivision shall not be subject to sampling and analysis other than as may be necessary to determine compliance with good manufacturing practice regulations pertaining to medicated animal feed and medicated feed premixes established under G.S. 106-284.38(4) of this law.

(c) Each person who is liable for the payment of such fee shall:

(1) File, not later than the last day of January, April, July and October of each year, a quarterly statement setting forth the number of net tons of commercial feeds and/or cases of canned pet food distributed in this State during the preceding calendar quarter, and upon filing such statements shall pay the inspection fee at the rate stated in subsections (a) and (b) of this section. Inspection fees which are due and owing and have not been remitted to the Commissioner within 15 days following the due date shall have a penalty fee of ten percent (10%) (minimum ten dollars ($10.00)) added to the amount due when payment is finally made. The assessment of this penalty fee shall not prevent the Commissioner from taking other actions as provided in this Chapter.

(2) Keep such records as may be necessary or required by the Commissioner to indicate accurately the tonnage of commercial feed distributed in this State, and the Commissioner or his duly designated agent shall have the right to examine such records during normal business hours, to verify statements of tonnage. Failure to make an accurate statement of tonnage or to pay the inspection fee or comply as provided herein shall constitute sufficient cause for the cancellation of all registrations on file for the distributor. (1973, c. 771, s. 11; 1975, c. 900, s. 2; c. 961, s. 2; 1987 (Reg. Sess., 1988), c. 1043; 1989, c. 544, s. 6.)

§ 106-284.41. Rules and regulations.

(a) The Board is authorized to promulgate such rules and regulations for commercial feeds and pet foods as are specifically authorized in this Article and such other reasonable rules and regulations as may be necessary for the efficient enforcement of this Article. In the interest of uniformity the Board shall by regulation adopt, unless it determines that they are inconsistent with the provisions of this Article or are not appropriate to conditions which exist in this State, the following:

(1) The official definitions of feed ingredients and official feed terms adopted by the Association of American Feed Control Officials and published in the official publication of that organization, and

(2) Any regulations promulgated pursuant to the authority of the Federal Food, Drug and Cosmetic Act (21 U.S.C. section 301 et seq.).

(b) Before the issuance, amendment, or repeal of any rule or regulation authorized by this Article, the Board shall publish the proposed regulation, amendment, or notice to repeal an existing regulation in a manner reasonably calculated to give interested parties, including all current registrants, adequate notice and shall afford all interested persons an opportunity to present their views thereon, orally or in writing, within a reasonable period of time. After consideration of all views presented by interested persons, the Board shall take appropriate action to issue the proposed rule or regulation or to amend or repeal an existing rule or regulation. The provisions of this subsection notwithstanding, if the Board pursuant to the authority of this Article, adopts the official definitions of feed ingredients or official feed terms as adopted by the Association of American Feed Control Officials, or regulations promulgated pursuant to the authority of the Federal Food, Drug and Cosmetic Act, any amendment or modification adopted by said Association or by the Secretary of Health, Education and Welfare in the case of regulations promulgated pursuant to the Federal Food, Drug and Cosmetic Act, shall be deemed adopted automatically under this Article without regard to the publication of the notice required by this subsection (b), unless the Board by resolution specifically determines that said amendment or modification shall not be adopted. (1973, c. 771, s. 12; 1975, c. 19, s. 32.)

§ 106-284.42. Inspection, sampling, and analysis.

(a) For the purpose of enforcement of this Article, and in order to determine whether its provisions have been complied with, including whether or not any operations may be subject to such provisions, officers or employees duly designated by the Commissioner upon presenting appropriate credentials, to the owner, operator, or agent in charge, are authorized (i) to enter, during normal business hours or actual operation, any factory, warehouse, or establishment within the State in which commercial feeds are manufactured, processed, packed, or held for distribution and take samples therefrom or to enter any vehicle being used to transport or hold such feeds and take samples therefrom; and (ii) to inspect during normal business hours or while in operation, such factory, warehouse, establishment or vehicle and all pertinent equipment, finished or unfinished materials, containers, and labeling therein. The inspection may include the verification of such records, and production and control procedures as may be necessary to determine compliance with this Article.

(b) A separate presentation of appropriate credentials shall be given for each such inspection, but a presentation shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness. Upon completion of the inspection, the person in charge of the facility or vehicle shall be so notified.

(c) If the officer or employee making such inspection of a factory, warehouse, or other establishment has obtained a sample(s) in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the sample(s) obtained.

(d) If the owner of any factory, warehouse or establishment described in subsection (a), or his agent, refuses to admit the Commissioner or his agent to inspect in accordance with subsections (a) and (b), the Commissioner or his agent is authorized to obtain without notice from any district or superior court judge within the county where the facility is located, an order directing such owner or his agent to submit the premises described in such order to inspection.

(e) Sampling and analysis shall be conducted in accordance with methods published by the Association of Official Analytical Chemists, or in accordance with other generally recognized methods.

(f) The results of all analyses of official samples shall be forwarded by the Commissioner to the person named on the label and to the dealer. When the inspection and analysis of an official sample indicates a commercial feed has been adulterated or misbranded, and upon written request within 30 days following receipt of the analysis, the Commissioner shall furnish to the registrant a portion of the sample concerned.

(g) The Commissioner, in determining for administrative purposes whether a commercial feed is deficient in any component, shall be guided by the official sample as defined in G.S. 106-284.33, subdivision (14), and obtained and analyzed as provided for in subsections (a), (c), and (e) of this section.

(h) The Board is authorized to adopt regulations establishing permitted analytical variation providing for reasonable deviation from the guaranteed analysis.

(i) The registrant of a commercial feed found to be in significant violative deviation from the guarantee shall be subject to a penalty for this deviation.

(j) If the analysis of a sample shows a deviation from permitted analytical variation established by the Board, the registrant or other responsible person shall be penalized according to the following schedule:

Component Deviating	*Method of Penalty Assessment*
Crude protein	Three times the relative percentage * of deviation from the guarantee times the retail value of the commercial feed.
Crude fat	Ten percent (10%) of retail value of the lot of commercial feed.
Crude fiber	Ten percent (10%) of retail value of the lot of commercial feed.
Vitamins	Ten percent (10%) of retail value of the lot of commercial feed.
Minerals	Ten percent (10%) of retail value of the lot of commercial feed.
Crude protein equivalent from nonprotein nitrogen	Ten percent (10%) of retail value of the lot of commercial feed.
Animal drugs	Twenty percent (20%) of retail value of the lot of commercial feed.
Antibiotics	Twenty percent (20%) of retail value of the lot of commercial feed.
Other analysis	Ten percent (10%) of retail value of the lot of commercial feed.

* Example, a feed guaranteed 16.0% protein and assaying only 14.0%, will be considered as 2.0%/16.0%, or 12.5% deficient in protein. The penalty will be computed as 3 x 0.125 x retail value of the feed, or 0.375 x retail value of the feed.

(k) Penalties for multiple deficiencies within a sample shall be additive; provided that in no case shall the penalty exceed the retail value of the product. The minimum penalty under any of the foregoing provisions shall be twenty-five dollars ($25.00) or the retail value of the product whichever is smaller, regardless of the value of the deficiency.

(*l*) Within 60 days from the date of written notice by the Commissioner or his duly designated agent to the manufacturer, guarantor, dealer or agent, all penalties assessed and collected under this section shall be paid to the purchaser of the lot of feed or canned pet food represented by the sample analyzed. When such penalties are paid, receipts shall be taken and promptly forwarded to the Commissioner of Agriculture. If said consumers cannot be found, the clear proceeds of the penalty assessed shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, ch. 771, s. 13; 1997-261, s. 109; 1998-215, s. 11.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, in the last sentence of subsection (*l*), substituted "the clear proceeds" for "the amount" and substituted "shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2" for "shall be paid to the Commissioner of Agriculture who shall deposit the same in the Department of Agriculture and Consumer Services fund, of which the State Treasurer is custodian, for the express purpose of enforcement of this Article."

§ 106-284.43. Detained commercial feeds.

(a) "Withdrawal from distribution" orders: When the Commissioner or his authorized agent has reasonable cause to believe any lot of commercial feed is being distributed in violation of any of the provisions of this Article or of any of the prescribed regulations under this Article, he may issue and enforce a written or printed "withdrawal from distribution" order, ordering the distributor not to dispose of the lot of commercial feed in any manner until written permission is given by the Commissioner or a court. The Commissioner shall release the lot of commercial feed so withdrawn when said provisions and regulations have been complied with. If compliance is not obtained within 30 days, the Commissioner may begin, or upon request of the distributor or registrant shall begin, proceedings for condemnation.

(b) "Condemnation and confiscation": Any lot of commercial feed not in compliance with said provisions and regulations shall be subject to seizure on complaint of the Commissioner to the superior court in the county in which said commercial feed is located. In the event the court finds the said commercial feed to be in violation of this Article, and orders the condemnation of said commercial feed, it shall be disposed of in any manner consistent with the quality of the commercial feed and the laws of the State, provided, that in no instance shall the disposition of said commercial feed be ordered by the court without first giving the claimant an opportunity to apply to the court for release of said commercial feed or for permission to process or relabel said commercial feed to bring it into compliance with this Article. All costs and expenses incurred by the Department of Agriculture and Consumer Services in any proceedings associated with such seizure and confiscation shall be paid by the claimant. (1973, c. 771, s. 14; 1997-261, s. 109.)

§ 106-284.44. Penalties; enforcement of Article; judicial review; confidentiality of information.

(a) Any person who shall be adjudged to have violated any provision of this Article, or any regulation of the Board adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Commissioner, or his duly designated agent, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(b) Nothing in this Article shall be construed as requiring the Commissioner or his representative to: (i) report for prosecution, or (ii) institute seizure

proceedings, or (iii) issue a withdrawal from distribution order, as a result of minor violations of the Article, or when he believes the public interest will best be served by suitable notice of warning in writing.

(c) It shall be the duty of each district attorney to whom any violation is reported to cause appropriate proceedings to be instituted and prosecuted in a court of competent jurisdiction without delay. Before the Commissioner reports a violation for such prosecution, an opportunity shall be given the distributor to present his view to the Commissioner or his designated agent.

(d) The Commissioner is hereby authorized to apply for and the court to grant a temporary restraining order and a preliminary or permanent injunction restraining any person from violating or continuing to violate any of the provisions of this Article or any rule or regulation promulgated under the Article notwithstanding the existence of other remedies at law.

(e) Any person adversely affected by an act, order, or ruling made pursuant to the provisions of this Article may within 30 days thereafter bring action in the Superior Court of Wake County for judicial review of such act, order or ruling according to the provisions of Chapter 150B of the General Statutes.

(f) Any person who uses to his own advantage, or reveals to other than the Board, or officers of the other State agencies whose requests are deemed justifiable by the Commissioner, or to the courts when relevant in any judicial proceeding, any information acquired under the authority of this Article, concerning any method, records, formulations, or processes which as a trade secret is entitled to protection, is guilty of a Class 2 misdemeanor; provided, that this prohibition shall not be deemed as prohibiting the Commissioner, or his duly authorized agent, from exchanging information of a regulatory nature with duly appointed officials of the United States government, or of the other states, who are similarly prohibited by law from revealing this information. (1973, c. 47, s. 2; c. 771, s. 15; c. 1331, s. 3; 1987, c. 827, s. 1; 1993, c. 539, ss. 760, 761; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-284.45. Cooperation with other entities.

The Commissioner may cooperate with and enter into agreements with governmental agencies of this State, other states, agencies of the federal government, and private associations in order to carry out the purpose and provisions of this Article. (1973, c. 771, s. 16.)

§ 106-284.46. Publication.

The Commissioner shall publish at least annually, in such forms as he may deem proper, information concerning the sales of commercial feeds, together with such data on their production and use as he may consider advisable, and a report of the results of the analyses of official samples of commercial feeds sold within the State as compared with the analyses guaranteed in the registration and on the label; provided, that the information concerning production and use of commercial feed shall not disclose the operations of any person. (1973, c. 771, s. 17.)

ARTICLE 32.

Linseed Oil.

§§ 106-285 through 106-302: Repealed by Session Laws 1977, c. 42.

ARTICLE 33.

Adulterated Turpentine.

§ 106-303: Repealed by Session Laws 1987, c. 244, s. 1(i).

ARTICLE 34.

Animal Diseases.

Part 1. Quarantine and Miscellaneous Provisions.

§ 106-304. Proclamation of livestock and poultry quarantine.

Upon the recommendation of the Commissioner of Agriculture, it shall be lawful for the Governor to issue his proclamation forbidding the importation into this State of any and all kinds of livestock and poultry from any state where there is known to prevail contagious or infectious diseases among the livestock and poultry of such state. (1915, c. 174, s. 1; C.S., s. 4871; 1969, c. 606, s. 1.)

Cross References. — As to llamas, see § 106-22.4.

§ 106-305. Proclamation of infected feedstuff quarantine.

Upon the recommendation of the Commissioner of Agriculture, it shall be lawful for the Governor to issue his proclamation forbidding the importation into this State of any feedstuff or any other article or material dangerous to livestock and poultry as a carrier of infectious or contagious disease from any area outside the State. This shall also include any and all materials imported for manufacturing purposes or for any other use, which have been tested by any state or federal agency competent to make such tests and found to contain living infectious and contagious organisms known to be injurious to the health of man, livestock and poultry. (1915, c. 174, s. 2; C.S., s. 4872; 1953, c. 1328; 1969, c. 606, s. 1.)

§ 106-306. Rules to enforce quarantine.

Upon such proclamation being made, the Commissioner of Agriculture shall have power to make rules and regulations to make effective the proclamation and to stamp out such infectious or contagious diseases as may break out among the livestock and poultry in this State. (1915, c. 174, s. 3; C.S., s. 4873; 1969, c. 606, s. 1.)

Cross References. — As to cattle and cattle diseases, see § 106-22(3).

CASE NOTES

Cattle Ticks. — The regulation of a quarantine district laid off and enforced in pursuance of § 106-22(3) and this section for the eradication of ticks on cattle is a reasonable and valid regulation. State v. Hodges, 180 N.C. 751, 105 S.E. 417 (1920).

§ 106-307. Violation of proclamation or rules.

Any person, firm, or corporation violating the terms of the proclamation of the Governor, or any rule or regulation made by the Commissioner of Agriculture in pursuance thereof, shall be guilty of a Class 2 misdemeanor. (1915, c. 174, s. 4; C.S., s. 4874; 1969, c. 606, s. 1; 1993, c. 539, s. 762; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-307.1. Serums, vaccines, etc., for control of animal diseases.

The North Carolina Department of Agriculture and Consumer Services is authorized and empowered to purchase for resale serums, viruses, vaccines, biologics, and other products for the control of animal and poultry diseases. The resale of said serums, viruses, vaccines, biologics and other products shall be at a reasonable price to be determined by the Commissioner of Agriculture. (1943, c. 640, s. 1; 1969, c. 606, s. 1; 1997-261, s. 49.)

Cross References. — For North Carolina Biologics Law of 1981, see §§ 106-707 through 106-714.

Legal Periodicals. — For comment on this section and §§ 106-307.2 to 106-307.6, see 21 N.C.L. Rev. 323 (1943).

§ 106-307.2. Reports of infectious disease in livestock and poultry to State Veterinarian.

All persons practicing veterinary medicine in North Carolina shall report promptly to the State Veterinarian the existence of any contagious or infectious disease in livestock and poultry. (1943, c. 640, s. 2; 1969, c. 606, s. 1.)

§ 106-307.3. Quarantine of infected or inoculated livestock.

Hog cholera and other contagious and infectious diseases of livestock are hereby declared to be a menace to the livestock industry and all livestock infected with or exposed to a contagious or infectious disease may be quarantined by the State Veterinarian or his authorized representative in accordance with regulations promulgated by the State Board of Agriculture. All livestock that are inoculated with a product containing a living virus or other organism are subject to quarantine at the time of inoculation in accordance with regulations promulgated by the State Board of Agriculture: Provided, nothing herein contained shall be construed as preventing anyone entitled to administer serum or vaccine under existing laws from continuing to administer same. (1943, c. 640, s. 3; 1969, c. 606, s. 1.)

Cross References. — For authority of State Veterinarian to quarantine, see § 106-401.

§ 106-307.4. Quarantine of inoculated poultry.

All poultry that are inoculated with a product containing a living virus or other organism capable of causing disease shall be quarantined at the time of inoculation in accordance with regulations promulgated by the State Board of Agriculture. Provided nothing herein contained shall be construed as preventing anyone entitled to administer vaccines under existing laws from continuing to administer same. (1969, c. 606, s. 1.)

Cross References. — As to permit for sale, transportation, etc., of animals affected with disease, see § 106-400.

CASE NOTES

Validity of Regulations. — Regulations relating to the importation of cattle, promulgated under authority of this section for the purpose of control of brucellosis or Bang's disease, if reasonable in their scope and incidence and not in conflict with federal regulations or statutes already preempting the field, are constitutional and valid. State v. Lovelace, 228 N.C. 186, 45 S.E.2d 48 (1947).

A provision in the regulations promulgated under authority of this section, limiting the exception to the requirement of a health certificate for imported cattle solely to those consigned to a slaughterhouse, is reasonable and valid. State v. Lovelace, 228 N.C. 186, 45 S.E.2d 48 (1947).

§ 106-307.5. Livestock and poultry brought into State.

All livestock and poultry transported or otherwise brought into this State shall be in compliance with regulations promulgated by the State Board of Agriculture. (1943, c. 640, s. 4; 1969, c. 606, s. 1.)

§ 106-307.6. Violation made misdemeanor.

Any person, firm or corporation who shall violate any provisions set forth in G.S. 106-307.1 to 106-307.5 or any rule or regulation duly established by the State Board of Agriculture shall be guilty of a Class 2 misdemeanor. (1943, c. 640, s. 6; 1969, c. 606, s. 1; 1993, c. 539, s. 763; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Applied in State v. Lovelace, 228 N.C. 186, 45 S.E.2d 48 (1947).

§ 106-307.7. Diseased livestock running at large.

Whenever the State Veterinarian is informed or reasonably believes that certain livestock is infected with or has been exposed to any contagious or infectious disease, that such livestock is running at large and that such livestock cannot be captured with the exercise of reasonable diligence, the State Veterinarian shall have authority to direct the appropriate sheriff or other proper officer to destroy such livestock in a reasonable manner and such sheriff or other officer shall make diligent effort to destroy such livestock. (1971, c. 676.)

Part 2. Foot and Mouth Disease; Rinderpest; Fowl Pest; Newcastle Disease.

§ 106-308. Appropriation to combat animal and fowl diseases.

If the foot and mouth disease, rinderpest (cattle plague), fowl pest, or Newcastle disease (Asiatic or European types), or any other type of foreign infectious disease which may become a menace to livestock and poultry and so declared to be by the Secretary of Agriculture of the United States, Chief of the United States Bureau of Animal Industry and the Commissioner of Agriculture of North Carolina, seem likely to appear in this State and an emergency as to

such disease or diseases is declared by the Secretary of Agriculture of the United States, or his authorized agents, and the North Carolina Department of Agriculture and Consumer Services has no funds available to immediately meet the situation in cooperation with the United States Department of Agriculture, the Director of the Budget, upon approval of the Governor and Council of State, shall set aside, appropriate and make available out of the Contingency and Emergency Fund such sum as the Governor and Council of State shall deem proper and necessary, and the Budget Bureau shall place said funds in an account to be known as the Animal and Fowl Disease Appropriation and make same available to the North Carolina Department of Agriculture and Consumer Services, to be used by the North Carolina Department of Agriculture and Consumer Services in the work of preventing or eradicating the above diseases, or any of them. Funds from the above appropriation shall be paid only for work in this connection upon warrants approved by the Commissioner of Agriculture. The provisions of Part 4 of Article 34 of Chapter 106 of the General Statutes relating to the compensation for killing diseased animals shall be applicable to animals infected with or exposed to the diseases named and described in this section, as well as to the destruction of material contaminated by or exposed to the diseases described in this section, as well as the necessary cost of the disinfection of materials. In no event shall any of the above appropriation be spent for the purposes set forth in this section unless the funds appropriated by this State are matched in an equal amount by the federal government or one of its agencies to be spent for the same purposes. (1915, c. 160, s. 1; C.S., s. 4875; 1951, c. 799; 1997-261, s. 109.)

Editor's Note. — All of the functions, property, records, etc., of the Budget Bureau have been transferred by § 143-344 to the Department of Administration.

§ 106-309. Disposition of surplus funds.

If said disease shall have appeared and shall have been eradicated and work is no longer necessary in connection with it, the State Treasurer shall return such part of the appropriation as is not expended to the general fund, and the Commissioner of Agriculture shall furnish the Governor an itemized statement of the money expended, and all moneys set aside out of the State funds and used for the purpose of eradicating said disease under the provisions of this Article shall be paid back to the State funds by the Department of Agriculture and Consumer Services out of the first funds received by said agricultural Department available for such purpose. (1915, c. 160, s. 2; C.S., s. 4876; 1997-261, s. 109.)

Part 3. Hog Cholera.

§ 106-310. Burial of hogs dying natural death required.

It shall be the duty of every person, firm, or corporation who shall lose a hog by any form of natural death to have the same buried in the earth to a depth of at least two feet within 12 hours after the death of the animal. Any person, firm, or corporation that shall fail to comply with the terms of this section shall be guilty of a Class 3 misdemeanor, and shall be fined not less than five dollars ($5.00) nor more than ten dollars ($10.00) for each offense, at the discretion of the court. (1915, c. 225; C.S., s. 4877; 1993, c. 539, s. 764; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-311. Hogs affected with cholera to be segregated and confined.

If any person having swine affected with the disease known as hog cholera, or any other infectious or contagious disease, who discovers the same, or to whom notice of the fact shall be given, shall fail or neglect for one day to secure the diseased swine from the approach of or contact with other hogs not so affected, by penning or otherwise securing and effectually isolating them so that they shall not have access to any ditch, canal, branch, creek, river or other watercourse which passes beyond the premises of the owners of such swine, he shall be guilty of a Class 3 misdemeanor. (1889, c. 173, s. 1; 1891, c. 67, ss. 1, 3; 1899, c. 47; 1903, c. 106; Rev., s. 3297; 1913, c. 120; C.S., s. 4490; 1993, c. 539, s. 765; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to confinement and isolation of diseased animals, see § 106-402.

§ 106-312. Shipping hogs from cholera-infected territory.

It shall be unlawful for any person, firm or corporation in any district or territory infected by cholera to bring, carry, or ship hogs into any stock-law section or territory, unless such hogs have been certified to be free from cholera either by the farm demonstration agent of the county or some other suitable person to be designated by the clerk of the superior court. Any violation of this section shall constitute a Class 1 misdemeanor. (1917, c. 203; C.S., s. 4491; 1993, c. 539, s. 766; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-313. Price of serum to be fixed.

The Department of Agriculture and Consumer Services shall fix the price of anti-hog-cholera serum at such an amount as will cover the cost of production. (1917, c. 275, s. 1; 1919, c. 6; C.S., s. 4878; 1997-261, s. 50.)

Cross References. — As to purchase for resale by Department of Agriculture, see § 106-307.1.

§ 106-314. Manufacture and use of serum and virus restricted.

It shall be unlawful for any person, firm, or corporation to distribute, sell, or use in the State anti-hog-cholera serum unless said anti-hog-cholera serum is produced at the serum plant of the State Department of Agriculture and Consumer Services, or produced in a plant which is licensed by the Biological Products Licensing Section, Animal Inspection and Quarantine Division, Agricultural Research Service of the United States Department of Agriculture, allowing said plant to do an interstate business.

It shall be unlawful for any person, firm, or corporation to distribute, sell, or use in the State of North Carolina, virulent blood from hog-cholera-infected hogs, or virus, unless said virulent blood, or virus, is produced at the serum plant of the State Department of Agriculture and Consumer Services or produced in a plant which is licensed by the Biological Products Licensing Section, Animal Inspection and Quarantine Division, Agricultural Research Service of the United States Department of Agriculture, allowing said plant to do an interstate business. No virulent blood from hog-cholera-infected hogs, or virus, shall be distributed, sold or used in the State unless and until

permission has been given in writing by the State Veterinarian for such distribution, sale or use. Said permission to be cancelled by the State Veterinarian when necessary.

Any person, firm, or corporation guilty of violating the provisions of this section or failing or refusing to comply with the requirements thereof shall be guilty of a Class 1 misdemeanor. (1915, c. 88; 1919, c. 125, ss. 1, 2, 3; C.S., s. 4879; 1959, c. 576, s. 1; 1993, c. 539, s. 767; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

Local Modification. — Currituck: 1943, c. 199; Edgecombe: 1933, c. 139; Hyde: 1943, c. 693; Nash: 1935, cc. 67, 222; Pasquotank: 1943, c. 358; Pitt: 1935, c. 352; Tyrrell: 1943, c. 693; Wilson: 1933, c. 58.

Cross References. — As to purchase for resale by Department of Agriculture, see § 106-307.1.

§ 106-315. Written permit from State Veterinarian for sale, use or distribution of hog-cholera virus, etc.

No hog-cholera virus or other product containing live virus or organisms of animal diseases shall be distributed, sold, or used within the State unless permission has been given in writing by the State Veterinarian for such distribution, sale, or use, said permission to be cancelled by the State Veterinarian when he deems same necessary. (1939, c. 360, s. 5; 1959, c. 576, s. 2.)

Local Modification. — Currituck: 1943, c. 199; Hyde: 1943, c. 693; Pasquotank: 1943, c. 358; Tyrrell: 1943, c. 693.

§ 106-316. Counties authorized to purchase and supply serum.

If the county commissioners of any county in the State deem it necessary to use anti-hog-cholera serum to control or eradicate the disease known as hog cholera, they are authorized within their discretion to purchase from the State Department of Agriculture and Consumer Services sufficient anti-hog-cholera serum and virus for use in their county and supply same free of cost to the residents of the county, or pay for any portion of the cost of said serum, the remaining portion to be paid by the owners of the hogs.

The use of anti-hog-cholera serum and virus and the quarantine of diseased animals shall remain under the supervision of the State Veterinarian.

Nothing in this section shall in any way interfere with existing laws and regulations covering the use of anti-hog-cholera serum and virus and the quarantine and control of contagious diseases, or any laws or regulations that may become necessary in the future. (1919, c. 132; C.S., s. 4881; 1997-261, s. 109.)

§ 106-316.1. Purpose of §§ 106-316.1 to 106-316.5.

It is the purpose and intent of G.S. 106-316.1 to 106-316.5 to safeguard the swine industry in North Carolina through a program designed to prevent the spread of hog cholera by prohibiting and restricting the use of virulent hog-cholera virus; to provide for the use of modified live virus hog-cholera vaccines that have been licensed as such by the Biological Products Licensing Section, Animal Inspection and Quarantine Division, Agricultural Research Service of the United States Department of Agriculture; to empower the State

Board of Agriculture to establish rules and regulations and the Commissioner of Agriculture to establish emergency rules and regulations governing the movement of hogs into the State from other states and within the State; to establish rules and regulations designating the minimum dosage of anti-hog-cholera serum and antibody concentrate that shall be used in combination with modified live-virus hog-cholera vaccines on swine vaccinated at public livestock markets and other places; and to establish such other rules and regulations and emergency rules and regulations as may be necessary for carrying out the purposes of G.S. 106-316.1 to 106-316.5. (1955, c. 824, s. 1; 1959, c. 576, s. 3.)

Editor's Note. — Section 106-316.5, referred to above, was repealed by Session Laws 1963, c. 1084, s. 2.

§ 106-316.2. Use of virulent hog-cholera virus prohibited without permit; virulent hog-cholera virus defined; use of modified live virus vaccines.

Notwithstanding any other provision of the law, either general, public-local, special or private, and except as herein provided, the possession, sale and use of virulent hog-cholera virus in North Carolina is hereby prohibited. Virulent hog-cholera virus referred to in this section means any unattended hog-cholera virus collected directly or indirectly from blood or other tissues of swine infected with hog cholera which has not been licensed as a modified live virus hog-cholera vaccine. The State Veterinarian may issue a permit authorizing the sale, possession and use of virulent hog-cholera virus only for the purpose of laboratory diagnosis; official research programs; production of anti-hog-cholera serum, antibody concentrate, modified live virus, killed virus vaccine, and similar biological products; and following a declaration that a state of emergency exists in a designated quarantined hog-cholera area or areas within the State by the Commissioner of Agriculture of North Carolina. The use of virulent hog-cholera virus during a declared state of emergency shall be under the direct supervision of the State Veterinarian or his authorized representative. Modified live-virus hog-cholera vaccines that have been licensed as such by the Biological Products Licensing Section, Animal Inspection and Quarantine Division, Agricultural Research Service of the United States Department of Agriculture may be sold and used in compliance with the General Statutes of North Carolina and the rules, regulations, definitions and standards adopted by the North Carolina Board of Agriculture and the emergency rules and regulations established by the Commissioner of Agriculture. (1955, c. 824, s. 2; 1959, c. 576, s. 4.)

§ 106-316.3. Unlawful to import hogs inoculated with virulent virus; exceptions for immediate slaughter; health certificate and permit required.

It shall be unlawful to bring hogs into North Carolina that have been inoculated with virulent hog-cholera virus less than 30 days prior to the date of entry, except for immediate slaughter, and in addition thereto the transportation or importation of such hogs that have been inoculated with virulent hog-cholera virus must be accompanied by the health certificate and permit as required by the rules and regulations of the North Carolina Board of Agriculture or emergency rules and regulations of the North Carolina Commissioner of Agriculture. The provisions of this section shall not be construed to be in

conflict with or to repeal any provisions of G.S. 106-317 through 106-322 or any other statute or rule or regulation prohibiting, restricting or controlling the interstate movement of hogs for other reasons. (1955, c. 824, s. 3; 1959, c. 576, s. 5.)

§ 106-316.4. Penalties for violation of §§ 106-316.1 to 106-316.5.

Any person, firm or corporation violating the provisions of G.S. 106-316.1 to 106-316.5 shall be guilty of a Class 1 misdemeanor. (1955, c. 824, s. 4; 1993, c. 539, s. 768; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Section 106-316.5, referred to above, was repealed by Session Laws 1963, c. 1084, s. 2.

§ 106-316.5: Repealed by Session Laws 1963, c. 1084, s. 2.

§ 106-317. Regulation of the transportation or importation of hogs and other livestock into State.

To prevent the spread of hog cholera, vesicular exanthema, vesicular stomatitis, foot-and-mouth disease, or any other contagious, infectious and communicable swine disease in North Carolina, the North Carolina Board of Agriculture is authorized and empowered to promulgate rules and regulations governing the transportation and importation of swine into North Carolina from any other state or territory: Provided, that following a proclamation by the Secretary of Agriculture of the United States and the Commissioner of Agriculture of North Carolina that a state of emergency exists, arising from the existence of a dangerous contagious and infectious disease of livestock which threatens the livestock industry of the country, the North Carolina Commissioner of Agriculture is empowered and authorized to immediately promulgate emergency rules and regulations governing the movement of swine and other livestock within the State and prohibiting, restricting and/or controlling the transportation and importation of swine and other livestock into North Carolina for the duration of the emergency. The emergency rules and regulations promulgated by the North Carolina Commissioner of Agriculture shall be subject to approval, disapproval or change at the next regular or special meeting of the North Carolina Board of Agriculture. The North Carolina Board of Agriculture under the authority of this section may by regulation establish a system of health certificates and permits for the better protection of the swine and livestock of this State. (1941, c. 373, s. 1; 1955, c. 424, s. 1.)

§ 106-318. Issuance of health certificates for swine and livestock; inspection.

Such health certificates that may be required under the rules and regulations by the Board of Agriculture or the emergency rules and regulations of the Commissioner of Agriculture shall be issued by a State, federal or duly licensed veterinarian in the state of origin certifying that the swine or other livestock transported and imported are healthy and not infected with or exposed to a contagious, infectious or communicable swine or other livestock disease, and all permits required under such rules and regulations shall be in possession of the owner or agent in charge, at all times until delivery of such swine or other

livestock, and upon request, the owner or agent in charge shall produce said required certificate and permit for inspection by any police or peace officer or inspection agent of this State or any county thereof. The burden shall be on the person transporting said swine or other livestock to prove the origin, identity and destination of such swine and other livestock. (1941, c. 373, s. 2; 1955, c. 424, s. 2.)

§ 106-319. Burial of hogs and other livestock dying in transit.

It shall be the duty of any owner or agent having in charge any swine or other livestock imported or transported into this State who shall, before delivery lose a hog or other livestock from natural or unnatural death to have the same delivered to a rendering plant or buried in the area to a depth of at least two feet within 12 hours after death of said swine or other livestock. (1941, c. 373, s. 3; 1955, c. 424, s. 3.)

§ 106-320: Repealed by Session Laws 1963, c. 1084, s. 2.

§ 106-321. Penalties for violation.

Any person, firm or corporation who shall violate any provision set forth in this Article or any rule or regulation duly established by the State Board of Agriculture or emergency rules and regulations established by the Commissioner of Agriculture shall be guilty of a Class 1 misdemeanor. (1941, c. 373, s. 5; 1955, c. 424, s. 4; 1993, c. 539, s. 769; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-322. Effect of §§ 106-317 to 106-322.

Sections 106-317 to 106-322 shall not repeal Article 34, Chapter 106, but shall be complementary thereto. (1941, c. 373, s. 6.)

§ 106-322.1. State-federal hog-cholera cooperative agreements; establishment of hog-cholera eradication areas.

The Commissioner of Agriculture is authorized to enter into cooperative State-federal agreements with the United States Department of Agriculture for the purpose of State-federal programs for the control and eradication of hog-cholera. The Commissioner of Agriculture may designate individual counties or two or more counties as hog-cholera eradication areas. (1963, c. 1084, s. 1.)

§ 106-322.2. Destruction of swine affected with or exposed to hog cholera; indemnity payments.

If it appears in the judgment of the State Veterinarian to be necessary for the control and eradication of hog cholera to destroy or slaughter swine affected with or exposed to such disease, the State Veterinarian is authorized to order said swine destroyed or slaughtered, notwithstanding the wishes of the owners of said swine, provided that if the owner contests the diagnosis of hog cholera he shall be entitled to a review of the case by a licensed practicing veterinarian, the State Veterinarian, or his authorized representative, and the federal inspector in charge, or his authorized representative, to determine that a diagnosis of hog cholera was arrived at by the use of accepted, standard

diagnostic techniques. The State Veterinarian is authorized to agree on the part of the State, in the case of swine destroyed or slaughtered on account of being affected with hog cholera or exposure to same to pay one half of the difference between the appraised value of each animal destroyed or slaughtered and the value of the salvage thereof; provided, that the State indemnity shall not be in excess of the indemnity payments made by the federal cooperating agency; provided further, that State indemnity payments shall be restricted to swine located on the farm or feedlot of the owner or authorized representative of the owner; provided further, that in no case shall any payments by the State be more than twenty-five dollars ($25.00) for any grade swine nor more than one hundred dollars ($100.00) for any purebred swine and subject to available State funds. The procedure for appraisal, disposal and salvage of slaughtered or destroyed swine shall be carried out in the same manner as that required under the General Statutes of North Carolina governing compensation for killing other diseased animals provided, however, that the appraisal may be made by the owner, or his representative, and the State Veterinarian, or his authorized representative, when agreement on the appraised value of the swine can be made; provided, further, that swine which entered the State 30 days or more before developing symptoms of hog cholera may be appraised in the same manner as swine which originate in North Carolina.

For the purposes of this section, "purebred swine" shall mean any swine upon which a certificate of pure breeding has been issued by a purebred swine association, or swine not more than 12 months of age eligible to receive such a certificate. (1963, c. 1084, s. 1; 1967, c. 105; 1969, c. 525, ss. 1, 2.)

§ 106-322.3. When indemnity payments not to be made.

No payments shall be made for any swine slaughtered in the following cases:

(1) If the owner does not clean up and disinfect premises as directed by an inspector of the Animal Health Division, Agricultural Research Service, United States Department of Agriculture or the State Veterinarian or his authorized representative;
(2) Where the owner has not complied with the livestock disease control laws and regulations applicable to hog cholera;
(3) For swine in a herd in which hog-cholera vaccine has been used illegally on one or more animals in the herd;
(4) Swine involved in an outbreak in which the existence of hog cholera has not been confirmed by the State Veterinarian or his authorized representative;
(5) Swine belonging to the United States or the State of North Carolina;
(6) Swine brought into the State in violation of State laws or regulations;
(7) Swine which the claimant knew to be affected with hog cholera, or had notice thereof, at the time they came into his possession;
(8) Swine which have not been within the State of North Carolina for at least 30 days prior to discovery of the disease;
(9) Where the owner does not use reasonable care in protecting swine from exposure to hog cholera;
(10) Where the owner has failed to submit the reports required by the United States Department of Agriculture and the North Carolina Department of Agriculture and Consumer Services for animals on which indemnity is paid under Article 34.
(11) Swine purchased by a buying station for slaughter which are not slaughtered within 10 days of purchase. (1969, c. 525, s. 2½; 1997-261, s. 51.)

Part 4. Compensation for Killing Diseased Animals.

§ 106-323. State to pay part of value of animals killed on account of disease; purchase by State of animals exposed to certain diseases.

If it appears to be necessary for the control or eradication of Bang's disease and tuberculosis and paratuberculosis in cattle, or glanders in horses and mules, to destroy such animals affected with such diseases and to compensate owners for loss thereof, the State Veterinarian is authorized, within his discretion, to agree on the part of the State, in the case of cattle destroyed for Bang's disease and tuberculosis, and paratuberculosis to pay one third of the difference between the appraised value of each animal so destroyed and the value of the salvage thereof: Provided, that in no case shall any payment by the State be more than twenty-five dollars ($25.00) for any grade animal nor more than one hundred dollars ($100.00) for any purebred animal; provided further, that the State indemnity shall not be in excess of the indemnity payments made by the federal government. In the case of horses or mules destroyed for glanders, to pay one half of the appraised value, said half not to exceed one hundred dollars ($100.00).

The State Veterinarian is also authorized, in his discretion, and subject to the maximum payment hereinabove provided, to purchase in the name of the State, cattle which have been exposed to Bang's disease, tuberculosis or paratuberculosis and horses and mules which have been exposed to glanders. (1919, c. 62, s. 1; C.S., s. 4882; 1929, c. 107; 1939, c. 272, ss. 1, 2; 1969, c. 525, s. 3; 1973, c. 1122.)

Cross References. — As to indemnity for swine destroyed on account of being affected by hog cholera, see § 106-322.2. As to provision that failure to kill animal affected with glanders constitutes a misdemeanor, see § 106-404.

§ 106-324. Appraisal of cattle affected with Bang's disease and tuberculosis.

Cattle affected with Bang's disease and tuberculosis and paratuberculosis shall be appraised by three men — one to be chosen by the owner, one by the United States Bureau of Animal Industry, and one by the State Veterinarian. If the United States Bureau of Animal Industry is not represented, then the appraisers shall be chosen, one by the owner, one by the State Veterinarian, the third by the first two named. The finding of such appraisers shall be final. (1919, c. 62, s. 2; C.S., s. 4883; 1929, c. 107; 1939, c. 272, s. 1.)

§ 106-325. Appraisal of animals affected with glanders; report.

Animals affected with glanders shall be appraised by three men — one to be chosen by the owner, one to be chosen by the State Veterinarian, the third to be named by the first two chosen, the finding of such appraisers to be final. The report of appraisal to be made in triplicate on forms furnished by the State Veterinarian, and a copy sent to the State Veterinarian at once. (1919, c. 62, s. 3; C.S., s. 4884.)

§ 106-326. Report of appraisal of cattle affected with Bang's disease and tuberculosis to State Veterinarian; contents.

Appraisals of cattle affected with Bang's disease or tuberculosis shall be reported on forms furnished by the State Veterinarian, which shall show the number of animals, the appraised value of each per head, or the weight and appraised value per pound, and shall be signed by the owners and the appraisers. This report must be made in triplicate and a copy sent to the State Veterinarian: Provided, that the State Veterinarian may change the forms for making claims so as to conform to the claim forms used by the United States Department of Agriculture. (1919, c. 62, s. 4; C.S., s. 4885; 1939, c. 272, ss. 1, 3.)

§ 106-327. Marketing of cattle affected with Bang's disease and tuberculosis.

Each owner of cattle affected with Bang's disease or tuberculosis, which have been appraised, and which have been authorized by the State Veterinarian to be marketed, shall market the cattle within 30 days and shall obtain from the purchaser a report in triplicate. One copy to be sent by the State Veterinarian at once, certifying as to the amount of money actually paid for the animals, all animals to be identified on report. (1919, c. 62, s. 5; C.S., s. 4886; 1939, c. 272, s. 1.)

§ 106-328. Report on salvage.

When the appraised cattle have been slaughtered and the amount of salvage ascertained, a report, on forms furnished by the State Veterinarian, in triplicate shall be made, signed by the owner and the United States Bureau of Animal Industry or State inspector and the appraisers by which the animals were appraised and destroyed, showing the difference between the appraised value and salvage. Two copies are to be attached to the voucher in which compensation is claimed, and one copy to be furnished by the owner of cattle. (1919, c. 62, s. 6; C.S., s. 4887.)

§ 106-329. Compensation when killing ordered.

Compensation for animals destroyed on account of glanders will only be paid when such destruction is ordered by the State Veterinarian or his authorized representative. When the owner of the animals presents his claim he shall support same with the original report of the appraiser, together with the report of the inspector who destroyed the animal, to the State Veterinarian. (1919, c. 62, s. 7; C.S., s. 4888.)

§ 106-330. Ownership of destroyed animals; outstanding liens.

When animals have been destroyed pursuant to this Article the inspector shall take reasonable precautions to determine, prior to his approval of vouchers in which compensation is claimed, who is the owner of and whether there are any mortgages or other liens outstanding against the animals. If it appears that there are outstanding liens, a full report regarding same shall be made and shall accompany the voucher. Every such report shall include a description of the liens, the name of the person or persons having possession of the documentary evidence, and a statement showing what arrangements, if

any, have been made to discharge the liens outstanding against the animals destroyed of which the inspector may have knowledge. (1919, c. 62, s. 8; C.S., s. 4889.)

§ 106-331. State not to pay for feed of animals ordered killed.

Expense for the care and feeding of animals held for slaughter shall not be paid by the State. (1919, c. 62, s. 9; C.S., s. 4890.)

§ 106-332. Disinfection of stockyards by owners.

Stockyards, pens, cars, vessels and other premises and conveyances will be disinfected whenever necessary for the control and eradication of disease by the owners at their expense under the supervision of an inspector of the United States Bureau of Animal Industry or State Veterinarian. (1919, c. 62, s. 10; C.S., s. 4891.)

§ 106-333. Payments made only on certain conditions.

No payments shall be made for any animal slaughtered in the following cases:

(1) If the owner does not disinfect premises, etc., as directed by an inspector of the United States Bureau of Animal Industry or the State Veterinarian.
(2) For any animals destroyed where the owner has not complied with all lawful quarantine regulations.
(3) Animals reacting to a test not approved by the State Veterinarian.
(4) Animals belonging to the United States.
(5) Animals brought into the State in violation of the State laws and regulations.
(6) Animals which the owner or claimant knew to be diseased, or had notice thereof, at the time they came into his possession.
(7) Animals which had the disease for which they were slaughtered or which were destroyed by reason of exposure to the disease, at the time of their arrival in the State.
(8) Animals which have not been within the State of North Carolina for at least 120 days prior to the discovery of the disease.
(9) Where owner does not use reasonable care in protecting animals from disease.
(10) Where owner has failed to submit the necessary reports as required by this Article.
(11) Any unregistered bull. (1919, c. 62, s. 11; C.S., s. 4892; 1939, c. 272, s. 4.)

§ 106-334. Owner's claim for indemnity supported by reports.

The owner must present his claim for indemnity to the State Veterinarian for approval, and the claim shall be supported with the original report of the appraisers, the original report of the sale of the animals in the case of cattle destroyed on account of Bang's disease and tuberculosis, the certificate of the State or United States Bureau of Animal Industry inspector, and a summary of the claim. All of which shall constitute a part of the claim.

The owner must state whether or not the animals are owned entirely by him or advise fully of any partnership, and describe fully any mortgages or other liens against animals. (1919, c. 62, s. 12; C.S., s. 4893; 1939, c. 272, s. 1.)

§ 106-335. State Veterinarian to carry out provisions of Article; how moneys paid out.

The State Veterinarian is authorized, himself or by his representative, to do all things specified in this Article. All moneys authorized to be paid shall be paid from the State treasury and the State Treasurer is hereby authorized to make such payment. (1919, c. 62, s. 13; C.S., s. 4894; 1983, c. 913, s. 13.)

Part 5. Tuberculosis.

§ 106-336. Animals reacting to tuberculin test.

All animals reacting to a tuberculin test applied by a qualified veterinarian shall be known as reactors and be forever considered as affected with tuberculosis. (1921, c. 177, s. 1; C.S., s. 4895(a).)

§ 106-337. Animals to be branded.

All veterinarians who, either by clinical examination or by tuberculin test, find an animal affected with tuberculosis, shall, unless the animal is immediately slaughtered, properly brand said animal for identification on the left jaw with the letter "T," not less than two inches high, and promptly report the same to the State Veterinarian. (1921, c. 177, s. 2; C.S., s. 4895(b).)

§ 106-338. Quarantine; removal or sale; sale and use of milk.

The owner or owners of an animal affected with tuberculosis shall keep said animal isolated and quarantined in such a manner as to prevent the spread of the disease to the other animals or man. Said animals must not be moved from the place where quarantined or sold, or otherwise disposed of except upon permission of the State Veterinarian, and then only in accordance with his instructions. The milk from said animals must not be sold, and if used shall be first boiled or properly pasteurized. (1921, c. 177, s. 3; C.S., s. 4895(c).)

§ 106-339. Seller liable in civil action.

Any person or persons who sell or otherwise dispose of to another an animal affected with tuberculosis shall be liable in a civil action to any person injured, and for any and all damages resulting therefrom. (1921, c. 177, s. 4; C.S., s. 4895(d).)

Cross References. — For similar section regarding animals affected with brucellosis, see § 106-391. As to disposition of dead domesticated animals, see § 106-403. As to killing of animals affected with glanders, see § 106-404.

§ 106-340. Responsibility of owner of premises where sale is made.

When cattle are sold or otherwise disposed of in this State by a nonresident of this State, the person or persons on whose premises the cattle are sold or otherwise disposed of with his knowledge and consent shall be equally responsible for violation of this law and the regulations of the Department of Agriculture and Consumer Services. (1921, c. 177, s. 5; C.S., s. 4895(e); 1997-261, s. 109.)

§ 106-341. Sale of tuberculin.

No person, firm, or corporation shall sell or distribute or administer tuberculin, or keep the same on hand for sale, distribution, or administration, except qualified veterinarians, licensed physicians, or licensed druggists, or others lawfully engaged in the sale of biological products. (1921, c. 177, s. 6; C.S., s. 4895(f).)

§ 106-342. Notice to owner of suspected animals; quarantine.

When the State Veterinarian receives information, or has reason to believe, that tuberculosis exists in any animal or animals, he shall promptly notify the owner or owners, and recommend that a tuberculin test be applied to said animals, that diseased animals shall be properly disposed of, and the premises disinfected under the supervision of the State Veterinarian, or his authorized representative. Should the owner or owners fail or refuse to comply with the said recommendations of the State Veterinarian within 10 days after said notice, then the State Veterinarian shall quarantine said animals on the premises of the owner or owners. Said animals shall not be removed from the premises where quarantined and milk or other dairy products from same shall not be sold or otherwise disposed of. Said quarantine shall remain in effect until the said recommendations of the State Veterinarian have been complied with, and the quarantine canceled by the State Veterinarian. (1921, c. 177, s. 7; C.S., s. 4895(g).)

§ 106-343. Appropriations by counties; elections.

The several boards of county commissioners in the State are hereby expressly authorized and empowered to make such appropriations from the general funds of their county as will enable them to cooperate effectively with the state Department of Agriculture and Consumer Services and Federal Department of Agriculture in the eradication of tuberculosis in their respective counties: Provided, that if in 10 days after said appropriation is voted, one fifth of the qualified voters of the county petition the board of commissioners to submit the question of tuberculosis eradication or no tuberculosis eradication to the voters of the county, said commissioners shall submit such questions to said voters. Said election shall be held and conducted under the rules and regulations provided for holding stock-law elections in G.S. 68-16, 68-20 and 68-21. If at any such election a majority of the votes cast shall be in favor of said tuberculosis eradication, the said board shall record the result of the election upon its minutes, and cooperative tuberculosis eradication shall be taken up with the state Department of Agriculture and Consumer Services and Federal Department of Agriculture. If, however, a majority of the votes cast shall be adverse, then said board shall make no appropriation. (1921, c. 177, s. 8; C.S., s. 4895(h); 1997-261, s. 109.)

Editor's Note. — The references to §§ 68-16, 68-20 and 68-21 in the second sentence are to former sections existing prior to the revision of Article 3 of Chapter 68 by Session Laws 1971, c. 741. Among other things, that act did away with the distinction between "stock-law" and "no-stock-law" territory and eliminated provisions for elections on the question of "stock law" or "no stock law."

§ 106-344. Petition for election if commissioners refuse cooperation; order; effect.

If the board of commissioners of any county should exercise their discretion and refuse to cooperate as set out in G.S. 106-343, then if a petition is presented to said board by one fifth of the qualified voters of the county requesting that an election be held as provided in G.S. 106-343 to determine the question of tuberculosis eradication in the county, the board of commissioners shall order said election to be held in the way provided in G.S. 106-343, and if a majority of the votes cast at such election shall be in favor of tuberculosis eradication, then said board shall cooperate with the State and federal governments as herein provided. (1921, c. 177, s. 9; C.S., s. 4895(i).)

§ 106-345. Importation of cattle.

Whenever a county board shall cooperate with the State and federal governments, whether with or without an election, no cattle except for immediate slaughter shall be brought into the county unless accompanied by a tuberculin test chart and health certificate issued by a qualified veterinarian. (1921, c. 177, s. 10; C.S., s. 4895(j).)

§ 106-346. Amount of appropriation.

When cooperative tuberculosis eradication shall be taken up in any county as provided for in G.S. 106-336 to 106-350, the county commissioners of such counties shall appropriate from the general county fund an amount sufficient to defray one half of the expense of said cooperative tuberculosis eradication. (1921, c. 177, s. 11; C.S., s. 4895(k).)

§ 106-347. Qualified veterinarian.

The words "qualified veterinarian" which appear in G.S. 106-336 to 106-350 shall be construed to mean a veterinarian approved by the State Veterinarian and the chief of the United States Bureau of Animal Industry for the tuberculin testing of cattle intended for interstate shipment. (1921, c. 177, s. 12; C.S., s. 4895(l).)

§ 106-348. Rules and regulations.

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations as may be necessary to control and eradicate tuberculosis. (1921, c. 177, s. 13; C.S., s. 4895(m).)

§ 106-349. Violation of law a misdemeanor.

Any person or persons who shall violate any provision set forth in G.S. 106-336 to 106-350, or any rule or regulation duly established by the State Board of Agriculture or any officer or inspector who shall willfully fail to comply with any provisions of this law, shall be guilty of a Class 1 misdemeanor. (1921, c. 177, s. 14; C.S., s. 4895(n); 1993, c. 539, s. 770; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-350. Sale of tubercular animal a felony.

Any person or persons who shall willfully and knowingly sell or otherwise dispose of any animal or animals known to be affected with tuberculosis

without permission as provided for in G.S. 106-338 shall be guilty of a Class I felony. (1921, c. 177, s. 15; C.S., s. 4895(o); 1993, c. 539, s. 1295; 1994, Ex. Sess., c. 24, s. 14(c).)

Part 6. Cattle Tick.

§ 106-351. Systematic dipping of cattle or horses.

Systematic dipping of all cattle or horses infested with or exposed to the cattle tick (Margaropus annulatus) shall be taken up in all counties or portions of counties that shall at any time be found partially or completely infested with the cattle tick (Margaropus annulatus) under the direction of the State Veterinarian acting under the authority as hereinafter provided in G.S. 106-351 to 106-363 and as provided in all other laws and parts of laws of North Carolina and the livestock sanitary laws and regulations of the State Board of Agriculture not in conflict with G.S. 106-351 to 106-363. (1923, c. 146, s. 1; C.S., s. 4895(p).)

Legal Periodicals. — See 1 N.C.L. Rev. 301 (1923).

§ 106-352. Counties not embraced in quarantine zones.

If it shall be determined by the State Veterinarian or an authorized quarantine inspector, that any county or counties shall be partially or completely infested with the cattle tick (Margaropus annulatus), the county commissioners of said counties which are partially or completely infested with the cattle tick (Margaropus annulatus) shall immediately take up the work of systematic tick eradication as hereafter provided and continue same until the cattle tick (Margaropus annulatus) is completely eradicated and notice in writing of same is given by the State Veterinarian. (1923, c. 146, s. 3; C.S., s. 4895(r).)

§ 106-353. Dipping vats; counties to provide; cost.

The county commissioners of the aforesaid counties shall provide such numbers of dipping vats as may be fixed by the State Veterinarian or his authorized representative, and provide the proper chemicals and other materials necessary to be used in the work of systematic tick eradication in such counties, which shall begin on said dates and continue until the cattle tick (Margaropus annulatus) is completely eradicated and notice in writing of same is given by the State Veterinarian. The cost of said vats and chemicals, or any other expense incurred in carrying out the provisions of G.S. 106-351 to 106-363, except G.S. 106-354 and 106-358, shall be paid out of the general county fund. (1923, c. 146, s. 4; C.S., s. 4895(s).)

§ 106-354. Local State inspectors; commissioned as quarantine inspectors; salaries, etc.

The State Veterinarian shall appoint the necessary number of local State inspectors to assist in systematic tick eradication, who shall be commissioned by the Commissioner of Agriculture as quarantine inspectors. The salaries of said inspectors shall be sufficient to insure the employment of competent men. If the service of any of said inspectors is not satisfactory to the State Veterinarian, his services shall be immediately discontinued and his commission canceled. (1923, c. 146, s. 5; C.S., s. 4895(t); 1925, c. 275, s. 6.)

§ 106-355. Enforcement of compliance with law.

If the county commissioners shall fail, refuse or neglect to comply with the provisions of G.S. 106-351 to 106-363, the State Veterinarian shall apply to any court of competent jurisdiction for a writ of mandamus, or shall institute such other proceedings as may be necessary and proper to compel such county commissioners to comply with the provisions of G.S. 106-351 to 106-363. (1923, c. 146, s. 6; C.S., s. 4895(u).)

§ 106-356. Owners of stock to have same dipped; supervision of dipping; dipping period.

Any person or persons, firms or corporations, owning or having in charge any cattle, horses or mules in any county where tick eradication shall be taken up, or is in progress under existing laws, shall, on notification by any quarantine inspector to do so, have such cattle, horses or mules dipped regularly every 14 days in a vat properly charged with arsenical solution as recommended by the United States Bureau of Animal Industry, under the supervision of said inspector at such time and place and in such manner as may be designated by the quarantine inspector. The dipping period shall be continued as long as may be required by the rules and regulations of the State Board of Agriculture, which shall be sufficient in number and length of time to completely destroy and eradicate all cattle ticks (Margaropus annulatus) in such county or counties. (1923, c. 146, s. 7; C.S., s. 4895(v).)

§ 106-357. Service of notice.

Quarantine and dipping notice for cattle, horses and mules, the owner or owners of which cannot be found, shall be served by posting copy of such notice in not less than three public places within the county, one of which shall be placed at the county courthouse. Such posting shall be due and legal notice. (1923, c. 146, s. 8; C.S., s. 4895(w).)

§ 106-358. Cattle placed in quarantine; dipping at expense of owner.

Cattle, horses or mules infested with or exposed to the cattle tick (Margaropus annulatus) the owner or owners of which, after five days' written notice from a quarantine inspector of such animals as is provided for in G.S. 106-357, shall fail or refuse to dip such animals regularly every 14 days in a vat properly charged with arsenical solution, as recommended by the United States Bureau of Animal Industry, under the supervision of a quarantine inspector, shall be placed in quarantine, dipped and cared for at the expense of the owner or owners, by the quarantine inspector. (1923, c. 146, s. 9; C.S., s. 4895(x).)

§ 106-359. Expense of dipping as lien on animals; enforcement of lien.

Any expense incurred in the enforcement of G.S. 106-358 and the cost of feeding and caring for animals while undergoing the process of tick eradication shall constitute a lien upon any animal, and should the owner or owners fail or refuse to pay said expense, after three days' notice, they shall be sold by the sheriff of the county after 20 days' advertising at the courthouse door and three other public places in the immediate neighborhood of the place at which the animal was taken up for the purpose of tick eradication. The said advertise-

ment shall state therein the time and place of sale, which place shall be where the animal is confined. The sale shall be at public auction and to the highest bidder for cash. Out of the proceeds of the sale the sheriff shall pay the cost of publishing the notices of the tick-eradication process, including dipping, cost of feeding and caring for the animals and cost of the sale, which shall include one dollar and fifty cents ($1.50) in the case of each sale to said sheriff. The surplus, if any, shall be paid to the owner of the animal if he can be ascertained. If he cannot be ascertained within 30 days after such sale, then the sheriff shall pay such surplus to the county treasurer for the benefit of the public school fund of the county: Provided, however, that if the owner of the animal shall, within 12 months after the fund is turned over to the county treasurer, as aforesaid, prove to the satisfaction of the board of county commissioners of the county that he was the owner of such animal, then, upon the order of said board, such surplus shall be refunded to the owner. (1923, c. 146, s. 10; C.S., s. 4895(y).)

§ 106-360. Duty of sheriff.

It shall be the duty of the sheriff, in any county in which the work of tick eradication is in progress, to render all quarantine inspectors any assistance necessary in the enforcement of G.S. 106-351 to 106-363 and the regulations of the North Carolina Department of Agriculture and Consumer Services. If the sheriff of any county shall neglect, fail or refuse to render his assistance when so required, he shall be guilty of a Class 1 misdemeanor. (1923, c. 146, s. 11; C.S., s. 4895(z); 1993, c. 539, s. 771; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

§ 106-361. Rules and regulations.

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations that may hereafter be necessary to complete tick eradication in North Carolina. (1923, c. 146, s. 12; C.S., s. 4895(aa).)

§ 106-362. Penalty for violation.

Any person, firm or corporation who shall violate any provisions set forth in G.S. 106-351 to 106-363 or any rule or regulation duly established by the State Board of Agriculture, or any officer or inspector who shall willfully fail to comply with any provision of G.S. 106-351 to 106-363 shall be guilty of a Class 1 misdemeanor. (1923, c. 146, s. 13; C.S., s. 4895(bb); 1993, c. 539, s. 772; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-363. Damaging dipping vats a felony.

Any person or persons who shall willfully damage or destroy by any means any vat erected, or in the process of being erected, as provided for tick eradication, shall be guilty of a Class H felony. (1923, c. 146, s. 14; C.S., s. 4895(cc); 1993, c. 539, s. 1296; 1994, Ex. Sess., c. 24, s. 14(c).)

Part 7. Rabies.

§§ 106-364 through 106-387: Repealed by Session Laws 1983, c. 891

Cross References. — As to the regulation of rabies, see now § 130A-184 et seq.

Part 8. Brucellosis (Bang's Disease).

§ 106-388. Animals affected with, or exposed to, brucellosis declared subject to quarantine, etc.

It is hereby declared that the disease of animals known as brucellosis, or Bang's disease, is of an infectious and contagious nature, and animals affected with, or exposed to, or suspected of being carriers of the disease, shall be subject to quarantine and the rules and regulations of the Department of Agriculture and Consumer Services. (1937, c. 175, s. 1; 1967, c. 511; 1997-261, s. 109.)

§ 106-389. Brucellosis defined; program for vaccination; sale, etc., of vaccine; cooperation with the United States Department of Agriculture.

"Brucellosis" shall mean the disease wherein an animal is infected with Brucella organisms (including Brucella Abortus, B. Melitensis and B. Suis), irrespective of the occurrence or absence of abortion or other symptoms. An animal shall be declared affected with brucellosis if it is classified as a reactor to a serological test for the disease, or if the Brucella organism has been found in the body, its secretions or discharges. The State Veterinarian is hereby authorized and empowered to set up a program for the vaccination of calves in accordance with the recommendations of the Brucellosis Committee of the United States Livestock Sanitary Association, and approved by the United States Department of Agriculture, when in his opinion vaccination is necessary for the control and eradication of brucellosis. Vaccinated animals shall be permanently identified by tattooing or other methods approved by the Commissioner of Agriculture. Above the ages designated by regulation of the Board of Agriculture, all such vaccinates classified as reactors on an official test for brucellosis, shall be considered as affected with brucellosis and shall be branded with the letter "B" in accordance with G.S. 106-390. It shall be unlawful to sell, offer for sale, distribute, or use brucellosis vaccine or any product containing live Brucella organisms, except as provided for in regulations adopted by the Board of Agriculture.

The control and eradication of brucellosis in the herds of North Carolina shall be conducted as far as available funds will permit, and in accordance with the rules and regulations made by the Board of Agriculture. The Board of Agriculture is hereby authorized to cooperate with the United States Department of Agriculture in the control and eradication of brucellosis. (1937, c. 175, s. 2; 1945, c. 462, s. 1; 1953, c. 1119; 1967, c. 511.)

§ 106-390. Blood sample testing; diseased animals to be branded and quarantined; sale; removal of identification, etc.

All blood samples for the brucellosis test shall be drawn by persons whose qualifications are set by regulation of the Board of Agriculture. Animals from which blood is collected for a brucellosis test shall be identified by numbered ear tag, tattoo, or in some other manner approved by the Commissioner of Agriculture. It shall be the duty of the person who collects the blood sample, or other designated authorized person, to brand all cattle affected with brucellosis with the letter "B" on the left hip or jaw, not less than three or more than four inches high, tag such animals with an approved brucellosis reactor ear tag, and report the same to the State Veterinarian. It shall be the duty of

the person owning said cattle at the time of said testing to assist with and cooperate with the person testing said cattle. Cattle affected with brucellosis shall be quarantined and slaughtered at a State or federally inspected slaughter plant within 10 days after branding and tagging; provided the State Veterinarian, in his discretion, may grant an extension of time for said slaughter not to exceed 30 days; and provided further that the Commissioner of Agriculture may allow a branded and tagged animal having unusual breeding value to be held for a period of time determined by him under conditions of isolation and quarantine prescribed by the State Veterinarian. Animals believed by the State Veterinarian or his authorized representative to have been exposed to brucellosis, or animals classified as suspects, shall be quarantined on the owner's premises or at such other place as is mutually agreeable to the owner and the State Veterinarian until the quarantine is removed in accordance with law or until the animal is disposed of in accordance with law. No animal affected with, or exposed to, brucellosis shall be sold, traded or otherwise disposed of except for immediate slaughter, and it shall be the duty of the person disposing of such infected animals to see that they are promptly slaughtered and a written report of same made to the State Veterinarian.

All cattle, swine, sheep, goats or other animals subject to infection by Brucella organisms, sold, or offered at public sale, except for immediate slaughter, shall be subject to test requirements established by the Board of Agriculture.

No ear tag, back tag, or other mark of identification approved by the Commissioner of Agriculture for identifying animals for the purpose of brucellosis testing, including testing at slaughter plants, shall be removed from the animal without authorization from the State Veterinarian or his authorized representative. (1937, c. 175, s. 3; 1945, c. 462, s. 2; 1959, c. 1171; 1963, c. 489; 1967, c. 511; 1969, c. 465.)

§ 106-391. Civil liability of vendors.

Any person or persons who knowingly sells, or otherwise disposes of, to another, an animal affected with brucellosis shall be liable in a civil action to any person injured, and for any and all damages resulting therefrom. (1937, c. 175, s. 4; 1967, c. 511.)

Cross References. — For similar section regarding animals affected with tuberculosis, see § 106-339.

§ 106-392. Sales by nonresidents.

When cattle are sold, or otherwise disposed of, in this State, by a nonresident of this State, the person or persons on whose premises the cattle are sold, or otherwise disposed of, with his knowledge and consent, shall be equally responsible for violations of G.S. 106-388 to 106-398 and the regulations of the Department of Agriculture and Consumer Services. (1937, c. 175, s. 5; 1967, c. 511; 1997-261, s. 109.)

§ 106-393. Duties of State Veterinarian; quarantine of animals; required testing.

When the State Veterinarian receives information, or has reasonable grounds to believe, that brucellosis exists in any animal, or animals, or that it has been exposed to the disease, he shall promptly cause said animal, or animals, to be quarantined on the premises of owner or such other place as is

mutually agreeable to the owner and the State Veterinarian or his authorized representative. Said animals shall not be removed from premises where quarantined until quarantine has been released by State Veterinarian or his authorized representative. A permit to move such infected or exposed animals to immediate slaughter may be issued by the State Veterinarian or his authorized representative. The Board of Agriculture is empowered to make regulations to provide for compulsory testing of animals for brucellosis. (1937, c. 175, s. 6; 1967, c. 511.)

§ 106-394. Cooperation of county boards of commissioners.

The several boards of county commissioners in the State are hereby expressly authorized and empowered within their discretion to make such appropriations from the general funds of their county as will enable them to cooperate effectively with the State and United States Departments of Agriculture in the eradication of brucellosis in their respective counties. (1937, c. 175, s. 7; 1967, c. 511.)

§ 106-395. Compulsory testing.

Whenever a county board of commissioners shall cooperate with the State and the United States governments, as provided for in G.S. 106-388 to 106-398, the testing of all cattle in said county shall become compulsory, and it shall be the duty of the cattle owners to give such assistance as may be necessary for the proper testing of said cattle. (1937, c. 175, s. 8; 1967, c. 511.)

§ 106-396. Authority to promulgate and enforce rules and regulations.

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations as may be necessary to carry out the provisions of G.S. 106-388 to 106-398, and for the effective control and eradication of brucellosis, including the establishment of fees and charges for the collection of blood samples. (1937, c. 175, s. 10; 1967, c. 511; 1981, c. 495, s. 8.)

§ 106-397. Violation made misdemeanor.

Any person or persons who shall violate any provision set forth in G.S. 106-388 to 106-398, or any rule or regulation duly established pursuant to this Article by the State Board of Agriculture or any inspector who shall willfully fail to comply with any provisions of G.S. 106-388 to 106-398, shall be guilty of a Class 1 misdemeanor. (1937, c. 175, s. 11; 1967, c. 511; 1993, c. 539, s. 773; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-398. Punishment for sale of animals known to be infected, or under quarantine.

Any person or persons who shall willfully and knowingly sell or otherwise dispose of any animal or animals known to be affected with brucellosis, or under quarantine because of suspected exposure to brucellosis, except as provided for in G.S. 106-388 to 106-398, shall be guilty of a Class 1 misdemeanor. (1937, c. 175, s. 12; 1967, c. 511; 1993, c. 539, s. 774; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-399: Repealed by Session Laws 1967, c. 511.

Part 9. Control of Livestock Diseases.

§ 106-400. Permit from State Veterinarian for sale, transportation, etc., of animals affected with disease.

No person or persons shall sell, trade, offer for sale or trade, or transport by truck or other conveyance on any public road or other public place within the State any animal or animals affected with a contagious or infectious disease, except upon a written permit of the State Veterinarian and in accordance with the provisions of said permit. The State Veterinarian, or his authorized representative, is hereby empowered to examine any livestock that are being transported or moved, sold, traded, offered for sale or trade on any highway or other public place within the State for the purpose of determining if said animals are affected with a contagious or infectious disease, or are being transported or offered for sale or trade in violation of G.S. 106-400 to 106-405. If the animals are found to be diseased or are being moved, sold, offered for sale or trade in violation of G.S. 106-400 to 106-405, they shall be placed under quarantine in accordance with the provisions of G.S. 106-400 to 106-405 in a place to be determined by the State Veterinarian or his authorized representative. Any animal or animals shipped or otherwise moved into this State in violation of federal laws or regulations shall be handled in accordance with the provisions of G.S. 106-400 to 106-405. (1939, c. 360, s. 1.)

Cross References. — As to quarantine of inoculated poultry, see § 106-307.4.

§ 106-400.1. Swine disease testing.

In order to control or prevent the spread of swine diseases, the Board of Agriculture may adopt rules authorizing the State Veterinarian or his representative to enter, at reasonable times, the premises where swine are kept and to examine the swine and obtain blood or tissue samples for testing purposes. The State Veterinarian shall also have the authority to quarantine swine which have not been properly tested. (1987, c. 793, s. 1.)

§ 106-401. State Veterinarian authorized to quarantine.

The State Veterinarian or his authorized representative is authorized to go upon or enter any property in the State, or to stop any motor vehicle on a public or private road to examine any animal which he has reasonable grounds to believe is affected with or exposed to a contagious disease. If such person refuses to consent to such entry and examination after the State Veterinarian or his authorized representative shall have notified, in writing, the owner or person in whose custody such animal or animals are found, of his intention to enter such property and conduct such examination, the State Veterinarian or his authorized representative may petition the district court in the county where such animal or animals are found for an order authorizing such entry and examination. The State Veterinarian or his authorized representative may quarantine any animal affected with or exposed to a contagious disease, or injected with or otherwise exposed to any material capable of producing a contagious disease and shall give public notice of such quarantine by posting or placarding with a suitable quarantine sign the entrance to any part of the

premises on which such animal is held. Such animal is to be maintained by the owner or person in charge as provided in G.S. 106-400 through 106-405 at the owner's or person's in charge expense. No animal under quarantine shall be removed from the place of quarantine except upon a written permit from the State Veterinarian or his authorized representative. Such quarantine shall remain in effect until cancelled by official written notice from the State Veterinarian or his authorized representative and such quarantine shall not be cancelled until any sick or diseased animal has been properly disposed of and the premises have been properly cleaned and disinfected. (1939, c. 360, s. 2; 1971, c. 724.)

Cross References. — As to quarantine of infected or inoculated livestock, see § 106-307.3.

§ 106-401.1. Inspection and quarantine of poultry.

The State Veterinarian, or his authorized representative, is hereby authorized to go upon or enter any property in the State, or to stop any motor vehicle, to examine any poultry which he has reason to believe are affected with or exposed to a contagious disease. He or his authorized representative is authorized to quarantine any poultry affected with or exposed to a contagious disease, or injected with or otherwise exposed to any material capable of producing a contagious disease and to give public notice of such quarantine by posting or placarding with a suitable quarantine sign the entrance to or any part of the premises on which such poultry are held. Said poultry are to be maintained by the owner or person in charge as provided for in G.S. 106-400 to 106-405 at the owner's expense. The quarantine provision hereof shall not apply to those diseases which are endemic in the State and for which adequate preventive and control measures are not available. No poultry under quarantine shall be moved from the place of quarantine except upon a written permit from the State Veterinarian or his authorized representative. Said quarantine shall remain in effect until cancelled by official written notice from the State Veterinarian or his authorized representative and shall not be released or cancelled until the sick or dead poultry have been properly disposed of and the premises have been properly cleaned and disinfected. (1969, c. 693, s. 1.)

§ 106-402. Confinement and isolation of diseased animals required.

Any animal, animals or poultry affected with or exposed to a contagious or infectious disease shall be confined by the owner or person in charge of said animal, animals or poultry in such a manner, by penning or otherwise securing and actually isolating same from the approach or contact with other animals or poultry not so affected; they shall not have access to any ditch, canal, branch, creek, river, or other watercourse which passes beyond the premises of the owner or person in charge of said animals or poultry, or to any public road, or to the premises of any other person. (1939, c. 360, s. 3; 1969, c. 693, s. 2.)

Cross References. — As to confinement and isolation of hogs affected with cholera, see § 106-311.

§ 106-403. Disposition of dead domesticated animals.

It shall be the duty of the owner or person in charge of any of his domesticated animals that die from any cause and the owner, lessee, or person in charge of any land upon which any domesticated animals die, to bury the same to a depth of at least three feet beneath the surface of the ground within 24 hours after knowledge of the death of said domesticated animals, or to otherwise dispose of the same in a manner approved by the State Veterinarian. It shall be a violation of this statute to bury any dead domesticated animal closer than 300 feet to any flowing stream or public body of water. It shall be unlawful for any person to remove the carcasses of dead domesticated animals from his premises to the premises of any other person without the written permission of the person having charge of such premises and without burying said carcasses as above provided. The governing body of each municipality shall designate some appropriate person whose duty it shall be to provide for the removal and disposal, according to the provisions of this section, of any dead domesticated animals located within the limits of the municipality when the owner or owners of said animals cannot be determined. The board of commissioners of each county shall designate some appropriate person whose duty it shall be to provide for the removal and disposal, according to the provisions of this section, of any dead domesticated animals located within the limits of the county, but without the limits of any municipality, when the owner or owners of said animals cannot be determined. All costs incurred by a municipality or county in the removal of a dead domesticated animal shall be recoverable from the owner of such animal upon admission of ownership or conviction. "Domesticated animal" as used herein shall include poultry. (1919, c. 36; C.S., s. 4488; 1927, c. 2; 1939, c. 360, s. 4; 1971, c. 567, ss. 1, 2.)

§ 106-404. Animals affected with glanders to be killed.

If the owner of any animal having the glanders or farcy shall omit or refuse, upon discovery or knowledge of its condition, to deprive the same of life at once, he shall be guilty of a Class 3 misdemeanor. (1881, c. 368, s. 8; Code, s. 2489; 1891, c. 65; Rev., s. 3296; C.S., s. 4489; 1993, c. 539, s. 775; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to compensation for killing diseased animals, see § 106-323 et seq.

§ 106-405. Violation made misdemeanor.

Any person or persons who shall knowingly and willfully violate any provision of G.S. 106-400 to 106-403 shall be guilty of a Class 2 misdemeanor. (1939, c. 360, s. 6; 1969, c. 693, s. 3; 1993, c. 539, s. 776; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Macon: 1939, c. 360, s. 7.

Part 10. Feeding Garbage to Swine.

§ 106-405.1. Definitions.

For the purpose of this Part, the following words shall have the meanings ascribed to them in this section:

(1) "Garbage" means consisting in whole or in part of animal waste resulting from handling, preparing, cooking and consuming food, including the offal from or parts thereof; provided that the Commissioner of Agriculture or his authorized representative is empowered to exempt from this definition the waste resulting from the processing of seafood.
(2) "Person" means the State, any municipality, political subdivision, institution, public or private corporation, individual, partnership, or any other entity. (1953, c. 720, s. 1; 1967, c. 872, s. 1.)

§ 106-405.2. Permit for feeding garbage to swine.

(a) No person shall feed garbage to swine without first securing a permit therefor from the North Carolina Commissioner of Agriculture or his authorized agent. Such permits shall be issued for a period of one year and shall be renewable on the date of expiration.
(b) No permit shall be issued or renewed for garbage feeding under this Part in any county or other subdivision in which local regulations to prohibit garbage feeding are in effect.
(c) This Part shall not apply to any individual who feeds only his own household garbage to swine: Provided, that any such swine sold or disposed of shall be sold or disposed of in accordance with rules and regulations promulgated by the State Board of Agriculture.
(d) This Part shall not apply to any person who holds a valid federal permit under the Swine Health Protection Act, P.L. 96-468. (1953, c. 720, s. 2; 1971, c. 566, s. 1; 1981, c. 392.)

§ 106-405.3. Application for permit.

(a) Any person desiring to obtain a permit to feed garbage to swine shall make written application therefor to the North Carolina Commissioner of Agriculture in accordance with requirements of this Part.
(b) The Commissioner of Agriculture is hereby authorized to collect a fee of twenty-five dollars ($25.00) for each permit issued to a garbage feeder under the provisions of this Part. The fees provided for in this Part shall be used exclusively for the enforcement of this Part.
(c) No permit fee shall be collected from any federal, State, county, or municipal institution. (1953, c. 720, s. 3; 1967, c. 872, s. 2.)

§ 106-405.4. Revocation of permits.

Upon determination that any person, having a permit issued under this Part or one who has applied for a permit hereunder, has violated or failed to comply with any provisions of this Part, the North Carolina Commissioner of Agriculture may revoke such permit or refuse to issue a permit to an applicant therefor. (1953, c. 720, s. 4.)

§ 106-405.5. Sanitation.

Premises on which garbage feeding is permitted under this Part must be equipped with feeding platforms constructed of concrete, wood or other impervious material, or troughs of such material of sufficient size to accommodate the swine herd. Premises must be kept free of collections of unused garbage and waste materials. Sanitation, rat and fly control measures must be practiced as a further means of the prevention of the spread of diseases. (1953, c. 720, s. 5.)

§ 106-405.6. Cooking or other treatment.

All garbage, regardless of previous processing, shall, before being fed to swine, be thoroughly heated to at least 212 degrees F. for at least 30 minutes unless treated in some other manner which shall be approved in writing by the North Carolina Commissioner of Agriculture as being equally effective for the protection of animal and human health. (1953, c. 720, s. 6.)

§ 106-405.7. Inspection and investigation; maintenance of records.

(a) Any authorized representative of the North Carolina Commissioner of Agriculture shall have the power to enter at reasonable times upon any private or public property for the purpose of inspecting and investigating conditions relating to the proper treatment of garbage to be fed to swine, sanitation of the premises and health of the animals.

(b) Garbage feeders shall keep a complete permanent record relating to the operation of equipment and their procedure of treating garbage, and also from whom all swine are received and to whom sold for immediate slaughter. Such record is to be available to the Commissioner of Agriculture or his authorized representative.

(c) Any operator, manager or person in charge of a restaurant, cafe, boardinghouse, school, hospital, or other public or private place where food is served to persons other than members of the immediate family or nonpaying guests of such operator, manager, or person in charge, shall not allow or permit garbage to be removed from the premises thereof unless the person removing said garbage is in possession of a valid garbage-feeding permit issued by the North Carolina Department of Agriculture and Consumer Services, or unless such person removing said garbage is in possession of a document from the county department of health wherein such garbage is located stating that the person removing said garbage is authorized to dispose of such garbage in a legal manner or unless such person removing said garbage is an employee of a municipality engaged in the regular collection of garbage for said municipality. The name and address or license number of any motor vehicle of any person removing garbage other than under authorization from the county department of health, the North Carolina Department of Agriculture and Consumer Services or a municipality, shall be reported by such operator, manager or person in charge, to the State Veterinarian within five days after the first removal of such garbage is made. (1953, c. 720, s. 7; 1971, c. 566, s. 2; 1997-261, s. 109.)

§ 106-405.8. Enforcement of Part; rules and regulations.

The North Carolina Commissioner of Agriculture is hereby charged with the administration and enforcement of the provisions of this Part. The North Carolina Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to cooperate with the United States Bureau of Animal Industry in the control and eradication of vesicular exanthema.

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations that may hereafter be necessary to carry out the provisions of this Part. (1953, c. 720, s. 8.)

§ 106-405.9. Penalties.

Any person, firm or corporation who shall knowingly violate any provisions set forth in this Part or any rule or regulation duly established by the State

Board of Agriculture, or any officer or inspector who shall willfully fail to comply with any provisions of this Part shall be guilty of a Class 1 misdemeanor. Such person, firm, or corporation may be enjoined from continuing such violation. (1953, c. 720, s. 9; 1993, c. 539, s. 777; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 106-405.10 through 106-405.14: Reserved for future codification purposes.

Part 11. Equine Infectious Anemia.

§ 106-405.15. "Equine infectious anemia" defined.

Equine infectious anemia shall mean the disease wherein an animal is infected with the virus of equine infectious anemia, irrespective of the occurrence or absence of clinical signs of the disease. An animal shall be declared infected with equine infectious anemia if it is classified as a reactor to a serological test or other test approved by the State Veterinarian. (1973, c. 1198, s. 1.)

§ 106-405.16. Animals infected with or exposed to equine infectious anemia declared subject to quarantine.

It is hereby declared that the disease of horses, ponies, mules and asses (and other equine animals) known as equine infectious anemia is of an infectious and contagious nature and that animals infected with, exposed to, or suspected of being carriers of the disease shall be subject to quarantine and identification as required by the rules and regulations of the North Carolina Department of Agriculture and Consumer Services. (1973, c. 1198, s. 2; 1997-261, s. 109.)

§ 106-405.17. Authority to promulgate and enforce rules and regulations.

The State Board of Agriculture shall have full power to promulgate and enforce such rules and regulations as it deems necessary for the control and eradication of equine infectious anemia. This authority shall include, but not be limited to, the power to make regulations requiring the testing of horses, ponies, mules and asses for equine infectious anemia prior to sale, exhibition or assembly at public stables or other public places, and authority to require the owner, operator or person in charge of shows, sales, public stables and other public places to require proof of freedom from equine infectious anemia before any animal is permitted to remain on the premises. The Board shall also have the authority to set fees for such tests as necessary to recover the costs to the North Carolina Department of Agriculture and Consumer Services. (1973, c. 1198, s. 3; 1981, c. 495, s. 7; 1997-261, s. 109.)

Editor's Note. — Session Laws 1999-237, ss. 13.6(a) and (b) provide that no later than October 1, 1999, the Board of Agriculture shall adopt rules pursuant to its authority under this section to provide for the mandatory testing of equines for equine infectious anemia prior to sale or prior to exhibition or assembly at public stables or other public places; and that funds appropriated in Session Laws 1999-237 to the Department of Agriculture and Consumer Services for the 1999-2000 fiscal year and for the 2000-2001 fiscal year shall be used for the costs of enforcing this mandatory testing program.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effect

beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4 contains a severability clause.

§ 106-405.18. Implementation of control and eradication program.

The control and eradication of equine infectious anemia in North Carolina shall be conducted as far as available funds will permit, and in accordance with the rules and regulations made by the Board of Agriculture. The Board of Agriculture is hereby authorized to cooperate with the U.S. Department of Agriculture in the control and eradication of equine infectious anemia. (1973, c. 1198, s. 4.)

§ 106-405.19. Violation made misdemeanor.

Any person who shall willfully move, direct the movement, or allow to be moved, from the premises where quartered any animal or animals known to be infected with equine infectious anemia, or under quarantine because of suspected exposure to equine infectious anemia, or who shall violate any provision of this Part or any rule or regulation promulgated by the Board of Agriculture under this Part shall be guilty of a Class 1 misdemeanor. (1973, c. 1198, s. 5; 1993, c. 539, s. 778; 1994, Ex. Sess., c. 24, s. 14(c).)

Part 12. Penalties.

§ 106-405.20. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 8; 1998-215, s. 12.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

Article 35.

Public Livestock Markets.

§ 106-406. Permits from Commissioner of Agriculture for operation of public livestock markets; application therefor; hearing on application.

Any person, firm or corporation desiring to operate a public livestock market within the State of North Carolina shall be required to file an application with the Commissioner of Agriculture for a permit authorizing the operation of such market; provided that, those markets operating under a valid permit and in

accordance with G.S. 106-406 through 106-418 at the time this Article becomes effective shall be issued a license upon payment of the annual license fee and upon satisfying the requirement for bonding as specified in G.S. 106-407. An application for a permit shall include the following information:

(1) The name and address of the applicant, name of market and a listing of the names and addresses of all persons having any financial interest in the proposed livestock market and the amount and nature of such interest, and such other information as is required to complete an application form supplied by the Commissioner; and

(2) The plans and specifications for the facilities proposed to be built, or for existing structures.

The application for a permit shall be accompanied by a permit fee of two hundred fifty dollars ($250.00), two hundred dollars ($200.00) of which shall be returned to the applicant if the application is denied, plus one hundred dollars ($100.00) annual permit fee for the first year of operation of the market, all of which shall be returned to the applicant if the application is denied. There shall be an annual renewal fee of one hundred dollars ($100.00) for each year of operation thereafter.

Upon the filing of said application, the Commissioner shall determine whether all necessary information has been furnished. If all information required has not been furnished, the Commissioner shall notify the applicant by mail of the additional information needed; it shall be furnished the Commissioner by the applicant within 10 days of such notification. Upon receipt of all required information, the Commissioner shall issue a license or fix the date of a hearing on said application, to be held in Raleigh. Notice of the time and date of the hearing shall be published in a newspaper having general circulation in the county in which the livestock market is proposed to be located; said notice shall appear at least 10 days prior to such hearing. The applicant shall be notified by mail by the Commissioner at least 20 days prior to the hearing of the time and place of said hearing. The Commissioner shall also notify by mail the members of the Public Livestock Market Advisory Board of the time and place of said hearing, at least 10 days before the date [on] which the hearing will be held.

A public hearing shall be conducted by the Commissioner on said application. If, after the hearing, at which any person may appear in support or opposition thereto, the North Carolina Public Livestock Market Advisory Board finds that the public livestock market for which a permit or license is sought fulfills the requirements of all applicable laws, it shall recommend to the Commissioner that a permit be issued to the applicant. If the Commissioner denies the application, the applicant may commence a contested case under G.S. 150B-23 by filing a petition within 10 days after receiving notice of the denial. Unless revoked by the Board of Agriculture pursuant to any applicable law or regulation, permits will be renewed each July 1 on payment of the annual renewal fee. (1941, c. 263, s. 1; 1943, c. 724, s. 1; 1967, c. 894, s. 1; 1971, c. 739, s. 1; 1973, c. 1331, s. 3; 1975, c. 69, s. 4; 1977, c. 132, ss. 1-3; 1987, c. 827, s. 32.)

§ 106-407. Bonds required of operators; exemption of certain market operations.

The Commissioner of Agriculture shall require the owner of each public livestock market issued a permit under the provisions of G.S. 106-406 to furnish a bond acceptable to the Commissioner of not less than five thousand dollars ($5,000) nor more than fifty thousand dollars ($50,000), in the discretion of the Commissioner, to secure the performance of all obligations incident to the operation of the public livestock market operation including prompt

payment to the vendors of all livestock sold at said market; provided, that, at the discretion of the Commissioner of Agriculture, a bond shall not be required of a livestock market bonded under the Federal Packers and Stockyards Act.

The term "public livestock market" as used in this Article shall not be interpreted to mean any of the following:

(1) A market where horses and mules exclusively are sold;
(2) A market that sells only finished livestock to be used for immediate slaughter;
(3) A dispersal sale of livestock by a farmer, dairyman, livestock breeder, or feeder when all animals offered for sale have been owned by him at least 30 days; provided that, no more than one dispersal sale shall be held by any person, firm or corporation within any period of six months.
(4) Purebred livestock association sales and those sales where Future Farmers of America, 4-H Clubs and similar groups, State institutions, or private fairs conduct sales of livestock. (1941, c. 263, s. 2; 1967, c. 894, s. 2.)

CASE NOTES

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 106-407.1. North Carolina Public Livestock Market Advisory Board created; appointment; membership; duties.

There is hereby created the North Carolina Public Livestock Market Advisory Board composed of eight persons, all of whom shall be residents of North Carolina, who shall be appointed and the chairman designated by the Commissioner of Agriculture on or before August 1, 1967. Two members of said Board shall be livestock producers, two shall be licensed livestock market operators, one shall be a meat packer, one shall be the State Veterinarian, one shall be a duly licensed and practicing veterinarian and one shall be an employee of the markets division of the North Carolina Department of Agriculture and Consumer Services. On the initial Board, two members shall be appointed for terms of one year, two members for terms of two years, two members for terms of three years, and two members for terms of four years. Thereafter, all members shall serve four-year terms. Any vacancy on the Board caused by death, resignation, or otherwise shall be filled by the Commissioner of Agriculture for the expiration of the term. The terms of all members of the initial and subsequent boards shall expire on June 30 of the year in which their terms expire.

It shall be the duty of the members of the Board to attend all hearings on applications for licenses to operate public livestock markets. The Board may meet once each year, or more often if directed by the Commissioner, in Raleigh or such other place in North Carolina as directed by the Commissioner for the purpose of (i) discussing problems of the livestock market industry, (ii) proposing changes in the rules and regulations of the Department of Agriculture and Consumer Services relative to public livestock markets, and (iii) making such other recommendations to the Commissioner and the Board of Agriculture as it deems in the best interest of the livestock industry of North Carolina.

Members of the Board, except members who are employees of the State, shall receive as compensation, subsistence and travel allowances, such sums

as by law are provided for other commissions and boards. Compensation, subsistence and travel allowances authorized for the Board members shall be paid from fees collected pursuant to this Article. (1967, c. 894, s. 3; 1977, c. 132, s. 4; 1981, c. 337; 1997-261, s. 109.)

State Government Reorganization. — The Public Livestock Market Advisory Board was transferred to the Department of Agriculture by § 143A-65, enacted by Session Laws 1971, c. 864.

§ 106-407.2. Revocation of permit by Board of Agriculture; restraining order for violations.

The Board of Agriculture may revoke a permit authorizing the operation of a public livestock market for a violation of this Article or a rule adopted under this Article.

If any person, firm or corporation shall operate a public livestock market in violation of the provisions of this Article, or the rules and regulations promulgated by the North Carolina Board of Agriculture, or shall fail to comply with the provisions of this Article, or rules and regulations promulgated thereunder, a temporary or permanent restraining order may be issued by a judge of the superior court upon application by the Commissioner of Agriculture, or his authorized representative, and the judge of the superior court shall have the same power and authority as in any other injunction proceeding, and the defendant shall have the same rights including the right of appeal, as in any other injunction proceeding heard before the superior court. (1967, c. 894, s. 4; 1973, c. 1331, s. 3; 1987, c. 827, s. 33.)

§ 106-408. Marketing facilities prescribed; records of purchases and sales; time of sales; notice.

All public livestock markets operating under this Article shall have proper facilities for handling livestock and such other equipment as specified by regulation of the North Carolina Board of Agriculture. Scales approved by the North Carolina Division of Weights and Measures shall be provided at public livestock markets where animals are bought, sold or exchanged by weight. The premises, including yards, pens, alleys, and chutes shall be cleaned and disinfected in accordance with regulations promulgated by the Board of Agriculture pursuant to the authority contained in G.S. 106-416. The market shall keep a complete legible permanent record, including the use of numbered invoices, showing the name and address of the person or firm from whom all animals are received and the name and address of the person or firm to whom sold. Symbols in lieu of names shall not be used. The weight, if sold by weight, and the price paid and the price received shall be recorded on the invoice. Such records as specified in this section shall be available for inspection to the Commissioner of Agriculture or his authorized representative during regular business hours.

The sales of all livestock at livestock auction markets shall start no later than 2:00 P.M.; provided, however, the Commissioner of Agriculture shall have authority to authorize a sale to begin at late as 4:00 P.M. when the sale (i) consists solely of the sale of pigs weighing no more than 150 pounds and sold as feeder pigs, (ii) continues without interruption, and (iii) lasts no later than 5:00 P.M., or when the sale consists solely of slaughter hogs sold by teleconference. The sale of livestock shall be continuous until all are sold.

Each public livestock market operator operating under this Article shall post notice of the day(s) of sale and the starting time in a conspicuous place on the market premises. In the event of subsequent changes in day of sale or starting

time, the operator shall post notice on the premises and notify the State Veterinarian in writing at least two weeks in advance of the date of change. (1941, c. 263, s. 3; 1949, c. 997, s. 1; 1961, c. 275, s. 1; 1967, c. 894, s. 5; 1969, c. 983; 1971, c. 739, s. 2; 1987, c. 436.)

Local Modification. — Harnett: 1955, c. 753; Lee: 1957, c. 772; Robeson: 1951, c. 160; 1961, c. 275, s. 1(a).

§ 106-408.1. Market operation fees.

A fee of twenty-five dollars ($25.00) shall be paid by the market operator to the North Carolina Department of Agriculture and Consumer Services for each day, or fraction thereof, a sale is held, provided that an additional maximum fee of ten dollars ($10.00) per one-half hour, or fraction thereof, shall be paid to the North Carolina Department of Agriculture and Consumer Services for operation after 6:00 P.M. Provided further, that the Board of Agriculture may at its discretion adjust both fees for market operation within the limits set in this section. A fee to be set by the Board of Agriculture may be charged to the buyer of cattle and swine required to be tested under G.S. 106-409 and 106-410, and the amount collected used to offset the twenty-five dollar ($25.00) market operation fee. All test fees charged in excess of twenty-five dollars ($25.00) shall revert to the North Carolina Department of Agriculture and Consumer Services and be payable within 24 hours following the close of a sale day. The starting and finishing time of each sale shall be recorded by the livestock inspector on his report of the sale. A copy of the report shall be given to the market operator or his representative following the sale. Failure to make the required payment within 24 hours following close of a sale day shall be cause for the Commissioner of Agriculture to prohibit, on 72 hours' notice, further sales at the market until the account is paid in full. The operation fee shall be waived when a livestock market operator employs a licensed, accredited veterinarian approved by the State Veterinarian to be present at the market from the starting time of the sale until all livestock to be admitted to the sales barn on that sale day have entered and such work in inspection, testing and vaccination as designated by the State Veterinarian has been completed. (1971, c. 739, s. 3; 1997-261, s. 109.)

§ 106-409. Removal of cattle from market for slaughter and nonslaughter purposes; identification; permit needed.

No cattle except those for immediate slaughter, shall be removed from any public livestock market except in accordance with this Article and regulations adopted by the North Carolina Board of Agriculture. All cattle removed from any public livestock market for immediate slaughter shall be identified in a manner approved by the Commissioner of Agriculture and the person removing same shall before removal sign a form in duplicate showing the number of cattle, their description, and where same are to be slaughtered or resold for slaughter. Cattle sold for slaughter shall be disposed of in one of the following ways:

(1) Moved directly to a recognized slaughtering establishment for immediate slaughter.
(2) Sold to a dealer bonded under the Packers and Stockyards Act who handles cattle for immediate slaughter.
(3) Offered for resale for slaughter through a livestock auction market holding a valid permit issued under this Article.

A "buying station" of a slaughterhouse or similar business not operating under a public livestock market permit shall not allow the removal of animals for any purpose other than that of immediate slaughter unless a written permit has been secured from the State Veterinarian or his authorized representative. This provision shall not apply to buying stations operated by feedlot operators buying animals for movement to their own feedlots.

Cattle sold for immediate slaughter shall be used for no other purpose unless prior written permission has been secured from the State Veterinarian or his authorized representative. No livestock market operator, or agent or employee thereof, shall allow the removal of any cattle from a market in violation of this section. (1941, c. 263, s. 4; 1943, c. 724, s. 2; 1949, c. 997, s. 2; 1967, c. 894, s. 6.)

§ 106-410. Removal of swine from market for slaughter and nonslaughter purposes; identification; permit needed; resale for feeding or breeding; out-of-state shipment.

No swine, except those for immediate slaughter, shall be removed from any public livestock market except in accordance with regulations adopted by the North Carolina Board of Agriculture. All swine removed from any public livestock market for immediate slaughter shall be identified in a manner prescribed by regulation adopted by the North Carolina Board of Agriculture and the person removing same shall sign a form in duplicate showing the number of hogs, their description and where they are to be slaughtered or resold for slaughter. Slaughter hogs may be disposed of in one of the following ways:

(1) Moved directly to a recognized slaughter establishment for immediate slaughter.
(2) Sold to a dealer, bonded under the Packers and Stockyards Act, who handles hogs for immediate slaughter.
(3) Offered for resale for slaughter through a livestock auction market holding a valid permit issued under this Article.

Swine sold for immediate slaughter shall be used for no other purpose unless prior written permission has been secured from the State Veterinarian or his authorized representative. No market operator shall allow the removal of any swine from a market in violation of this section.

Swine for breeding or feeding purposes shall not be resold in a livestock market for other than immediate slaughter within 14 days of prior sale at a livestock market unless they are identified as having been previously sold swine at the time of resale. Such identification shall contain the date and place of the prior sale and shall be furnished in writing to the market operator by the seller of said swine.

Provided, however, that the Commissioner of Agriculture may permit swine to be shipped out of the State of North Carolina, under the same conditions as if said swine were being delivered for immediate slaughter, for immediate delivery to holding or feeding lots in any other state when he determines that said holding or feeding lots are being operated in compliance with the laws of said state and the rules and regulations promulgated thereunder. (1941, c. 263, s. 5; 1943, c. 724, s. 3; 1949, c. 997, ss. 3, 4; 1967, c. 894, s. 7; 1971, c. 739, s. 5.)

§ 106-411. Regulation of use of livestock removed from market; swine shipped out of State.

Any person or persons who shall remove, or whose agent or employee at the direction of the employer, shall remove from a public livestock market any

cattle, swine, or other livestock for immediate slaughter shall use them for immediate slaughter only or resale for immediate slaughter only in compliance with this Article and the applicable regulations of the Department of Agriculture and Consumer Services. It shall be a Class 1 misdemeanor for the owner of any cattle, swine or other livestock purchased for immediate slaughter, to order, direct or procure his agent or employee to transport said cattle, swine, or other livestock to any place other than a recognized slaughter plant or as provided in G.S. 106-409 and G.S. 106-410; and the agent or employee who transports said animal or animals shall likewise be guilty of a Class 1 misdemeanor.

Provided that, it shall not be a violation of law to ship swine out of this State to holding or feeding lots as provided for in G.S. 106-410. (1941, c. 263, s. 6; 1943, c. 724, s. 4; 1949, c. 997, s. 5; 1967, c. 894, s. 8; 1993, c. 539, s. 779; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

§ 106-412. Admission of animals to markets; quarantine of diseased animals; sale restricted; regulation of trucks, etc.

No animal known to be affected with or having visible symptoms of a contagious or infectious disease shall be received or admitted into any public livestock market except upon special permit issued by the Commissioner of Agriculture or his authorized representative. All animals affected with, or exposed to, any contagious or infectious disease of animals or any animal that reacts to an official test indicating the presence of such a disease, shall be quarantined separate and apart from healthy animals and shall not be sold, traded, or otherwise disposed of except upon written permission of the Commissioner of Agriculture or his authorized representative. All animals sold for slaughter under this provision must be moved directly to a recognized slaughter establishment with State or federal meat inspection unless written permission to do otherwise is secured from the State Veterinarian or his authorized representative. The owner of the animals shall be responsible for the cost of maintaining the quarantine, the necessary treatment, and the feed and care of the animals while under quarantine and said costs shall constitute a lien against all of said animals. All trucks, trailers, and other conveyances used in transporting livestock shall be cleaned and disinfected in accordance with the regulations issued by authority of this Article. (1941, c. 263, s. 7; 1967, c. 894, s. 9.)

§ 106-413. Sale, etc., of certain diseased animals restricted; application of Article; sales by farmers.

No person or persons shall sell or offer for sale, trade or otherwise dispose of any animal or animals that are affected with a contagious or infectious disease, or that the owner or person in charge or a livestock inspector or an approved veterinarian has reason to believe are so affected or exposed; provided, however, that upon written permission of the Commissioner of Agriculture or his authorized representative it shall be lawful to sell, trade, or otherwise dispose of such animals for immediate slaughter at a plant with State or federal meat inspection. The provisions of this Article, including those regulations adopted by the North Carolina Board of Agriculture, shall apply to all animals sold or offered for sale on any public highway, right-of-way, street, or within one-half mile of any public livestock market, or other public place; provided, that the one-half mile provision shall not apply to animals raised and

owned by a bona fide farmer who is a resident of the State of North Carolina and sold or offered for sale by him. (1941, c. 263, s. 8; 1943, c. 724, s. 5; 1967, c. 894, s. 10.)

§ 106-414. Transportation, sale, etc., of diseased livestock; burden of proving health; movement to laboratory; removal of identification.

No cattle, swine, or other livestock with visible symptoms of a contagious or infectious disease shall be transported or otherwise moved on any public highway or street in this State except upon written permission of the Commissioner of Agriculture or his authorized representative. The burden of proof to establish the health of any animal transported on the public highways of this State, or sold, traded, or otherwise disposed of in any public place shall be upon the vendor. Any person who shall sell, trade, or otherwise dispose of any animal affected with, or exposed to, a contagious or infectious disease, or one he has or should have reason to believe is so affected, or exposed, shall be civilly liable for all damages resulting from such sale or trade; provided that, nothing in this section shall prevent an individual who owns or has custody of sick animals from transporting sick or dead animals to a disease diagnostic laboratory operated or approved by the North Carolina Department of Agriculture and Consumer Services if reasonable and proper precautions to prevent the exposure of other animals is taken by the owner or transporter thereof.

It shall be a Class 1 misdemeanor to remove before slaughter any ear tag, back tag, or other mark of identification approved by the Commissioner of Agriculture for identifying animals for disease control purposes unless prior written authorization has been obtained from the State Veterinarian or his authorized representative. (1941, c. 263, s. 9; 1967, c. 894, s. 11; 1993, c. 539, s. 780; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

§ 106-415. Cost of tests, serums, etc.

The cost of all tests, serums, vaccines and other medical supplies necessary for the enforcement of this Article and the protection of livestock against contagious and infectious diseases shall be paid for by the owner of said livestock and the cost shall constitute a lien against all said animals; provided that, the Commissioner of Agriculture, by and with the consent of the Board of Agriculture, is hereby authorized to determine reasonable charges and costs for such tests, serums, vaccines, and other medical supplies; provided further, that an animal which shows a reaction to a test for brucellosis shall be automatically "no-saled" and resold for immediate slaughter and the cost of the test paid by the original seller. (1941, c. 263, s. 10; 1949, c. 997, s. 6; 1957, c. 1269; 1967, c. 894, s. 12.)

§ 106-416. Rules and regulations.

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations that may be necessary to carry out the provisions of this Article. This power shall include, but not be confined to, the authority to designate a time after which livestock shall not be allowed to enter a sales barn on the day of a sale. (1941, c. 263, s. 11; 1967, c. 894, s. 13; 1971, c. 739, s. 4.)

§ 106-417. Violation made misdemeanor; responsibility for health, etc., of animals.

Any person, firm, or corporation who shall knowingly violate any provisions set forth in this Article or any rule or regulation duly established by the State Board of Agriculture, or any officer or inspector who shall willfully fail to comply with any provisions of this Article, shall be guilty of a Class 1 misdemeanor. A market operating under this Article shall not be responsible for the health or death of an animal sold through such market if the provisions of this Article have been complied with. (1941, c. 263, s. 12; 1943, c. 724, s. 6; 1967, c. 894, s. 14; 1993, c. 539, s. 781; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-417.1. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 9; 1998-215, s. 13.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

§ 106-418. Exemption from health provisions.

The health provisions of this Article shall not apply to "no-sale" cattle offered for sale at a public livestock market by a bona fide farmer who has owned them at least 60 days. (1941, c. 263, s. 12½; 1967, c. 894, s. 15.)

Article 35A.

North Carolina Livestock Prompt Pay Law.

§ 106-418.1. Short title.

This Article shall be known by the short title of "North Carolina Livestock Prompt Pay Law." (1973, c. 38, s. 2.)

§ 106-418.2. Legislative intent and purpose.

The purpose of the Article is to regulate the sale of livestock by auction at public livestock markets and to assure prompt payment for livestock sold. (1973, c. 38, s. 1.)

§ 106-418.3. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Banking business day" means a day in which banks are normally open for business in North Carolina.

(2) "Commissioner" means the Commissioner of Agriculture of North Carolina or his designated agent or agents.

(3) "Custodial accounts" means custodial accounts for trust funds as explained in the Code of Federal Regulations, January 1, 1972, § 201.42.
(4) The "North Carolina Public Livestock Market Advisory Board" means the Board established under G.S. 106-407.1.
(5) "Public livestock market" means livestock sales at a market duly licensed under G.S. 106-406. (1973, c. 38, s. 3; 1975, c. 19, s. 33.)

§ 106-418.4. Duties of Commissioner.

The Commissioner shall regulate, by and with the consent of the Board of Agriculture as provided herein, the payment for livestock sold at auction. (1973, c. 38, s. 4.)

§ 106-418.5. Collection of payment.

Collection of payment for livestock purchased at auction shall be made by the public livestock market on the same date of purchase of the livestock, and the proceeds therefrom shall be deposited by the public livestock market in their custodial account not later than the next banking business day following the date of sale. Collection for livestock purchased by auction shall be made by cash, check, or draft. There shall be no loans made from the custodial account of any public livestock market to any purchaser of livestock at said sales establishment. Payment shall be made by the public livestock market to the seller of livestock at auction not later than one banking business day after the date of sale of the animal or animals. (1973, c. 38, s. 5.)

§ 106-418.6. Action upon failure of payment.

It shall be the duty and responsibility of each public livestock market to report to the Commissioner within 24 hours after having knowledge that a check or draft issued in payment for livestock has been dishonored or that a buyer of livestock at auction has not fulfilled his obligation to pay for livestock within the prescribed time in G.S. 106-418.5. It shall be the duty and responsibility of the Commissioner to notify all public livestock markets of the fact of dishonor of any such check issued or the failure to honor any draft upon presentation used in payment for livestock or due to the lack of satisfactory payment for livestock. (1973, c. 38, s. 6.)

§ 106-418.7. Authority of Board of Agriculture, North Carolina Public Livestock Market Advisory Board and the Commissioner.

The Board of Agriculture shall establish rules and regulations pertaining to the purchase and payment of livestock sold in this State at public livestock markets. The North Carolina Public Livestock Market Advisory Board shall recommend rules and regulations pertaining to the administration of this Article to the Board of Agriculture for their consideration. The Commissioner is authorized to revoke any livestock market operator's license issued or to refuse to issue a livestock market license to any person as hereinafter provided upon satisfactory proof that said person has repeatedly violated any of the provisions of this Article or any of the rules and regulations made and promulgated thereunder; provided that no license shall be revoked or refused until the person, firm or corporation shall have first been given an opportunity to appear at a hearing before the Commissioner or his agent. Any person who is refused a license, or whose license is revoked by any order of the Commis-

sioner, may appeal within 30 days from said order to the Superior Court of Wake County or the superior court of the county of his residence. (1973, c. 38, s. 7; 1989, c. 770, s. 25.)

§ 106-418.7A. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 10; 1998-215, s. 14.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

ARTICLE 35B.

Livestock Dealer Licensing Act.

§ 106-418.8. Definitions.

When used in this Article,

(1) The term "Commissioner" means the Commissioner of Agriculture of North Carolina;

(2) The term "livestock" means cattle, sheep, goats, swine, horses and mules;

(3) The term "livestock dealer" means any person who buys livestock (i) for his own account for purposes of resale, or (ii) for the account of others; and

(4) The term "person" means an individual, partnership, corporation, association, or other legal entity. (1973, c. 196.)

CASE NOTES

Applied in Development Assocs. v. Wake County Bd. of Adjustment, 48 N.C. App. 541, 269 S.E.2d 700 (1980).

§ 106-418.9. Exemptions.

The provisions of this Article shall not apply to a person who offers for sale or trade only livestock which he has raised or livestock which he owns or has had in his possession for a period of 30 days or longer or who has had the livestock grown under contract, and is not engaged in the business of buying, selling, trading, or negotiating the transfer of livestock. Neither shall this Article apply to a livestock market operator conducting sales in compliance with the Public Livestock Markets Act (General Statutes Chapter 106, Article 35). (1973, c. 196.)

§ 106-418.10. Prohibited conduct.

It shall be unlawful for any person to:

(1) Carry on or conduct the business of a livestock dealer without a current valid license issued by the North Carolina Department of Agriculture and Consumer Services under the provisions of this Article;
(2) Fail to keep the records required by G.S. 106-418.13. (1973, c. 196; 1997-261, s. 52.)

§ 106-418.11. Licenses.

(a) Any person desiring to be licensed as a livestock dealer shall make application to the Commissioner. Such application shall contain the address, both business and personal, of the applicant. No financial information shall be required from the applicant.

Whenever an applicant has complied with this Article, the Commissioner shall issue to such applicant a license which shall entitle the licensee to engage in the business of livestock dealer for a period of one year, unless such license is sooner suspended, or revoked in accordance with the provisions of this Article.

The license may be renewed annually by written request to the Commissioner on a form prepared by the Department of Agriculture and Consumer Services, which form shall require only the name and current address of the licensee. No renewal fee shall be charged.

(b) The Commissioner may suspend for a period not to exceed 120 days the license of any livestock dealer whom the Commissioner finds has violated G.S. 106-418.10(2). For a second violation of G.S. 106-418.10(2) within a period of two years, the Commissioner may revoke a dealer's license.

(c) The Commissioner may refuse to issue a license to any person who has (i) within five years of his application therefor, been finally adjudicated as having on two or more occasions violated the provisions of G.S. 106-418.10(1) or (ii) on three or more occasions within five years of his application therefor been finally adjudicated as violating G.S. 106-418.10(2).

(d) All proceedings relative to the suspension, revocation, or refusal of a license shall be conducted pursuant to the provisions of Chapter 150B of the General Statutes. (1973, c. 196; c. 1331, s. 3; 1975, c. 19, s. 34; 1987, c. 827, s. 1; 1997-261, s. 109.)

§ 106-418.12. Hearings.

Any hearing required or permitted to be held pursuant to this Article may be conducted by the Commissioner or his delegate and his decision shall be treated for all purposes as that of the Commissioner. (1973, c. 196.)

§ 106-418.13. Maintenance of records.

Every livestock dealer shall keep complete records for at least one year of all transactions involving livestock and permit any authorized agent of the Commissioner to have access to and to copy all records relating to such transactions. Such records shall consist of the approximate age, breed and species of the livestock, the date of sale, name and address of persons from whom and to whom livestock are sold and traded. (1973, c. 196.)

§ 106-418.14. Penalties.

Any person who violates G.S. 106-418.10(1) is guilty of a Class 3 misdemeanor. For a second or subsequent violation of G.S. 106-418.10(1), a person is guilty of a Class 2 misdemeanor. (1973, c. 196; 1999-408, s. 5.)

Effect of Amendments. — Session Laws 1999-408, s. 5, effective December 1, 1999, and applicable to acts committed on or after that date, rewrote the section.

§ 106-418.15. Short title.

This Article may be cited as the "Livestock Dealer Licensing Act." (1973, c. 196.)

§ 106-418.16. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 11; 1998-215, s. 15.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

ARTICLE 36.

Plant Pests.

§ 106-419. Plant pest defined.

A plant pest is hereby defined to mean any insect, mite, nematode, other invertebrate animal, disease, noxious weed, plant or animal parasite in any stage of development which is injurious to plants and plant products. (1957, c. 985.)

§ 106-419.1. Plants, plant products and other objects exposed to plant pests.

Any plant, plant product, object or article which has been, or which the Commissioner of Agriculture or his agents have reasonable grounds to believe has been exposed to a plant pest, may be treated as a plant pest for the purposes of this Article. (1971, c. 526.)

§ 106-420. Authority of Board of Agriculture to adopt regulations.

The Board of Agriculture is hereby authorized to adopt reasonable regulations to implement and carry out the purposes of this Article as to eradicate, repress and prevent the spread of plant pests (i) within the State, (ii) from within the State to points outside the State, and (iii) from outside the State to points within the State. The Board of Agriculture shall adopt regulations for eradicating such plant pests as it may deem capable of being economically eradicated, for repressing such as cannot be economically eradicated, and for preventing their spread within the State. Regulations may provide for quarantine of areas. It may also adopt reasonable regulations for preventing the introduction of dangerous plant pests from without the State, and for govern-

ing common carriers in transporting plants, articles or things liable to harbor such pests into, from and within the State. The Board is authorized, in order to control plant pests, to adopt regulations governing the inspection, certification and movement of nursery stock, (i) into the State from outside the State, (ii) within the State, and (iii) from within the State to points outside the State. The Board is further authorized to prescribe and collect a schedule of fees to be collected for its nursery inspection, nursery dealer certification, narcissus bulb inspection, plant pest inspection, and plant pest certification activities. (1957, c. 985; 1991, c. 442, s. 1.)

Cross References. — As to insect pests, see § 106-22(5).

§ 106-420.1. Agreements against plant pests.

The North Carolina Board of Agriculture is authorized to enter into agreements with any agency of the United States or any agency of another state for the eradication, suppression, control and prevention of spread of plant pests. The Commissioner of Agriculture is authorized to enter into agreements with any unit of local government in this State or any organization incorporated or unincorporated who has an interest in the control of plant pests for the eradication, suppression, control and prevention of spread of plant pests. (1971, c. 526.)

§ 106-421. Permitting uncontrolled existence of plant pests; nuisance; method of abatement.

No person shall knowingly and willfully keep upon his premises any plant or plant product infested or infected by any dangerous plant pest, or permit dangerous plants or plant parasites to mature seed or otherwise multiply upon his land, except under such regulations as the Board of Agriculture may prescribe. All such infested or infected plants and premises are hereby declared public nuisances. The owner of such plants or premises shall, when notified to do so by the Commissioner of Agriculture, take such measures as may be prescribed to eradicate such pests. The notice shall be in writing and shall be mailed to the usual or last known address, or left at the ordinary place of business, of the owner or his agent. If such person fails to comply with such notice within such reasonable time as the notice prescribes, the Commissioner of Agriculture, through his duly authorized agents, shall proceed to take such measures as shall be necessary to eradicate such pests, and shall compute the actual costs of labor and materials used in eradicating such pests, and the owner of the premises in question shall pay to the Commissioner of Agriculture such assessed costs. No damages shall be awarded the owner of such premises for entering thereon and destroying or otherwise treating any infected or infested plants or soil when done by the order of the Commissioner of Agriculture. (1957, c. 985.)

§ 106-422. Agents of Board; inspection.

The Commissioner of Agriculture shall be the agent of the Board in enforcing these regulations, and shall have authority to designate such employees of the Department as may seem expedient to carry out the duties and exercise the powers provided by this Article. Persons collaborating with the Division of Entomology may also be designated by the Commissioner of Agriculture as agents for the purpose of this Article. The Commissioner of Agriculture, and any duly authorized agent of the Commissioner, shall have the authority to

inspect vehicles or other means of transportation and its cargo suspected of carrying plant pests and to enter upon and inspect any premises between the hours of sunrise and sunset during every working day of the year to determine the presence or absence of injurious plant pests. Any duly authorized agent of the Commissioner shall have authority to stop or cause to be stopped on any highway or other public place, by any law-enforcement officer at the request of said authorized agent of the Commissioner, any vehicle or other means of transportation that is being used, or that the representative of the Commissioner has reasonable grounds to believe is being used, to transport or move any plant, plant product or seed in violation of the provisions of this Article. (1957, c. 985; 1967, c. 976.)

§ 106-423. Nursery inspection; nursery dealer's certificate; narcissus inspection.

The Board of Agriculture shall have the authority to define nursery stock. The Commissioner of Agriculture shall have the right to cause all plant nurseries, and narcissus bulb fields where narcissus bulbs are commercially raised, within the State to be inspected at least once each year for serious plant pests. Every person, firm or corporation buying and reselling nursery stock shall register and secure a dealer's certificate for each location from which plants are sold. (1957, c. 985.)

§ 106-423.1. Criminal penalties; violation of laws or regulations.

If anyone shall attempt to prevent inspection of his premises as provided in the preceding sections, or shall otherwise interfere with the Commissioner of Agriculture, or any of his agents, while engaged in the performance of his duties under this Article, or shall violate any provisions of this Article or any regulations of the Board of Agriculture adopted pursuant to this Article, he shall be guilty of a Class 3 misdemeanor. Each day's violation shall constitute a separate offense. (1957, c. 985; 1993, c. 539, s. 782; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 37.

Cotton Grading.

§§ 106-424 through 106-429: Repealed by Session Laws 1999-44, s. 3, effective May 13, 1999.

Article 38.

Marketing Cotton and Other Agricultural Commodities.

§§ 106-429.1 through 106-434: Repealed by Session Laws 1997-74, s. 10.

§ 106-435. Fund for support of system; collection and investment.

In order to provide a sufficient indemnifying or guarantee fund to cover any loss not covered by the bonds hereinbefore mentioned, in order to provide the

financial backing which is essential to make the warehouse receipt universally acceptable as collateral, and in order to provide that a State warehouse system intended to benefit all cotton growers in North Carolina shall be supported by the class it is designed to benefit, it is hereby declared: that on each bale of cotton ginned in North Carolina during the period from the ratification of this bill until June 30, 1922, twenty-five cents (25¢) shall be collected through the ginner of the bale and paid into the State treasury, to be held there as a special guarantee or indemnifying fund to safeguard the State warehouse system against any loss not otherwise covered. The State Tax Commission shall provide and enforce the machinery for the collection of this tax, which shall be held in the State treasury to the credit of the State warehouse system. Not less than ten per centum (10%) of the entire amount collected from the per bale tax shall be invested in United States government or farm loan bonds or North Carolina bonds, and the remainder may be invested in amply secured first mortgage notes or bonds to aid and encourage the establishment of warehouses operating under this system, and to aid and encourage the establishment of farm markets designed to serve the marketing, packaging, and grading needs for the sale and distribution of unprocessed farm commodities when adequate markets are not otherwise provided. Such investments shall be made by the Board of Agriculture, with the approval of the Governor and Attorney General: Provided, such first mortgages shall be for not more than one-half the actual value of the warehouse property covered by such mortgages, and run not more than 10 years: Provided further, that the interest received from all investments shall be available for appropriation for capital projects and nonrecurring expenditures as provided in the bill making the appropriation, and for the administrative expense of carrying into effect the provisions of this law, including the employment of such persons and such means as the State Board of Agriculture in its discretion may deem necessary: Provided further, that the guarantee fund, raised under the provisions of sections 4907 to 4925 of the Consolidated Statutes of 1919, shall become to all intents and purposes a part of guarantee fund to be raised under this law and subject to all the provisions hereof. The fund created by this section may be used for loans to owners of cotton gins to make improvements to gins to comply with federal and State air quality regulations, rules, and laws. The loans shall be secured and made under terms and conditions approved by the Board of Agriculture. Income earnings, including earnings from interest, may also be used by the Department of Agriculture and Consumer Services for cotton promotion activities. (1919, c. 168, s. 5; 1921, c. 137, s. 5; Ex. Sess. 1921, c. 28; C.S., s. 4925(e); 1957, c. 1091; 1993, c. 561, s. 95(a); 1993 (Reg. Sess., 1994), c. 769, s. 26(a); 1997-261, s. 109.)

CASE NOTES

Constitutionality. — The tax contemplated under this section, being uniform upon those of the class designated, and being laid upon a trade, whether that of cotton ginning or farming, is within the authority conferred on the legislature to further "tax trades," etc., and is constitutional. Bickett v. State Tax Comm'n, 177 N.C. 433, 99 S.E. 415 (1919).

Purpose of Fund. — The General Assembly, when by this section it created the State Indemnifying and Guaranty Fund to safeguard the state warehouse system and to make its receipts acceptable as collateral, did not intend that it should encourage individuals or financial institutions to engage in transactions from which they would otherwise have recoiled. On the contrary, the fund was created to protect those parties to or purchasers of warehouse receipts who, acting in good faith and without reason to know that the goods described thereon are misdescribed or nonexistent, suffer loss through their acceptance or purchase of the receipt. Branch Banking & Trust Co. v. Gill, 293 N.C. 164, 237 S.E.2d 21 (1977).

Proper Parties in Action to Enforce Section. — The Governor, the State Board of Agriculture, and the State warehouse superintendent are proper parties plaintiff in an action against the members of the State Tax Commission to require them to provide and enforce the

machinery for the collection of the tax provided by this Article. Bickett v. State Tax Comm'n, 177 N.C. 433, 99 S.E. 415 (1919).

Liability of Fund Is Secondary. — A judgment against defendants who had deposited cotton and received negotiable warehouse receipts without disclosing that the cotton was a portion of crops included in recorded liens held by plaintiff, and a judgment against the State Treasurer to be paid from the fund provided by this section, should provide that the liability of the defendants depositing the cotton is primary and the liability of guaranty fund is secondary. Ahoskie Prod. Credit Ass'n v. Whedbee, 251 N.C. 24, 110 S.E.2d 795 (1959).

Recovery on Bond. — Where a warehouse superintendent fraudulently negotiates spent warehouse receipts and the bona fide holder thereof recovers from the indemnifying fund provided by this section, the State may recover on the bond of the superintendent. The bond is the fund primarily liable. Lacy v. Globe Indem. Co., 189 N.C. 24, 126 S.E. 316 (1925). See Ellison v. Hunsinger, 237 N.C. 619, 75 S.E.2d 884 (1953).

Loss Due to Failure to Issue Receipt Not Recoverable from State Treasurer. — A recovery may not be had against the State Treasurer out of the fund accumulated under this section, for a loss resulting to plaintiff by failure of a warehouse to issue official receipts for cotton to plaintiff as agreed, the receipts having been issued to the holder of a lien against the cotton and the warehouse having refused delivery of the cotton to plaintiff upon his demand, since the purpose of the statute is to make warehouse receipts acceptable as collateral, and plaintiff is not the holder of the receipts. Northcutt v. People's Bonded Whse. Co., 206 N.C. 842, 175 S.E. 165 (1934).

Cited in Harris v. Fairley, 232 N.C. 551, 61 S.E.2d 616 (1950).

§§ 106-436 through 106-451.1: Repealed by Session Laws 1997-74, s. 11.

§§ 106-451.2 through 106-451.5: Reserved for future codification purposes.

Article 38A.

Cotton Warehouse Act.

§ 106-451.6. Short title.

The provisions of this Article may be known and designated as the "North Carolina Cotton Warehouse Act". (1987, c. 840, s. 1.)

§ 106-451.7. Definitions.

As used in the Article, unless the context otherwise requires:

(1) "Board" means the North Carolina Board of Agriculture.
(2) "Commissioner" means the North Carolina Commissioner of Agriculture.
(3) "Person" means an individual, partnership, firm, corporation, association, or two or more people having a joint or common interest.
(4) "Producer" means a farmer or grower of cotton.
(5) "Receipt" means a warehouse receipt issued pursuant to this Article.
(6) "Warehouse" means any building, structure or other protected enclosure in which cotton is or may be stored for hire.
(7) "Warehouseman" means a person licensed by North Carolina Department of Agriculture and Consumer Services to engage in the business of storing cotton for hire. (1987, c. 840, s. 1; 1997-261, s. 54.)

§ 106-451.8. Board of Agriculture makes rules.

The Board is empowered to make and enforce such rules and regulations as may be necessary to make effective the provisions of this Article, including fees for inspection of warehouses. (1987, c. 840, s. 1.)

§ 106-451.9. Commissioner of Agriculture to administer and enforce Article.

The Commissioner of Agriculture shall have the following powers and duties under this Article:

(1) To administer and enforce the provisions of this Article.

(2) To assign and reassign the administrative and enforcement duties and functions assigned to him in this Article to one or more divisions within the Department of Agriculture and Consumer Services.

(3) To delegate to any division head and other officer or employee of the Department of Agriculture and Consumer Services any of the powers and duties given to the Department by statute or by rules promulgated pursuant to this Article.

(4) To investigate and determine upon application, whether the warehouse is suitable for the proper storage of cotton.

(5) To conduct investigations of the daily operations of every State licensed warehouse.

(6) To prescribe, within the limits of this Article, the duties of the warehousemen with respect to their care of and responsibility for cotton stored in licensed warehouses.

(7) To issue licenses for the operation of warehouses under this Article.

(8) To cooperate or enter into formal agreements with any other agency of this State or its subdivisions or with any agency of any other state or of the federal government for the purpose of administering or enforcing any of the provisions of this Article. (1987, c. 840, s. 1; 1997-261, s. 55.)

§ 106-451.10. Licensing of warehousemen.

(a) The Commissioner, or his designated representative, is authorized, upon application to him, to issue to any person a license for the conduct of a cotton warehouse in accordance with this Article and such rules and regulations as may be made hereunder: Provided, that each such warehouse be found suitable for the proper storage of cotton, and that such person agree, as a condition to the granting of the license, to comply with and abide by all terms of this Article and the rules and regulations prescribed hereunder. All licenses issued pursuant to this Article shall expire on December 31 of each year. Any warehouseman may renew his license by filing a renewal application with the Commissioner on or before January 1 of each year.

(b) Each license application and license renewal application must include:

(1) A current financial statement prepared by a certified public accountant;

(2) Proof of the bond required by G.S. 106-451.11;

(3) A license fee of one hundred dollars ($100.00); and

(4) A certificate of insurance if insurance is required. (1987, c. 840, s. 1.)

§ 106-451.11. Bond required.

(a) Any person applying for a license to conduct a warehouse pursuant to this Article shall, as a condition to the granting thereof, execute and file with the Commissioner a good and sufficient bond to the State to secure the faithful performance of his obligations as a warehouseman. Said bond shall be in such form and amount, shall have such surety or sureties, subject to service of process in suits on the bond within the State and shall contain such terms and conditions as the Commissioner may prescribe to carry out the purposes of this Article. Whenever the Commissioner, or his designated representative, shall

determine that a previously approved bond is, or for any cause has become, insufficient, he may require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this section, and unless the same be given within the time fixed by a written demand therefor the license of such warehouseman may be suspended or revoked.

(b) The Board may require as a condition to the granting of a license that the warehouseman maintain casualty insurance on the cotton stored in a warehouse licensed under this Article. (1987, c. 840, s. 1.)

§ 106-451.12. Action on bond by person injured.

Any person injured by the breach of any obligation to secure which a bond is given, under the provisions of this Article, shall be entitled to sue on the bond in his own name in any court of competent jurisdiction to recover the damages he may have sustained by such breach. (1987, c. 840, s. 1.)

§ 106-451.13. Suspension and revocation of license.

The Commissioner, or his designated representative, may, after opportunity for hearing has been afforded to the licensee concerned, suspend or revoke any license to any warehouseman conducting a warehouse under this Article, for any violation of or failure to comply with any provision of this Article or of the rules and regulations made hereunder, or upon the ground that unreasonable or exorbitant charges have been made for services rendered. (1987, c. 840, s. 1.)

§ 106-451.14. License to classify, grade and weigh cotton stored.

The Commissioner or his designated representative, may upon presentation of satisfactory proof of competency, issue to any person a license to inspect, sample, or classify any cotton stored or to be stored in a warehouse licensed under this Article, according to condition, grade, or otherwise and to certificate the condition, grade, or other class thereof, or to weigh the same and certificate the weight thereof, or both to inspect, sample, or classify and weigh the same and to certificate the condition, grade, or other class and the weight thereof, upon condition that such person agree to comply with and abide by the terms of this Article and of the rules and regulations prescribed hereunder. (1987, c. 840, s. 1.)

§ 106-451.15. Suspension and revocation of license to classify, grade or weigh.

Any license issued to any person to inspect, sample, or classify, or to weigh cotton under this Article may be suspended or revoked by the Commissioner or his designated representative, whenever he is satisfied, after opportunity afforded to the licensee concerned for a hearing, that such licensee has failed to inspect, sample, or classify, or to weigh the cotton correctly, or has violated any of the provisions of this Article or of the rules and regulations prescribed hereunder or that he has used his license or allowed it to be used for any improper purpose whatever. (1987, c. 840, s. 1.)

§ 106-451.16. Delivery to warehouse presumed for storage.

Any cotton delivered to a warehouse under this Article shall be presumed to be delivered for storage. (1987, c. 840, s. 1.)

§ 106-451.17. Deposit of cotton deemed subject to Article.

Any producer who deposits cotton for storage in a warehouse licensed under this Article shall be deemed to have deposited the same subject to the provisions of this Article and the rules and regulations prescribed hereunder. (1987, c. 840, s. 1.)

§ 106-451.18. Receipts for cotton stored.

For all cotton stored in a warehouse licensed under this Article original receipts shall be issued by the warehouseman conducting the same, but no receipt shall be issued except for cotton actually stored in the warehouse at the time of the issuance thereof. (1987, c. 840, s. 1.)

§ 106-451.19. Contents of receipts.

Every receipt issued for cotton stored in a warehouse licensed under this Article shall embody within its written or printed terms:

(1) The location of the warehouse in which the cotton is stored;
(2) The date of issue of the receipt;
(3) The consecutive number of the receipt;
(4) A statement whether the cotton received will be delivered to the bearer, to a specified person, or to a specified person or his order;
(5) The rate of storage charges;
(6) A description of the cotton received, showing the quantity thereof and a description of each bale by mark, number, or other means of identification and the weight of each bale;
(7) The grade or other classification of the cotton received and the standard or description in accordance with which such classification has been made;
(8) A statement that the receipt is issued subject to this Article and the rules and regulations prescribed hereunder;
(9) If the receipt be issued for cotton of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership;
(10) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien; and
(11) Signature of the warehouseman, which may be made by his authorized agent. (1987, c. 840, s. 1.)

§ 106-451.20. Issuance of further receipt with original outstanding.

While an original receipt issued under this Article is outstanding and uncanceled by the warehouseman issuing the same no other or further receipt shall be issued for the cotton covered thereby or for any part thereof, except that in the case of a lost or destroyed receipt a new receipt, upon the same terms and subject to the same conditions and bearing on its face the number and date of the receipt in lieu of which it is issued, may be issued. (1987, c. 840, s. 1.)

§ 106-451.21. Delivery of products stored on demand; conditions to delivery.

A warehouseman conducting a warehouse licensed under this Article, in the absence of some lawful excuse, shall, without unnecessary delay, deliver the

cotton stored therein upon a demand made either by the holder of a receipt for such cotton or by the depositor thereof if such demand be accompanied with (a) an offer to satisfy the warehouseman's lien; (b) an offer to surrender the receipt, if negotiable, with such endorsements as would be necessary for the negotiation of the receipt; and (c) a readiness and willingness to sign, when the cotton is delivered, an acknowledgment that it has been delivered if such signature is requested by the warehouseman. (1987, c. 840, s. 1.)

§ 106-451.22. Cancellation of receipt on delivery of cotton stored.

A warehouseman conducting a warehouse licensed under this Article shall plainly cancel upon the face thereof each receipt returned to him upon the delivery by him of the cotton for which the receipt is issued. (1987, c. 840, s. 1.)

§ 106-451.23. Records; report to Commissioner; compliance with provisions of Article, rules, and regulations.

Every warehouseman conducting a warehouse licensed under this Article shall keep in a place of safety complete and correct records of all cotton stored therein and withdrawn therefrom, of all warehouse receipts issued by him, and of the receipts returned to and canceled by him, shall make reports to the Commissioner concerning such warehouse and the condition, contents, operation, and business thereof in such form and at such times as he may require, and shall conduct said warehouse in all other respects in compliance with this Article and the rules and regulations made hereunder. (1987, c. 840, s. 1.)

§ 106-451.24. Examination of books, records, etc., of warehousemen.

The Commissioner is authorized through officials, employees, or agents of the Department of Agriculture and Consumer Services designated by him to examine all books, records, papers, and accounts of warehouses and all cotton stored in warehouses licensed under this Article and of the warehousemen conducting such warehouse relating thereof. (1987, c. 840, s. 1; 1997-261, s. 109.)

§ 106-451.25. Inspectors to be bonded.

Each inspector employed by the Commissioner for the inspection and examination of warehouses licensed under this Article shall be bonded in an amount not less than five thousand dollars ($5,000), or in such greater amount as the Commissioner deems necessary, for the faithful performance of his duties and for the proper accounting of all funds coming into his hands. The cost of the bond shall be paid by the Department of Agriculture and Consumer Services. (1987, c. 840, s. 1; 1997-261, s. 109.)

§ 106-451.26. Liability of officials and employees.

No action may be brought in any court of this State against any State official or State employee on account of any act or omission in connection with the administration of this Article unless it be shown that such official or employee acted in bad faith and with corrupt intent. (1987, c. 840, s. 1.)

§ 106-451.27. Use of income from Warehouse Fund to administer.

Income from the Warehouse Fund established under G.S. 106-435 may be used for the administration of this Article. (1987, c. 840, s. 1.)

§ 106-451.28. Violation a misdemeanor; fraudulent or deceptive acts.

Any person who shall violate any provision of this Article or who shall engage in any fraudulent or deceptive practice in the operation of a warehouse licensed under this Article shall be guilty of a Class 1 misdemeanor. (1987, c. 840, s. 1; 1993, c. 539, s. 786; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 106-451.29 through 106-451.39: Reserved for future codification purposes.

ARTICLE 38B.

Cotton Gins, Warehouses, Merchants.

§ 106-451.40. Definitions.

(1) "Cotton gin" means any cotton gin.

(2) "Cotton merchant" means any person who buys cotton from the producer for the purpose of resale, or acts as a broker or agent for the producer in arranging the sale of cotton. It does not include a person who buys cotton for his own use.

(3) "Cotton warehouse" means any enclosure in which producer-owned cotton is stored or held for longer than 48 hours. (1999-412, s. 1.)

Editor's Note. — Session Laws 1999-412, s. 2, made this Article effective January 1, 2000.

§ 106-451.41. Registration required.

No person shall engage in business as a cotton gin, cotton warehouse, or cotton merchant without first having registered with the Commissioner of Agriculture. This shall include a cotton marketing cooperative or association that performs any of these functions. (1999-412, s. 1.)

§ 106-451.42. Application; bond; display of certificate of registration.

(a) A cotton gin, cotton warehouse, cotton merchant, or cotton marketing cooperative or association shall, on or before July 1 of each year, file an application for registration on a form provided by the Commissioner of Agriculture. A fee of twenty-five dollars ($25.00) shall be submitted with each application.

(b) An application for registration as a cotton warehouse shall also be accompanied by a bond in the amount of three hundred thousand dollars ($300,000) issued by a company authorized to issue surety bonds in North Carolina and shall be conditioned upon fulfillment of contractual obligations related to the purchase or storage of cotton. A bond shall not be required for a person who is licensed and bonded under the U.S. Warehouse Act.

(c) The registration certificate shall be conspicuously displayed at the place of business. (1999-412, s. 1.)

§ 106-451.43. Records; receipts; other duties; denial of registration.

(a) Cotton gins, cotton warehouses, cotton merchants, and cotton cooperatives or associations shall keep records of producer-owned cotton transactions for seven years, showing the producer's name, bale number, and bale weight.

(b) Cotton gins shall, within 48 hours of ginning, make available to the person from whom cotton was received, a paper document showing the bale number and weight for each bale of cotton ginned.

(c) Cotton gins, cotton warehouses, cotton merchants, and cotton cooperatives or associations shall not market, obligate for sale, or otherwise dispose of producer-owned cotton without written consent from the producer.

(d) Cotton gins, cotton warehouses, cotton merchants, and cotton cooperatives or associations shall assist the Commissioner of Agriculture or his agents in inspecting records of producer-owned cotton transactions. Cotton gins, cotton warehouses, cotton merchants, and cotton cooperatives or associations shall assist the Commissioner or his agents in weighing or reweighing a representative sample of cotton bales stored or held at their premises, using sampling procedures approved by the Board of Agriculture.

(e) Violation of any of the requirements of this section shall be grounds for denial, suspension, or revocation of registration under G.S. 106-451.41. (1999-412, s. 1.)

§ 106-451.44. Operation without registration unlawful; injunction.

Engaging in business as a cotton gin, cotton warehouse, or cotton merchant without being registered under G.S. 106-451.41 is punishable as a Class 2 misdemeanor. In addition, the Commissioner of Agriculture may apply to any court of competent jurisdiction to obtain injunctive relief to prevent violations of this act. (1999-412, s. 1.)

§§ 106-451.45 through 106-251.49: Reserved for future codification purposes.

Article 39.

Leaf Tobacco Warehouses.

§ 106-452. Maximum warehouse charges.

The charges and expenses of handling and selling leaf tobacco upon the floor of tobacco warehouses shall not exceed the following schedule of prices, viz: for auction fees, fifteen cents (15¢) on all piles of 100 pounds or less, and twenty-five cents (25¢) on all piles over 100 pounds; for weighing and handling, ten cents (10¢) per pile for all piles less than 100 pounds, for all piles over 100 pounds at the rate of ten cents (10¢) per hundred pounds; for commissions on the gross sales of leaf tobacco in said warehouses, not to exceed two and one-half per centum (2½%): Provided that tobacco warehouses selling burley tobacco only may charge commissions on the gross sales of burley leaf tobacco not to exceed three and one-half per centum (3½%). There may also be a basket fee of twenty-five cents (25¢) per basket on all burley leaf tobacco sold in such

warehouses. (1895, c. 81; Rev., s. 3042; C.S., s. 5124; 1941, c. 291; 1955, c. 1029.)

Editor's Note. — For provisions regarding the creation of a nonprofit corporation established pursuant to the final judgment entered in State of North Carolina v. Philip Morris Incorporated, Et Al. (98 CVS 14377), for the receipt and distribution of funds received by the state see the editor's note under § 55A-3-07 regarding Session Laws 1999-2, ss. 1-6.

CASE NOTES

Warehouse System Authorized as Aid in Marketing of Leaf Tobacco. — See Champion Shoe Mach. Co. v. Sellers, 197 N.C. 30, 147 S.E. 674 (1929).

Cited in Townsend v. Yeomans, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937); Davies Whse. Co. v. Bowles, 321 U.S. 144, 64 S. Ct. 474, 88 L. Ed. 635 (1944).

§ 106-453. Oath of tobacco weigher; duty of weigher to furnish list of number and weight of baskets weighed.

All leaf tobacco sold upon the floor of any tobacco warehouse shall first be weighed by some reliable person 18 years of age or older, who shall have first sworn and subscribed to the following oath, to wit: "I do solemnly swear (or affirm) that I will correctly and accurately weigh all tobacco offered for sale at the warehouse of _____, and correctly test and keep accurate the scales upon which the tobacco so offered for sale is weighed." Such oath shall be filed in the office of the clerk of the superior court of the county in which said warehouse is situated.

Immediately upon the weighing of any lot or lots of tobacco, the tobacco weigher shall furnish, upon request, to the person delivering such tobacco to the scale for weighing a true list showing the number of baskets of tobacco weighed and the individual weight of each such basket so presented. (1895, c. 81, s. 2; Rev., s. 3043; C.S., s. 5125; 1951, c. 1105, s. 1; 1971, c. 1085, s. 2.)

§ 106-454. Warehouse proprietor, etc., to render bill of charges; penalty.

The owner, operator, or person in charge of each warehouse shall render to each seller of tobacco at the warehouse a bill plainly stating the amount charged for weighing and handling, the amount charged for auction fees, and the commission charged on such sale, and it shall be unlawful for any other charge or fees to be made or accepted. Any person, firm, corporation, or any employee thereof, violating the provisions of this section shall be guilty of a Class 3 misdemeanor for the first offense, and for the second or additional offenses a Class 2 misdemeanor. (1895, c. 81, ss. 3, 4; Rev., s. 3044; C.S., s. 5126; 1973, c. 1305; 1993, c. 539, s. 787; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-455. Tobacco purchases to be paid for by cash or check to order.

The proprietor of each and every warehouse shall pay for all tobacco sold in said warehouse either in cash or by giving to the seller a check payable to his order in his full name or in his surname and initials and it shall be unlawful to use any other method. Every person, firm or corporation violating the provisions hereof shall, in addition to any and all civil liability which may arise by law, be guilty of a Class 3 misdemeanor. (1931, c. 101, s. 1; 1939, c. 348; 1993, c. 539, s. 788; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For discussion of this section prior to the 1939 amendment, see 9 N.C.L. Rev. 387 (1931).

ARTICLE 40.

Leaf Tobacco Sales.

§§ 106-456 through 106-460: Repealed by Session Laws 1999-44, s. 4, effective May 13, 1999.

Editor's Note. — For provisions regarding the creation of a nonprofit corporation established pursuant to the final judgment entered in State of North Carolina v. Philip Morris Incorporated, Et Al. (98 CVS 14377), for the receipt and distribution of funds received by the state see the editor's note under § 55A-3-07 regarding Session Laws 1999-2, ss. 1-6.

§ 106-461. Nested, shingled or overhung tobacco.

It shall be unlawful for any person, firm or corporation to sell or offer to sale, upon any leaf tobacco warehouse floor, any pile or piles of tobacco, which are nested, or shingled, or overhung, or either as hereinafter defined:

(1) Nesting tobacco: That is, so arranging tobacco in the pile offered for sale that it is impossible for the buyer thereof to pull leaves from the bottom of such pile for the purpose of inspection;

(2) Shingling tobacco: That is, so arranging a pile of tobacco that a better quality of tobacco appears upon the outside and tobacco of inferior quality appears on the inside of such pile; and

(3) Overhanging tobacco: This is, so arranging a pile of tobacco that there are alternate bundles of good and sorry tobacco. (1933, c. 467, s. 1.)

§ 106-462. Sale under name other than that of true owner prohibited.

It shall be unlawful for any person, firm or corporation to sell or offer for sale or cause to be sold, or offered for sale, any leaf tobacco upon the floors of any leaf tobacco warehouse, in the name of any person, firm or corporation, other than that of the true owner or owners thereof, which true owner's name shall be registered upon the warehouse sales book in which it is being offered for sale. (1933, c. 467, s. 2.)

§ 106-463. Allowance for weight of baskets and trucks.

It shall be unlawful for any person, firm or corporation in weighing tobacco for sale to permit or allow the basket and truck upon which such tobacco is placed for the purpose of obtaining such weight to vary more than two pounds from the standard or uniform weight of such basket and truck. (1933, c. 467, s. 3.)

§ 106-464. Violation made misdemeanor.

Any person, firm or corporation violating the provisions of G.S. 106-461 to 106-463 shall be guilty of a Class 3 misdemeanor. (1933, c. 467, s. 4; 1993, c. 539, s. 789; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-465. Organization and membership of tobacco boards of trade; rules and regulations; fire insurance and extended coverage required; price fixing prohibited.

Tobacco warehousemen and the purchasers of leaf tobacco, at auction, on warehouse floors, are hereby authorized to organize, either as nonstock corporations, or voluntary associations, tobacco boards of trade in the several towns and cities in North Carolina in which leaf tobacco is sold on warehouse floors, at auction.

Such tobacco boards of trade as may now exist, or which may hereafter be organized, are authorized to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on the warehouse floors in the several towns and cities in North Carolina in which an auction market is situated.

Each tobacco board of trade organized pursuant to this section shall, on or before June 1, 1973, by regulation, require that all auction warehouse firms which are members of, or may hereafter request membership in, such board of trade for the purpose of displaying for sale and selling leaf tobacco, deposit with the board of trade prior to the market opening, a copy of a policy of fire insurance and extended coverage in a company licensed to do business in North Carolina to fully insure, as determined by the board of trade, the market value of the maximum volume of tobacco that will be weighed and left displayed for sale on said warehouse floor at any time during the marketing season. Warehouses using mechanized conveyor-line auction sales where tobacco is not displayed for sale on sales floor would be excluded from the requirement of this regulation.

In determining the market value and maximum volume of tobacco that will be weighed and placed on said warehouse floor at any one time, the board of trade shall use as criteria the prior season's official gross average price for that belt, as recorded by the North Carolina Department of Agriculture and Consumer Services and the maximum limit of daily sales, as recommended by the currently functioning flue-cured and burley tobacco marketing organizations, applied to each warehouse based on the firm's pro rata share of the market's maximum limit daily sales opportunity, multiplied times the number of days of sales that said warehouse plans to place on sales floor at any one time, including any and all tobacco weighed and deposited with the warehouse as bailee for future sale. The data relating to the official average price and the maximum limits of daily sales shall be assembled and supplied by the North Carolina Commissioner of Agriculture or his representative to the board of trade in each tobacco market in North Carolina, at least 30 days prior to the opening of markets in each belt.

It shall be unlawful for any person, firm, or corporation to operate an auction sale in said market until said policy is so deposited with and approved by the board of trade. The board of trade shall enjoin the sale of tobacco by any warehouse firm that fails to so deposit a policy of fire insurance and extended coverage with the board.

The tobacco boards of trade in the several towns and cities in North Carolina are authorized to require as a condition to membership therein the applicants to pay a reasonable membership fee and the following schedule of maximum fees shall be deemed reasonable, to wit:

A membership fee of fifty dollars ($50.00) in those towns in which less than 3,000,000 pounds of tobacco was sold at auction between the dates of August 20, 1931, and May 1, 1932; a fee of one hundred dollars ($100.00) in those towns in which during said period of time more than 3,000,000 and less than 10,000,000 pounds of tobacco was sold; a fee of one hundred fifty dollars

($150.00) in those towns in which during said period of time more than 10,000,000 and less than 25,000,000 pounds of tobacco was sold; a fee of three hundred dollars ($300.00) in those towns in which during said period of time more than 25,000,000 pounds of tobacco was sold.

Membership, in good standing, in a local board of trade shall be deemed a reasonable requirement by such board of trade as a condition to participating in the business of operating a tobacco warehouse or the purchase of tobacco at auction therein.

Membership in the several boards of trade may be divided into two categories:

(1) Warehousemen;

(2) Purchasers of leaf tobacco other than warehousemen.

Purchasers of leaf tobacco may be: (i) participating or (ii) nonparticipating. The holder of a membership as a purchaser of leaf tobacco shall have the option of becoming, upon written notice to the board of trade, either a participating or a nonparticipating member. Individuals, partnerships, and/or corporations who are members of tobacco boards of trade, established under this section or coming within the provisions of this section, as nonparticipating members shall not participate in or have any voice or vote in the management, conduct, activities, allotment of sales time, and/or hours, the fixing of dates for the opening or closing of tobacco auction markets, or in any other manner or respect. Individuals, partnerships, and/or corporations who are such nonparticipating members in any of the several tobacco boards of trade shall not be responsible or liable for any of the acts, omissions or commissions of the several tobacco boards of trade.

It shall be unlawful and punishable as of a Class 1 misdemeanor for any bidder or purchaser of tobacco upon warehouse floors to refuse to take and pay for any basket or baskets so bid off from the seller when the seller has or has not accepted the price offered by the purchaser or bidder of other baskets. Any person suspended or expelled from a tobacco board of trade under the provisions of this section may appeal from such suspension to the superior court of the county in which said board of trade is located.

Nothing in this section shall authorize the organization of any association having for its purpose the control of prices or the making of rules and regulations in restraint of trade. (1933, c. 268; 1951, c. 383; 1973, c. 96; 1993, c. 539, s. 790; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 109.)

CASE NOTES

Interests of Warehousemen, Buyers and Sellers of Tobacco. — The warehousemen have an economic stake in the markets' operations, but the markets exist for the purpose of serving the interests of buyers and sellers of tobacco. Those interests deserve inquiry and consideration in an appraisal of any plan containing market restrictions and limitations. Robertson v. FTC, 415 F.2d 49 (4th Cir. 1969).

The very nature of leaf tobacco demands regulation of its sale, as this section recognizes and the decisions of the courts confirm. Eagles v. Harriss Sales Corp., 368 F.2d 927 (4th Cir. 1966).

Jurisdiction of Federal Trade Commission. — There is a substantial public interest in maintaining free and open competition among warehousemen on tobacco auction markets. The public interest often is specific and substantial, because the unfair method employed threatens the existence of present or potential competition. That is the basis for the jurisdiction of the Federal Trade Commission in a case involving regulations adopted pursuant to this section governing the allocation of selling time to tobacco warehouses. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

The decisions of the North Carolina courts since the enactment of this section make it clear that the sale of tobacco at auction is of great public importance to the State of North Carolina, but they also show that the operation of the business is in the hands of private parties. A tobacco board of trade is organized primarily for the benefit of those engaged in the business; its articles of association and bylaws constitute a contract amongst the members by

which each member consents to reasonable regulations pertaining to the conduct of the business. Such a board is not an instrumentality of the State, and its activities are subject to the jurisdiction of the Federal Trade Commission. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

Unfair Trade Regulations Are Subject to Correction by Federal Trade Commission, Not Courts. — The Federal Trade Commission rather than the courts has the expertise, the power, and the implements to explore and correct unfair trade regulations. Eagles v. Harriss Sales Corp., 368 F.2d 927 (4th Cir. 1966).

Members Have Technical Representation Through Board. — Under this section, tobacco purchasers are, or may be, members of a board of trade. To the extent that they are, they have had technical representation through the board of trade. Roberts v. Fuquay-Varina Tobacco Bd. of Trade, Inc., 405 F.2d 283 (4th Cir. 1968).

By becoming a member of a board a person consents to be bound by its reasonable regulations. Eagles v. Harriss Sales Corp., 368 F.2d 927 (4th Cir. 1966).

Rules and Regulations of Board. — The authority granted to a tobacco board of trade, under and by virtue of the provisions of this section, to make reasonable rules and regulations for the economical and efficient handling of the sale of leaf tobacco at auction on warehouse floors where an auction market is situated, is sufficiently broad to include the authority to make reasonable rules and regulations in respect to allotment of sales time. Cooperative Warehouse v. Lumberton Tobacco Bd. of Trade, Inc., 242 N.C. 123, 87 S.E.2d 25; Day v. Asheville Tobacco Bd. of Trade, 242 N.C. 136, 87 S.E.2d 18 (1955).

The articles of association for the purposes expressed in the charter and bylaws of a tobacco board of trade, organized and existing under and by virtue of this section, constitute a contract between it and its members, and as a consequence of membership in the corporation for mutual membership, each member is deemed to have consented to all reasonable rules and regulations pertaining to the business. Cooperative Warehouse v. Lumberton Tobacco Bd. of Trade, 242 N.C. 123, 87 S.E.2d 25; Day v. Asheville Tobacco Bd. of Trade, 242 N.C. 136, 87 S.E.2d 18 (1955).

Regulations adopted by a local tobacco board of trade involving allocation of selling time to warehouses were held in the instant case to unreasonably and unduly restrain trade in the purchase and sale of tobacco and to constitute unfair methods of competition and unfair acts or practices in commerce within the meaning of the Federal Trade Commission Act. Asheville Tobacco Bd. of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959).

A tobacco board of trade has no authority to legislate. It cannot create a duty where the law creates none. The legislature has the authority to regulate, within constitutional limits, the sale of leaf tobacco upon the auction markets of this State, and in doing so may prescribe standards of conduct to be observed by those who conduct auction warehouses as well as others participating in the sales. But this is a nondelegable power. Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 71 S.E.2d 21, cert. denied, 344 U.S. 866, 73 S. Ct. 108, 97 L. Ed. 671 (1952).

Board Has No Right to Establish Sales and Require Buyers to Purchase Thereat. — This section is silent upon the question of the number of sales and prescribes no standard by which the number of sales may be determined. Therefore, in the absence of an agreement, either expressed or implied, a board organized under this section has no right to establish sales and require buyers to purchase thereat. Kinston Tobacco Bd. of Trade v. Liggett & Myers Tobacco Co., 235 N.C. 737, 71 S.E.2d 21, cert. denied, 344 U.S. 866, 73 S. Ct. 108, 97 L. Ed. 671 (1952).

Regulation adjusting divisions of selling time to establish an equitable market participation did not constitute conspiracy, monopoly, or an unreasonable restraint of trade. Eagles v. Harriss Sales Corp., 368 F.2d 927 (4th Cir. 1966).

Applied in Roberts v. Fuquay-Varina Tobacco Bd. of Trade, Inc., 220 F. Supp. 608 (E.D.N.C. 1963).

Article 41.

Dealers in Scrap Tobacco.

§§ 106-466 through 106-470: Repealed by Session Laws 1999-44, s. 5, effective May 13, 1999.

Editor's Note. — For provisions regarding the creation of a nonprofit corporation established pursuant to the final judgment entered in State of North Carolina v. Philip Morris Incorporated, Et Al. (98 CVS 14377), for the receipt and distribution of funds received by

the state see the editor's note under § 55A-3-07 regarding Session Laws 1999-2, ss. 1-6.

Article 42.

Production, Sale, Marketing and Distribution of Tobacco.

§§ 106-471 through 106-489: Repealed by Session Laws 1955, c. 188, s. 1.

Editor's Note. — This Article, known as the Tobacco Compact Act, depended upon similar action in other tobacco-producing states, which failed to materialize, and consequently was of no avail. See 15 N.C.L. Rev. 323.

Article 43.

Combines and Power Threshers .

§§ 106-490 through 106-495: Repealed by Session Laws 1955, c. 268, s. 2.

§§ 106-495.1, 106-495.2: Repealed by Session Laws 1975, c. 24.

Article 44.

Unfair Practices by Handlers of Fruits and Vegetables.

§ 106-496. Protection against unfair trade practices.

The Board of Agriculture is hereby authorized to make such rules and regulations as it deems necessary to protect producers of fruits and vegetables from loss caused by financial irresponsibility and unfair, harmful or unethical trade practices of handlers who incur financial liability for the purchase or production of fruits and vegetables. A "handler," as used herein, is a person, firm, corporation or other legal entity or his agent or employee who enters into a written contract for the purchase from or production by a producer of fruits and vegetables. (1941, c. 359, s. 1; 1971, c. 1064, s. 1.)

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, with federal law compared, see 50 N.C.L. Rev. 199 (1972).

CASE NOTES

Commissioner Is Not Individually Liable. — The Commissioner of Agriculture could not be held individually liable to producers of soybeans for failure to require a soybean dealer to obtain a permit to operate as a grain dealer and to furnish bond as set forth in § 106-496 et seq., since the sections did not place a mandatory duty on the Commissioner to require permits or bonds, and there was no liability provision in the statute. Etheridge v. Graham, 14 N.C. App. 551, 188 S.E.2d 551 (1972), decided prior to 1971 amendments to this Article.

§ 106-497. Permits required.

A handler of fruits and vegetables shall not enter into a written contract with a producer until he obtains a written permit from the Commissioner of Agriculture. The Board of Agriculture may prescribe by regulation the form of the application for a permit, the information to be furnished to the Commissioner by the applicant for a permit and the date for filing the application. A permit shall not be issued until the applicant files on or before the date set by the Board a written request with the Commissioner and files with the request two copies of the applicant's proposed contract. A penalty of twenty-five dollars ($25.00) shall be paid by the applicant if the application is filed after the date established by the Board and no permit shall be issued until such penalty is paid. Any penalties collected by the Commissioner shall be used to help defray the costs of administering Article 44 of Chapter 106.

This Article shall not apply to transactions by a handler with a producer on a cash basis. "Cash" as used herein shall include bank bills, checks drawn on banks and bank notes. (1941, c. 359, s. 2; 1971, c. 1064, s. 2.)

§ 106-498. Bond required.

No permit shall be issued to a handler until such handler has furnished the Commissioner of Agriculture a bond satisfactory to the Commissioner in an amount of not less than ten thousand dollars ($10,000). The Commissioner may require a new bond or he may require the amount of any bond to be increased if he finds it necessary for the protection of the producer. Such bond shall be payable to the State and shall be conditioned upon the fulfilling of all financial obligations incurred by the handler with all producers with whom the handler contracts. Any producer alleging any injury by the fraud, deceit, willful injury or failure to comply with the terms of any written contract by a handler may bring suit on the bond against the principal and his surety in any court of competent jurisdiction and may recover the damages found to be caused by such acts complained of. (1941, c. 359, s. 3; 1967, c. 154; 1971, c. 1064, s. 3.)

§ 106-499. Contracts between handlers and producers; approval of Commissioner.

All contracts filed with the Commissioner by an applicant shall be approved by the Commissioner before a permit is issued. The Commissioner may withhold his approval in his discretion if he is of the opinion that the contract is illegal or unfair to the producer, or that the contractor is insolvent or financially irresponsible, or if for any other cause it reasonably appears to him that the contract in question might defeat the purpose of this Article. (1941, c. 359, s. 4; 1971, c. 1064, s. 4.)

§ 106-500. Additional powers of Commissioner to enforce Article.

In order to enforce this Article, the Commissioner of Agriculture, upon his own motion or upon the verified complaint of any producer, shall have the following additional powers:

(1) To inspect or investigate transactions for the sale or delivery of fruits and vegetables to persons acting as handlers; to require verified reports and accounts of all authorized handlers; to examine books, accounts, memoranda, equipment, warehouses, storage, transportation and other facilities, fruits and vegetables and other articles

connected with the business of the handlers; to inquire into failure or refusal of any handlers to accept produce under his contracts and to pay for it as agreed;

(2) To hold hearings after due notice to interested parties and opportunity to all to be heard; to administer oaths, take testimony and issue subpoenas; to require witnesses to bring with them relevant books, papers, and other evidence; to compel testimony; to make written findings of fact and on the basis of these findings to issue orders in controversies before him, and to revoke the permits of persons disobeying the terms of this Article or of rules, regulations, and orders made by the Board or the Commissioner. Any party disobeying any order or subpoena of the Commissioner shall be guilty of contempt, and shall be certified to the superior court for punishment. Any party may appeal to the superior court from any final order of the Commissioner;

(3) To issue all such rules and regulations, with the approval of the Board, and to appoint necessary agents and to do all other lawful things necessary to carry out the purposes of this Article.

(4) This Article will not apply to peanuts and corn grown under contract for seed purposes. (1941, c. 359, s. 5; 1971, c. 1064, ss. 5, 6.)

§ 106-501. Violation of Article or rules made misdemeanor.

Any person who violates the provisions of this Article or the rules and regulations promulgated thereunder shall be guilty of a Class 1 misdemeanor. (1941, c. 359, s. 6; 1993, c. 539, s. 792; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 45.

Agricultural Societies and Fairs.

Part 1. State Fair.

§ 106-502. Land set apart.

For the purpose of the operating of a State fair, expositions and other projects which properly represent the agricultural, manufacturing, industrial and other interests of the State of North Carolina, there is hereby dedicated and set apart 200 acres of land owned by the State or any department thereof within five miles of the State Capitol, the particular acreage to be selected, set apart, and approved by the Governor and Council of the State of North Carolina. (1927, c. 209, s. 1; 1959, c. 1186, s. 1.)

§ 106-503. Board of Agriculture to operate fair.

(a) The State fair and other projects provided for in G.S. 106-502, shall be managed, operated and conducted by the Board of Agriculture established in G.S. 106-502. To that end, said Board of Agriculture shall, at its first meeting after the ratification of this section, take over said State fair, together with all the lands, buildings, machinery, etc., located thereon, now belonging to said State fair and shall operate said State fair and other projects with all the authority and power conferred upon the former board of directors, and it shall make such rules and regulations as it may deem necessary for the holding and conducting of said fair and other projects, and/or lease said fair properties so as to provide a State fair.

(b) The Board of Agriculture may adopt regulations establishing fees or charges for admission to the State Fairgrounds and for services provided incidental to the use of the State Fairgrounds.

(c) The Board of Agriculture, subject to the provisions of Chapter 146 of the General Statutes, may establish a schedule of rental rates for fair properties and specifications for the issuance of premiums so as to provide a State fair and other projects.

(d) The Board of Agriculture shall provide and maintain recycling bins for the collection and recycling of newspaper, aluminum cans, glass containers, and recyclable plastic beverage containers at the State Fairgrounds. (1931, c. 360, s. 3; 1959, c. 1186, s. 2; 1981, c. 495, s. 4; 1981 (Reg. Sess., 1982), c. 1359, s. 2; 1987, c. 827, s. 34; 1991, c. 336, s. 2.)

Editor's Note. — Session Laws 1991, c. 336, s. 5 provides: "This act shall not be construed to obligate the General Assembly to make any appropriation to implement the provisions of this act. Each department and agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated to that department or agency."

§ 106-503.1. Board authorized to construct and finance facilities and improvements for fair.

(a) Borrowing Money and Issuing Bonds. — For the purpose of building, enlarging and improving the facilities on the properties of the State fair, the State Board of Agriculture is hereby empowered and authorized to borrow a sum of money not to exceed one hundred thousand dollars ($100,000), and to issue revenue bonds therefor, payable in series at such time or times and bearing such rate of interest as may be fixed by the Governor and Council of State: Provided, that no part of the payments of the principal or interest charges on said loan shall be made out of the general revenue of the State of North Carolina, and the credit of the State of North Carolina and the State Department of Agriculture and Consumer Services or the agricultural fund, other than the revenue of the State fair funds, shall not be pledged either directly or indirectly for the payment of said principal or interest charges. The receipts, funds, and any other State fair assets may be pledged as security for the payment of any bonds that may be issued.

(b) Contracts and Leases; Pledge of Gate Receipts, etc. — For the further purpose of acquiring, constructing, operating and financing said properties and facilities on the North Carolina State fairgrounds, the Board of Agriculture may enter into such agreements, contracts and leases as may be necessary for the purpose of this section, and may pledge, appropriate, and pay such sums out of the gate receipts or other revenues coming to the State Board of Agriculture from the operation of any facilities of the State fair as may be required to secure, repay, or meet the principal and interest charges on the loan herein authorized.

(c) Gifts and Endowments. — The State Board of Agriculture may receive gifts and endowments, whether real estate, moneys, goods or chattels, given or bestowed upon or conveyed to them for the benefit of the State fair, and the same shall be administered in accordance with the requirements of the donors. (1945, c. 1009; 1959, c. 1186, s. 3; 1997-261, s. 109.)

§ 106-504. Lands dedicated by State may be repossessed at will of General Assembly.

Any lands which may be dedicated and set apart under the provisions of this Article may be taken possession of and repossessed by the State of North Carolina, at the will of the General Assembly. (1927, c. 209, s. 4(a).)

Part 2. County Societies.

§ 106-505. Incorporation; powers and term of existence.

Any number of resident persons, not less than 10, may associate together in any county, under written articles of association, subscribed by the members thereof, and specifying the object of the association to encourage and promote agriculture, domestic manufactures, and the mechanic arts, under such name and style as they may choose, subject to any other applicable provisions of law, and thereby become a body corporate with all the powers incident to such a body, and may take and hold such property, both real and personal, as may be needful to promote the objects of their association.

Whenever any such association is formed subsequent to April 1, 1949, a copy of the articles of incorporation shall be filed with the Secretary of State, together with any other information the Secretary of State may require. A fee of ten dollars ($10.00) shall be paid to the Secretary of State when such articles are filed. Upon receipt of such articles in proper form, and such other information as may be required, and the filing fee, the Secretary of State shall issue a charter of incorporation.

The corporate existence shall continue as long as there are 10 members, during the will and pleasure of the General Assembly. (1852, c. 2, ss. 1, 2, 3; R.C., c. 2, ss. 6, 7; Code, s. 2220; Rev., ss. 3868, 3869; C.S., s. 4941; 1949, c. 829, s. 2.)

§ 106-506. Organization; officers; new members.

Such society shall be organized by the appointment of a president, two vice-presidents, a secretary and treasurer, and such other officers as they may deem proper, who shall thereafter be chosen annually, and hold their places until others shall be appointed. And the society may from time to time, on such conditions as may be prescribed, receive other members of the corporation. (1852, c. 2, s. 3; R.C., c. 2, s. 7; Code, s. 2221; Rev., s. 3869; C.S., s. 4942.)

§ 106-507. Exhibits exempt from State and county taxes.

Any society or association organized under the provisions of this Chapter, desiring to be exempted from the payment of State, county, and city license taxes on its exhibits, shows, attractions, and amusements, shall each year, not later than 60 days prior to the opening date of its fair, file an application with the Secretary of Revenue for a permit to operate without the payment of said tax; said application shall state the various types of exhibits and amusements for which the exemption is asked, and also the date and place they are to be exhibited. The Secretary of Revenue shall immediately refer said application to the Commissioner of Agriculture for approval or rejection. If the application is approved by said Commissioner of Agriculture, the Secretary of Revenue shall issue a permit to said society or association authorizing it to exhibit within its fairgrounds and during the period of its fair, without the payment of any State, county, or city license tax, all exhibits, shows, attractions, and amusements as were approved. Provided, however, that the Secretary of Revenue shall have the right to cancel said permit at any time upon the recommendation of said Commissioner of Agriculture. Any society or association failing to so obtain a permit from the Secretary of Revenue or having its permit canceled shall pay the same State, county, and city license taxes as may be fixed by law for all other persons or corporations exhibiting for profit within the State shows, carnivals, or other attractions. (1905, c. 513, s. 2; Rev., s. 3871; C.S., s. 4944; 1935, c. 371, s. 107; 1949, c. 829, s. 2; 1973, c. 476, s. 193.)

§ 106-508. Funds to be used in paying premiums.

All moneys so subscribed, as well as that received from the State treasury as herein provided, shall after paying the necessary incidental expenses of such society, be annually paid for premiums awarded by such societies, in such sums and in such way and manner as they severally, under their bylaws, rules and regulations, shall direct, on such live animals, articles of production, and agricultural implements and tools, domestic manufacturers, mechanical implements, tools and productions as are of the growth and manufacture of the county or region, and also such experiments, discoveries, or attainments in scientific or practical agriculture as are made within the county or region wherein such societies are respectively organized. (1852, c. 2, s. 7; R.C., c. 2, s. 9; Code, s. 2223; Rev., s. 3873; C.S., s. 4945; 1949, c. 829, s. 2.)

§ 106-509. Annual statements to State Treasurer.

Each agricultural society entitled to receive money from the State Treasurer shall, through its treasurer, transmit to the Treasurer of the State, in the month of December or before, a statement showing the money received from the State, the amount received from the members of the society for the preceding year, the expenditures of all such sums, and the number of the members of such society. (1852, c. 2, s. 8; R.C., c. 2, s. 10; Code, s. 2224; Rev., s. 3874; C.S., s. 4946.)

§ 106-510. Publication of statements required.

Each agricultural society receiving money from the State under this Chapter shall, in each year, publish at its own expense a full statement of its experiments and improvements, and reports of its committees, in at least one newspaper in the State; and evidence that the requirements of this Chapter have been complied with shall be furnished to the State Treasurer before he shall pay to such society the sum of fifty dollars ($50.00) for the benefit of such society for the next year. (1852, c. 2, s. 9; R.C., c. 2, s. 11; Code, s. 2225; Rev., s. 3875; C.S., s. 4947.)

§ 106-511. Records to be kept; may be read in evidence.

The secretary of such society shall keep a fair record of its proceedings in a book provided for that purpose, which may be read in evidence in suits wherein the corporation may be a party. (1852, c. 2, s. 5; R.C., c. 2, s. 12; Code, s. 2226; Rev., s. 3876; C.S., s. 4948.)

Part 3. Protection and Regulation of Fairs.

§ 106-512. Lien against licensees' property to secure charge.

All agricultural fairs which shall grant any privilege, license, or concession to any person, persons, firm, or corporation for vending wares or merchandise within any fairgrounds, or which shall rent any ground space for carrying on any kind of business in such fairgrounds, either upon stipulated price or for a certain percent of the receipts taken in by such person, persons, firm, or corporation, shall have the right to retain possession of and shall have a lien upon any or all the goods, wares, fixtures, and merchandise or other property of such person, persons, firm, or corporation until all charges for privileges,

licenses, or concessions are paid, or until their contract is fully complied with. (1915, c. 242, s. 1; C.S., s. 4950.)

§ 106-513. Notice of sale to owner.

Written notice of such sale shall be served on the owner of such goods, wares, merchandise, or fixtures or other property 10 days before such sale, if he or it be a resident of the State, but if a nonresident of the State, or his or its residence be unknown, the publication of such notice for 10 days at the courthouse door and three other public places in the county shall be sufficient service of the same. (1915, c. 242, s. 2; C.S., s. 4951.)

§ 106-514. Unlawful entry on grounds a misdemeanor.

If any person, after having been expelled from the fairgrounds of any agricultural or horticultural society, shall offer to enter the same again without permission from such society; or if any person shall break over [open] the enclosing structure of said fairgrounds and enter the same, or shall enter the enclosure of said fairgrounds by means of climbing over, under or through the enclosing structure surrounding the same, or shall enter the enclosure through the gates without the permission of its gatekeeper or the proper officer of said fair association, he shall be guilty of a Class 3 misdemeanor. (1870-1, c. 184, s. 3; Code, s. 2795; 1901, c. 291; Rev., s. 3669; C.S., s. 4952; 1993, c. 539, s. 793; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-515. Assisting unlawful entry on grounds a misdemeanor.

It shall be unlawful for any person or persons to assist any other person or persons to enter upon the grounds of any fair association when an admission fee is charged, by assisting such other person or persons to climb over or go under the fence or by pulling off a plank or to enter the enclosed grounds by any trick or device or by passing out a ticket or a pass or in any other way. Any violation of this section shall be a Class 3 misdemeanor. (1915, c. 242, ss. 3, 4; C.S., s. 4953; 1993, c. 539, s. 794; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-516. Vendors and exhibitors near fairs to pay license.

Every person, firm, officer, or agent of any corporation who shall temporarily expose for sale any goods, wares, foods, soft drinks, ice cream, fruits, novelties, or any other kind of merchandise, or who shall operate any merry-go-round, Ferris wheel, or any other device for public amusement, within one fourth of a mile of any agricultural fair during such fair, shall pay a tax of one hundred dollars ($100.00) in each county in which he shall carry on such business, whether as a principal or agent: Provided, this section shall not apply to any business established 60 days prior to the beginning of such fair. (1915, c. 242, s. 5; C.S., s. 4954.)

§ 106-516.1. Carnivals and similar amusements not to operate without permit.

Every person, firm, or corporation engaged in the business of a carnival company or a show of like kind, including menageries, merry-go-rounds, Ferris wheels, riding devices, circus and similar amusements and enterprises operated and conducted for profit, shall, prior to exhibiting in any county annually

staging an agricultural fair, apply to the sheriff of the county in which the exhibit is to be held for a permit to exhibit. The sheriff of the county shall issue a permit without charge; provided, however, that no permit shall be issued if he shall find the requested exhibition date is less than 30 days prior to a regularly advertised agricultural fair and so in conflict with G.S. 105-37.1(d). Exhibition without a permit from the sheriff of the county in which the exhibition is to be held shall constitute a Class 1 misdemeanor: Provided, that nothing contained in this section shall prevent veterans' organizations and posts chartered by Congress or organized and operated on a statewide or nationwide basis from holding fairs or tobacco festivals on any dates which they may select if such fairs or festivals have heretofore been held as annual events. (1953, c. 854; 1963, c. 1127; 1991 (Reg. Sess., 1992), c. 1030, s. 26; 1993, c. 539, s. 795; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Franklin: 1953, c. 854; Greene: 1957, c. 738.

§ 106-517. Application for license to county commissioners.

Every such person mentioned in G.S. 106-516 shall apply in advance for a license to the board of county commissioners of the county in which he proposes to peddle, sell, or operate, and the board of county commissioners may in their discretion issue license upon the payment of the tax to the sheriff, which shall expire at the end of 12 months from its date. (1915, c. 242, s. 6; C.S., s. 4955.)

§ 106-518. Unlicensed vending, etc., near fairs a misdemeanor.

Any person violating the provisions of G.S. 106-516 and 106-517 shall be guilty of a Class 3 misdemeanor. (1915, c. 242, s. 7; C.S., s. 4956; 1993, c. 539, s. 796; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-519. Commissioners may refuse to license shows within five miles.

The county commissioners of any county in North Carolina in which there is a regularly organized agricultural fair may refuse to allow any circus, menagerie, wild West show, dog and pony show, or carnival show, to exhibit within five miles of such fair from its beginning to its ending: Provided, that notice is given the sheriff by the commissioners of said county not to issue such license to said entertainments 60 days prior to the date of such exhibition. (1913, c. 163, s. 1; C.S., s. 4957.)

§ 106-520. Local aid to agricultural, animal, and poultry exhibits.

Any city, town, or county may appropriate not to exceed one hundred dollars ($100.00) to aid any agricultural, animal, or poultry exhibition held within such city, town, or county. (1919, c. 135; C.S., s. 4958.)

Local Modification. — Craven: 1955, c. 607; 1957, c. 886; Edgecombe and Nash: 1953, c. 273; city of New Bern: 1955, c. 1125; city of Rocky Mount: 1953, c. 273.

Part 4. Supervision of Fairs.

§ 106-520.1. Definition.

As used in this Article, the word "fair" means a bona fide exhibition designed, arranged and operated to promote, encourage and improve agriculture, horticulture, livestock, poultry, dairy products, mechanical fabrics, domestic economy, and 4-H Club and Future Farmers of America activities, by offering premiums and awards for the best exhibits thereof or with respect thereto. (1949, c. 829, s. 1.)

§ 106-520.2. Use of "fair" in name of exhibition.

It shall be unlawful for any person, firm, corporation, association, club, or other group of persons to use the word "fair" in connection with any exhibition, circus, show, or other variety of exhibition unless such exhibition is a fair within the meaning of G.S. 106-520.1. (1949, c. 829, s. 1.)

§ 106-520.3. Commissioner of Agriculture to regulate.

The Commissioner of Agriculture, with the advice and approval of the State Board of Agriculture, is hereby authorized, empowered and directed to make rules and regulations with respect to classification, operation and licensing of fairs, so as to insure that such fairs shall conform to the definition set out in G.S. 106-520.1, and shall best promote the purposes of fairs as set out in such definition. Every fair, and every exhibition using the word "fair" in its name, except fairs classified by the Commissioner of Agriculture as noncommercial community fairs, must comply with the standards, rules and regulations set up and promulgated by the Commissioner of Agriculture, and must secure a license from the Commissioner of Agriculture before such exhibition or fair is staged or operated. No license shall be issued for any such exhibition or fair unless it meets the standards and complies with the rules and regulations of the Commissioner of Agriculture with respect thereto. (1949, c. 829, s. 1.)

§ 106-520.4. Local supervision of fairs.

No county or regional fairs shall be licensed to be held unless such fair is operated under supervision of a local board of directors who shall employ appropriate managers, who shall be responsible for the conduct of such fair, and otherwise comply with the standards, rules and regulations promulgated by the Commissioner of Agriculture. The Commissioner of Agriculture, with the advice and approval of the State Board of Agriculture, shall make rules and regulations requiring county and regional fairs to emphasize agricultural, educational, home and industrial exhibits by providing adequate premiums. (1949, c. 829, s. 1.)

§ 106-520.5. Reports.

Every fair shall make such reports to the Commissioner of Agriculture, as said Commissioner may require. (1949, c. 829, s. 1.)

§ 106-520.6. Premiums and premium lists supplemented.

The State Board of Agriculture may supplement premiums and premium lists for county and regional fairs and the North Carolina State Fair, and improve and expand the facilities for exhibits at the North Carolina State Fair,

at any time or times, out of any funds which may be available for such purposes. (1949, c. 829, s. 1.)

§ 106-520.7. Violations made misdemeanor.

Any person who violates any provision of G.S. 106-520.1 through G.S. 106-520.6 is guilty of a Class 1 misdemeanor. (1949, c. 829, s. 1; 1993, c. 539, s. 797; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 46.

Erosion Equipment.

§§ 106-521 through 106-527: Repealed by Session Laws 1987, c. 244, s. 1(j).

Article 47.

State Marketing Authority.

§ 106-528. State policy and purpose of Article.

It is declared to be the policy of the State of North Carolina and the purpose of this Article to promote, encourage and develop the orderly and efficient marketing of products of the home, farm, sea and forest; to establish, maintain, supervise and control, with the cooperation of counties, cities and towns, centrally located markets for the sale and distribution of such products, so as to promote a steady flow of commodities, properly graded and labeled, into the channels of trade at the time and place to enable the producer to get the market price and the consumer to get a product in keeping with the price paid. (1941, c. 39, s. 1.)

§ 106-529. State Marketing Authority created; members and officers; commodity advisers; meetings and expenses.

To secure these aims, there is hereby created an incorporated public agency of the State, to be known as the State Marketing Authority, hereinafter referred to as the "Authority." It shall consist of the members of the State Board of Agriculture, and the Commissioner of Agriculture shall be the chairman. They shall perform the duties and exercise the powers herein set out as a part of their official duties as members of the Board of Agriculture. The Governor shall appoint from time to time commodity advisers to plan with the Authority the programs undertaken in their respective communities. The Authority shall elect and prescribe the duties of a secretary-treasurer, who shall not be a member of the Authority. He shall give bond in such amount as the Authority shall determine in some reliable surety company doing business in North Carolina, and the Authority shall pay the premiums. The Authority shall meet in regular session annually at a fixed place and date, and shall meet in special session at such other times and places as the chairman may request. The members shall receive no salary, but shall receive actual expenses plus seven dollars ($7.00) per day for actual time spent in performing their duties. (1941, c. 39, s. 2.)

§ 106-530. Powers of Authority.

The Authority shall have the following powers:

(1) To sue and be sued in its corporate name in any court or before any administrative agency of the State or of the United States, and to enter into agreements with the United States Department of Agriculture or any other legally constituted State or federal agency, or with any county, city or town in the furtherance of the purposes of this Article.

(2) To plan, build, construct, or cause to be built or constructed, or to purchase, lease or acquire the use of any warehouses or other facilities that may be necessary for the successful operation by the Authority of wholesale markets for products of the home, farm, sea and forest at chosen points in North Carolina. The Authority may make such contracts as may be needed for these purposes. In no case shall the Authority be responsible for any rent except from the income of the market in excess of other operating expenses. The Authority may select and employ for each market capable managers, who shall be familiar with the problems of the grower and the distributor, and of the marketing of farm products, and who shall have the business ability and training to operate a market and to plan for its proper development and growth in order best to serve the interests of producers, distributors, consumers in the area, and the general public. The managers may employ assistants and agents with the approval of the Authority. The Authority may make such regulations as will promote the policy of this Article, as to the manner in which the markets shall be operated, the business conducted, and stalls sublet to dealers.

(3) To fix the terms upon which individual, cooperative or corporate wholesale merchants, warehouses or warehousemen may place their facilities or services under the supervision and regulation of the Authority. The Authority may extend to any such wholesale merchants, warehouses or warehousemen marketing benefits in the form of inspection, market informational and news service and may make regulations as to the operation of such facilities or services and as to forms, reports, handling, grades, weights, packages, labels, and other standards for the products handled by such merchants, warehouses or warehousemen.

(4) To fix rentals and charges for each type of service or facility in the markets under its control, taking into consideration the cost of such facility or service, the interest and amortization period required, a proper relationship between types of operators in the market, cost of operation, and the need for reasonable reserves for repairs, depreciation, expansion, and similar items. These rentals and charges shall not bring any profit to any agency over and above the costs of operation, necessary reserves, and debt service.

(5) To issue permits to itinerant dealers in intrastate commerce, who express a willingness to come under the program of the State Marketing Authority. Such permits shall enable the holders to solicit orders and to buy and sell produce under the rules and regulations of the Authority and in conformance with G.S. 106-185 to 106-196 and not inconsistent with the United States Perishable Agricultural Commodities Act, 1930 (46 Stat. 531).

(6) To issue bonds and other securities to obtain funds to acquire, construct, and equip warehouses to be used in carrying out the purposes of this Article. The bonds shall be entitled "North Carolina

Marketing Authority Bonds" and shall be issued in such form and denominations and shall mature at such time or times, not exceeding 30 years after their date, and shall bear such interest, not exceeding five percent (5%) per annum, payable either annually or semiannually, as the Authority shall determine. They shall be signed by the chairman of the Authority, and the corporate seal affixed or impressed upon each bond and attested by the secretary-treasurer of the Authority. The coupons shall bear the facsimile signature of the chairman officiating when the bonds are issued. Any issue of these bonds and notes may be sold publicly, or at private sale for not less than par to the Reconstruction Finance Corporation or other State or federal agency or may be given in exchange to any county, city, town or individual for the lease or purchase of property to be used by the Authority. To secure such indebtedness, the Authority may give mortgages or deeds of trust, executed in the same manner as the bonds, on the property purchased or acquired, and may pledge the revenues from the markets in excess of operating expenses, interest and insurance: Provided, that each market shall be operated on a separate financial basis, and only such revenues and properties of each separate market shall be liable for the obligations of that market. No obligations incurred by the Authority shall be obligations of the State of North Carolina or any of its political subdivisions, or a burden on the taxpayers of the State or any political subdivision. This does not prevent the State or any of its agencies, departments or institutions, or any private or public agency from making a contribution to the Authority, in money or services or otherwise.

Bonds and notes issued under this Article shall be exempt from all State, county or municipal taxes or assessments of any kind; the interest shall not be taxable as income, nor shall the notes, bonds, nor coupons be taxable as part of the surplus of any bank, trust company or other corporation.

Any resolution or resolutions authorizing any bonds shall contain provisions which shall be a part of the contract with the holders of the bonds, as to:

a. Pledging the fees, rentals, charges, dues, tolls, and inspection and sales fees, and other revenues to secure payment of the bonds;
b. The rates of the fees or tolls to be charged for the use of the facilities of the warehouse or warehouses, and the use and disposition of the revenues from its operation;
c. The setting aside of reserves or working funds, and the regulation and disposition thereof;
d. Limitations on the purposes to which the proceeds of sale of any issue of bonds may be applied;
e. Limitations on the issuance of additional bonds; and
f. The procedure, if any, by which the terms of any contract with bondholders may be amended or abrogated, the amount of bonds the holders of which must consent thereto, and the manner in which such consent may be given.

(7) To accept grants in aid or free work.
(8) To adopt, use and alter a corporate seal.
(9) To dispossess tenants for nonpayment of rent and for failure to abide by the regulations of the Authority.
(10) To hire necessary agents, engineers, and attorneys, and to do all things necessary to carry out the powers granted by this Article. (1941, c. 39, s. 3.)

§ 106-531. Discrimination prohibited; restriction on use of funds.

The Authority shall not permit:

(1) Any discrimination against the sale, on any of the markets under their control, of any farm product because of type of operator or area of production.

(2) The use of any of its funds for any purpose other than for the support, necessary expansion, and operation of this State marketing system, or the use of any of its funds to establish any retail market or to build or furnish more than one market in any town. (1941, c. 39, s. 4.)

§ 106-532. Fiscal year; annual report to Governor.

The Authority shall operate on a fiscal year, which shall be from July first to June thirtieth. The Commissioner of Agriculture shall file an annual report with the Governor containing a statement of receipts and disbursements and the purposes of such disbursements, and a complete statement of the financial condition of the Authority, and an account of its activities for the year. (1941, c. 39, s. 5.)

§ 106-533. Application of revenues from operation of warehouses.

All rentals and charges, fees, tolls, storage and sales commissions and revenues of any sort from operation of each warehouse shall be applied to the payment of the cost of operating and administering the warehouse and market facilities including interest on bonds and other evidences of indebtedness issued therefor, and the cost of insurance against loss by injury to persons or property, and the balance shall be paid to the secretary-treasurer of the Authority and be used to provide a sinking fund to pay at or before maturity all bonds and notes and other evidences of indebtedness incurred for and on behalf of the building, constructing, maintaining and operating of each warehouse. A separate sinking fund account shall be kept for each market, and no market shall be liable for the obligations of any other market. (1941, c. 39, s. 6.)

§ 106-534. Exemption from taxes and assessments.

The Authority shall be regarded as performing an essential governmental function in constructing, operating or maintaining these markets, and shall be required to pay no taxes or assessments on any property acquired or used by it for the purposes herein set out. (1941, c. 39, s. 7.)

Article 48.

Relief of Potato Farmers.

§§ 106-535 through 106-538: Repealed by Session Laws 1987, c. 244, s. 1(k).

Article 49.

Poultry; Hatcheries; Chick Dealers.

§ 106-539. National poultry improvement plan.

In order to promote the poultry industry of the State, the North Carolina Department of Agriculture and Consumer Services is hereby authorized to

cooperate with the United States Department of Agriculture in the operation of the national poultry improvement plan. (1945, c. 616, s. 1; 1969, c. 464; 1983, c. 290, s. 1; 1997-261, s. 109.)

§ 106-540. Rules and regulations.

The North Carolina Board of Agriculture is hereby authorized to adopt such regulations as may be necessary to:

(1) Carry out the provisions of the national poultry improvement plan.
(2) Set up minimum standards for the operation of hatcheries.
(3) Regulate hatching egg dealers, chick dealers, poult dealers, poultry dealers, ratite dealers, and jobbers.
(4) Regulate the shipping into this State of baby chicks, turkey poults and hatching eggs.
(5) Facilitate the control and eradication of contagious and infectious diseases of poultry.
(6) Establish fee schedules for pullorum and other disease testing, and the performance of services such as culling and selecting by Department personnel.
(7) Provide for compulsory testing of poultry for pullorum disease and fowl typhoid. (1945, c. 616, s. 2; 1969, c. 464; 1983, c. 290, ss. 2, 3; 1998-212, s. 13.10(a).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, in subdivision (3), inserted "poultry dealers, ratite dealers".

§ 106-541. Definitions.

For the purpose of this Article, the following definitions apply:

(1) "Hatchery" means any establishment that operates hatchery equipment for the production of baby chicks or poults.
(2) "Hatching egg dealer, chick dealer, or jobber" means any person, firm, or corporation that buys hatching eggs, baby chicks, or turkey poults and sells or offers them for sale.
(3) "Live poultry or ratite dealer" means a person who sells or offers for sale to the general public live poultry or ratites. Live poultry or ratite dealer does not include persons who sell on their own premises live poultry or ratites that were raised on the same premises.
(4) "Mixed chicks" or "assorted chicks" means chicks produced from eggs from purebred females of a distinct breed mated to a purebred male of a distinct breed.
(5) "Poultry" means live chickens, doves, ducks, geese, grouse, guinea fowl, partridges, pea fowl, pheasants, pigeons, quail, swans, or turkeys other than chicks or poults.
(6) "Ratite" has the same meaning as in G.S. 106-549.15. (1945, c. 616, s. 3; 1969, c. 464; 1998-212, s. 13.10(b).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, rewrote this section.

§ 106-542. Hatcheries, chick dealers and others to obtain license to operate.

(a) It shall be unlawful for any person, firm or corporation to operate a hatchery within this State without first obtaining a hatchery license from the Department of Agriculture and Consumer Services for a fee of twenty-five dollars ($25.00) per year.

(b) It shall be unlawful for any person, firm or corporation to operate as a hatching egg dealer, chick dealer or jobber within this State without first obtaining a license from the Department of Agriculture and Consumer Services for a fee of ten dollars ($10.00) per year.

(b1) It shall be unlawful for any person, firm, or corporation to operate as a live poultry or ratite dealer without first registering with the Department of Agriculture and Consumer Services.

(b2) It shall be unlawful for a specialty market operator, as defined in G.S. 66-250, to knowingly and willfully permit an unregistered poultry or ratite dealer to operate on the premises of the specialty market, as defined in G.S. 66-250, more than 10 days after being notified in writing by the Department of Agriculture and Consumer Services that the dealer is not registered.

(c) The Department of Agriculture and Consumer Services may deny, suspend, revoke or refuse to renew the license of any person, firm or corporation for violation of this Article or any rule or regulation promulgated thereunder. (1945, c. 616, s. 4; 1969, c. 464; 1983, c. 290, s. 4; 1997-261, s. 56; 1998-212, s. 13.10(c).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, added subsections (b1) and (b2).

§ 106-543. Requirements of national poultry improvement plan must be met.

All baby chicks, turkey poults and hatching eggs produced, sold or offered for sale shall originate in flocks that meet the requirements of the national poultry improvement plan as administered by the North Carolina Department of Agriculture and Consumer Services and the regulations issued by authority of this Article for the control of pullorum disease and other infectious diseases provided that nothing in this Article shall require any hatchery to adopt the national poultry improvement plan. (1945, c. 616, s. 5; 1969, c. 464; 1983, c. 290, s. 5; 1997-261, s. 109.)

§ 106-544. Shipments from out of State.

All baby chicks, turkey poults and hatching eggs shipped or otherwise brought into this State shall originate in flocks that meet the minimum requirements of pullorum and typhoid disease control provided for in this Article and the regulations issued by authority of this Article, and shall be accompanied by a certificate approved by the official state agency or the livestock sanitary officials of the state of origin certifying same. (1945, c. 616, s. 6; 1969, c. 464.)

§ 106-545. False advertising.

No hatchery, hatchery dealer, chick dealer or jobber shall use false or misleading advertising in the sale of their products. (1945, c. 616, s. 7; 1969, c. 464.)

§ 106-546. Notice describing grade of chicks to be posted.

All hatcheries, chick dealers or jobbers offering chicks for sale to the public shall post in a conspicuous manner in their place of business a poster furnished by the North Carolina Department of Agriculture and Consumer Services describing the grade of chicks approved by the North Carolina Department of Agriculture and Consumer Services. (1945, c. 616, s. 8; 1969, c. 464; 1997-261, s. 109.)

§ 106-547. Records to be kept.

Every hatchery, hatching egg dealer, chick dealer, poultry dealer, ratite dealer, or jobber shall keep such records of operation as the regulations of the Department of Agriculture and Consumer Services may require for the proper inspection of said hatchery, dealer, or jobber. (1945, c. 616, s. 9; 1969, c. 464; 1997-261, s. 109; 1998-212, s. 13.10(d).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, inserted "poultry dealer, ratite dealer," and made a punctuation change.

§ 106-548. Quarantine.

When the State Veterinarian receives information or has reason to believe that pullorum disease or fowl typhoid exists in any poultry or that they have been exposed to one of these diseases, he shall promptly cause said poultry to be quarantined on the premises where located. Said poultry or hatching eggs shall not be removed from the premises where quarantined until quarantine has been released by the State Veterinarian or his authorized representative. A permit to move such infected or exposed poultry to immediate slaughter, or to another premise under quarantine, may be issued by the State Veterinarian or his authorized representative. (1945, c. 616, s. 10; 1969, c. 464; 1983, c. 290, s. 6.)

§ 106-549. Violation a misdemeanor.

Any person, firm or corporation who shall willfully violate any provision of this Article or any rule or regulation duly established by authority of this Article, shall be guilty of a Class 2 misdemeanor. (1945, c. 616, s. 11; 1969, c. 464; 1993, c. 539, s. 798; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-549.01. Civil penalties.

The Department of Agriculture and Consumer Services may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 12; 1997-261, s. 57; 1998-215, s. 16.)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number as enacted by Session Laws 1995, c. 516, s. 12 having been § 106-549.1.

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

Article 49A.

Voluntary Inspection of Poultry.

§§ 106-549.1 through 106-549.14: Repealed by Session Laws 1981, c. 284.

Article 49B.

Meat Inspection Requirements; Adulteration and Misbranding.

§ 106-549.15. Definitions.

As used in this Article, except as otherwise specified, the following terms shall have the meanings stated below:

(1) "Adulterated" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

a. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

b. 1. If it bears or contains (by reason of administration of any substance to the live animal or otherwise) any added poisonous or added deleterious substance (other than one which is (i) a pesticide chemical in or on a raw agricultural commodity; (ii) a food additive; or (iii) a color additive) which may, in the judgment of the Commissioner, make such article unfit for human food;

2. If it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 408 of the Federal Food, Drug, and Cosmetic Act;

3. If it bears or contains any food additive which is unsafe within the meaning of section 409 of the Federal Food, Drug, and Cosmetic Act;

4. If it bears or contains any color additive which is unsafe within the meaning of section 706 of the Federal Food, Drug, and Cosmetic Act: Provided, that an article which is not adulterated under clause 2, 3, or 4 shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive or color additive in or on such article is prohibited by order of the Commissioner in establishments at which inspection is maintained under this Article;

c. If it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

d. If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;
e. If it is, in whole or in part, the product of an animal which has died otherwise than by slaughter;
f. If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;
g. If it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 409 of the Federal Food, Drug, and Cosmetic Act;
h. If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is; or
i. If it is margarine containing animal fat and any of the raw material used therein consist in whole or in part of any filthy, putrid, or decomposed substance.

(2) "Animal food manufacturer" means any person, firm, or corporation engaged in the business of manufacturing or processing animal food derived wholly or in part from carcasses, or parts or products of the carcasses, of cattle, sheep, swine, goats, horses, mules, or other equines.
(3) "Authorized representative" means the Director of the Meat and Poultry Inspection Service of the North Carolina Department of Agriculture and Consumer Services.
(4) "Board" means the North Carolina Board of Agriculture.
(5) "Capable of use as human food" shall apply to any carcass, or part or product of a carcass, of any animal, unless it is denatured or otherwise identified as required by regulations prescribed by the Board to deter its use as human food, or it is naturally inedible by humans.
(6) "Commissioner" means the North Carolina Commissioner of Agriculture or his authorized representative.
(7) "Federal Food, Drug, and Cosmetic Act" means the act so entitled, approved June 25, 1938 (52 Stat. 1040), and acts amendatory thereof or supplementary thereto.
(8) "Federal Meat Inspection Act" means the act so entitled approved March 4, 1907 (34 Stat. 1260), as amended by the Wholesome Meat Act (81 Stat. 584).
(9) "Firm" means any partnership, association, or other unincorporated business organization.
(10) "Intrastate commerce" means commerce within this State.
(11) "Label" means a display of written, printed, or graphic matter upon the immediate container (not including package liners) of any article.
(12) "Labeling" means all labels and other written, printed, or graphic matter (i) upon any article or any of its containers or wrappers, or (ii) accompanying such article.
(13) "Meat broker" means any person, firm, corporation engaged in the business of buying or selling carcasses, parts of carcasses, meat, or meat food products of cattle, sheep, swine, goats, bison, horses, mules, or other equines on commission, or otherwise negotiating purchases or sales of such articles other than for his own account or as an employee of another person, firm, or corporation.

(14) "Meat food product" means any product capable of use as human food that is made wholly or in part from any meat or other portion of the carcass of any cattle, sheep, swine, goats, bison, fallow deer, or red deer, excepting products that contain meat or other portions of such carcasses only in a relatively small proportion or historically have not been considered by consumers as products of the meat food industry, and that are exempted from definition as a meat food product by the Board under such conditions as it may prescribe to assure that the meat or other portions of such carcasses contained in such product are not adulterated and that such products are not represented as meat food products. This term as applied to food products of equines shall have a meaning comparable to that provided in this subdivision with respect to cattle, sheep, swine, goats, and bison.

(15) "Misbranded" shall apply to any carcass, part thereof, meat or meat food product under one or more of the following circumstances:

a. If its labeling is false or misleading in any particular;

b. If it is offered for sale under the name of another food;

c. If it is imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated;

d. If its container is so made, formed, or filled as to be misleading;

e. If in a package or other container unless it bears a label showing (i) the name and place of business of the manufacturer, packer, or distributor; and (ii) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; provided, that under clause (ii) of this paragraph e, reasonable variations may be permitted, and exemptions as to small packages may be established, by regulations prescribed by the Board;

f. If any word, statement, or other information required by or under authority of this or the subsequent Article to appear on the label or other labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

g. If it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed by regulations of the Board under G.S. 106-549.21 unless (i) it conforms to such definition and standard, and (ii) its label bears the name of the food specified in the definition and standard and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food;

h. If it purports to be or is represented as a food for which a standard or standards of fill of container have been prescribed by regulations of the Board under G.S. 106-549.21, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

i. If it is not subject to the provisions of paragraph g, unless its label bears (i) the common or usual name of the food, if any there be, and (ii) in case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings may, when authorized by the Commissioner, be designated as spices, flavorings, and colorings without naming each: Provided, that, to the extent that compli-

ance with the requirements of clause (ii) of this paragraph i is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Board;

j. If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Board determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses;

k. If it bears or contains any artificial flavoring, artificial coloring, or chemical preservatives, unless it bears labeling stating that fact: Provided, that, to the extent that compliance with the requirements of this paragraph k is impracticable, exemptions shall be established by regulations promulgated by the Board; or

l. If it fails to bear, directly thereon or on its container, as the Board may by regulations prescribe, the inspection legend and, unrestricted by any of the foregoing, such other information as the Board may require in such regulations to assure that it will not have false or misleading labeling and that the public will be informed of the manner of handling required to maintain the article in a wholesome condition.

(16) "Official certificate" means any certificate prescribed by regulations of the Board for issuance by an inspector or other person performing official functions under this or the subsequent Article.

(17) "Official device" means any device prescribed or authorized by the Board for use in applying any official mark.

(18) "Official inspection legend" means any symbol prescribed by regulations of the Board showing that an article was inspected and passed in accordance with this or the subsequent Article.

(19) "Official mark" means the official inspection legend or any other symbol prescribed by regulations of the Board to identify the status of any article or animal under this or the subsequent Article.

(20) "Pesticide chemical," "food additive," "color additive," and "raw agricultural commodity" shall have the same meanings for purposes of this Article as under the Federal Food, Drug, and Cosmetic Act.

(21) "Prepared" means slaughtered, canned, salted, smoked, rendered, boned, cut up, or otherwise manufactured or processed.

(21a) "Ratite" means a bird whose breastbone is smooth so that flight muscles cannot attach, such as an ostrich, an emu, and a rhea. These birds are subject to the provisions of this Article and Article 49C to the same extent as any other meat food product.

(22) "Renderer" means any person, firm, or corporation engaged in the business of rendering carcasses, or parts or products of the carcasses, of cattle, sheep, swine, goats, fallow deer, red deer, horses, mules, or other equines, except rendering conducted under inspection under this Article. (1969, c. 893, s. 1; 1991, c. 317, ss. 4, 5; 1993, c. 311, s. 1; 1995, c. 194, ss. 1, 2; 1997-142, ss. 4, 5; 1997-261, s. 58.)

§ 106-549.16. Statement of purpose.

Meat and meat food products are an important source of the nation's total supply of food. It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded meat or meat food products are injurious to the public welfare, destroy markets for

wholesome, not adulterated, and properly labeled and packaged meat and meat food products, and results in sundry losses to livestock producers and processors of meat and meat food products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that regulation by the Board and cooperation by North Carolina and the United States as contemplated by this and the subsequent Article are appropriate to protect the health and welfare of consumers and otherwise effectuate the purposes of this and the subsequent Article. (1969, c. 893, s. 2; 1971, c. 54, s. 3.)

§ 106-549.17. Inspection of animals before slaughter; humane methods of slaughtering.

(a) For the purpose of preventing the use in intrastate commerce, as hereinafter provided, of meat and meat food products which are adulterated, the Commissioner shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of all cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering, or similar establishment in this State in which slaughtering and preparation of meat and meat food products of such animals are conducted for intrastate commerce; and all cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines found on such inspection to show symptoms of disease shall be set apart and slaughtered separately from all other cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, or other equines, and when so slaughtered, the carcasses of said cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, or other equines shall be subject to a careful examination and inspection, all as provided by the rules and regulations to be prescribed by the Board as herein provided for.

(b) For the purpose of preventing the inhumane slaughtering of livestock, the Commissioner shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this law. The Commissioner may refuse to provide inspection to a new slaughtering establishment or may cause inspection to be temporarily suspended at a slaughtering establishment if the Commissioner finds that any cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, or other equines have been slaughtered or handled in connection with slaughter at such establishment by any method not in accordance with subsection (c) of this section until the establishment furnishes assurances satisfactory to the Commissioner that all slaughtering and handling in connection with slaughter of livestock shall be in accordance with such a method.

(c) Either of the following two methods of slaughtering of livestock and handling of livestock in connection with slaughter are found to be humane:

(1) In the case of cattle, calves, fallow deer, red deer, bison, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical, or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(2) By slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia

of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering. (1969, c. 893, s. 3; 1981, c. 376, s. 1; 1991, c. 317, s. 6; 1995, c. 194, s. 3; 1997-142, s. 6.)

§ 106-549.18. Inspection; stamping carcass.

For the purposes hereinbefore set forth the Commissioner shall cause to be made by inspectors appointed for that purpose, as hereinafter provided, a post mortem examination and inspection of the carcasses and parts thereof of all cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines, capable of use as human food, to be prepared at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in this State in which such articles are prepared for intrastate commerce; and the carcasses and parts thereof of all such animals found to be not adulterated shall be marked, stamped, tagged, or labeled, as "Inspected and Passed"; and said inspectors shall label, mark, stamp, or tag as "Inspected and Condemned," all carcasses and parts thereof of animals found to be adulterated; and all carcasses and parts thereof thus inspected and condemned shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Commissioner or his authorized representative may remove inspectors from any such establishment which fails to so destroy any such condemned carcass or part thereof, and said inspectors, after said first inspection shall, when they deem it necessary, reinspect said carcasses or parts thereof to determine whether since the first inspection the same have become adulterated and if any carcass or any part thereof shall, upon examination and inspection subsequent to the first examination and inspection, be found to be adulterated, it shall be destroyed for food purposes by the said establishment in the presence of an inspector, and the Commissioner or his authorized representative may remove inspectors from any establishment which fails to so destroy any such condemned carcass or part thereof. (1969, c. 893, s. 4; 1991, c. 317, s. 7; 1995, c. 194, s. 4; 1997-142, s. 7.)

§ 106-549.19. Application of Article; place of inspection.

The foregoing provisions shall apply to all carcasses or parts of carcasses of cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines or the meat or meat products thereof, capable of use as human food, which may be brought into any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, where inspection under this Article is maintained, and such examination and inspection shall be had before the said carcasses or parts thereof shall be allowed to enter into any department wherein the same are to be treated and prepared for meat food products; and the foregoing provisions shall also apply to all such products which, after having been issued from any such slaughtering, meat-canning, salting, packing, rendering, or similar establishment, shall be returned to the same or to any similar establishment where such inspection is maintained. The Commissioner or his authorized representative may limit the entry of carcasses, part of carcasses, meat and meat food products, and other materials into any establishment at which inspection under this Article is maintained, under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this and the subsequent Article. (1969, c. 893, s. 5; 1991, c. 317, s. 8; 1995, c. 194, s. 5; 1997-142, s. 8.)

§ 106-549.20. Inspectors' access to businesses.

For the purposes hereinbefore set forth the Commissioner or his authorized representative shall cause to be made by inspectors appointed for that purpose

an examination and inspection of all meat food products prepared in any slaughtering, meat-canning, salting, packing, rendering, or similar establishment, where such articles are prepared for intrastate commerce and for the purposes of any examination and inspection said inspectors shall have access at all times during regular business hours to every part of said establishment; and said inspectors shall mark, stamp, tag, or label as "North Carolina Department of Agriculture and Consumer Services Inspected and Passed" all such products found to be not adulterated; and said inspectors shall label, mark, stamp, or tag as "North Carolina Department of Agriculture and Consumer Services Inspected and Condemned" all such products found adulterated, and all such condemned meat food products shall be destroyed for food purposes, as hereinbefore provided, and the Commissioner or his authorized representative may remove inspectors from any establishment which fails to so destroy such condemned meat food products. (1969, c. 893, s. 6; 1997-261, s. 109.)

§ 106-549.21. Stamping container or covering; regulation of container.

(a) When any meat or meat food product prepared for intrastate commerce which has been inspected as hereinbefore provided and marked "North Carolina Department of Agriculture and Consumer Services Inspected and Passed" shall be placed or packed in any can, pot, tin, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Article is maintained, the person, firm, or corporation preparing said product shall cause a label to be attached to said can, pot, tin, canvas, or other receptacle or covering, under supervision of an inspector, which label shall state that the contents thereof have been "North Carolina Department of Agriculture and Consumer Services Inspected and Passed" under the provisions of this Article, and no inspection and examination of meat or meat food products deposited or inclosed in cans, tins, pots, canvas, or other receptacle or covering in any establishment where inspection under the provisions of this Article is maintained shall be deemed to be complete until such meat or meat food products have been sealed or inclosed in said can, tin, pot, canvas, or other receptacle or covering under the supervision of an inspector.

(b) All carcasses, parts of carcasses, meat and meat food products inspected at any establishment under the authority of this Article and found to be not adulterated shall at the time they leave the establishment bear, in distinctly legible form, directly thereon or on their containers, as the Commissioner or authorized representative may require, the information required under subdivision (15) of G.S. 106-549.15.

(c) The Board whenever it determines such action is necessary for the protection of the public, may prescribe:

(1) The styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling of any articles or animals subject to this and the subsequent Article;

(2) Definitions and standards of identity or composition for articles subject to this Article and standards of fill of container for such articles not inconsistent with any such standards established under the Federal Food, Drug, and Cosmetic Act, or under the Federal Meat Inspection Act, and there shall be consultation between the Commissioner or his authorized representative and the Secretary of Agriculture of the United States prior to the issuance of such standards to avoid inconsistency between such standards and the federal standards.

(d) No article subject to this title shall be sold or offered for sale by any person, firm, or corporation, in intrastate commerce, under any name or other marking or labeling which is false or misleading, or in any container of a misleading form or size, but established trade names and other marking and labeling and containers which are not false or misleading, and which are approved by the Commissioner or his authorized representative, are permitted.

(e) If the Commissioner or his authorized representative has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this title is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. If the person, firm, or corporation using or proposing to use the marking, labeling or container does not accept the determination of the Commissioner or his authorized representative, such person, firm, or corporation may request a hearing, but the use of the marking, labeling, or container shall, if the Commissioner so directs, be withheld pending hearing and final determination by the Commissioner. A person who uses or proposes to use the marking, labeling, or container and who does not accept the determination of the Commissioner may commence a contested case under G.S. 150B-23. If directed by the Commissioner, the marking, labeling, or container may not be used pending a final decision. (1969, c. 893, s. 7; 1973, c. 1331, s. 3; 1987, c. 827, s. 35; 1997-261, s. 109.)

§ 106-549.22. Rules and regulations of Board.

The Commissioner or his authorized representative shall cause to be made, by experts in sanitation, or by other competent inspectors, such inspection of all slaughtering, meat-canning, salting, packing, rendering, or similar establishments in which cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines are slaughtered and the meat and meat food products thereof are prepared for intrastate commerce as may be necessary to inform himself concerning the sanitary conditions of the same, and the Board shall prescribe the rules and regulations of sanitation under which such establishments shall be maintained; and where the sanitary conditions of any such establishment are such that the meat or meat food products are rendered adulterated, the Commissioner or his authorized representative shall refuse to allow said meat or meat food products to be labeled, marked, stamped, or tagged as "North Carolina Department of Agriculture and Consumer Services Inspected and Passed." (1969, c. 893, s. 8; 1991, c. 317, s. 9; 1995, c. 194, s. 6; 1997-142, s. 9; 1997-261, s. 109.)

§ 106-549.23. Prohibited slaughter, sale and transportation.

No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals:

(1) Slaughter any of these animals or prepare any of these articles which are capable of use as human food, at any establishment preparing any such articles for intrastate commerce except in compliance with the requirements of this and the subsequent Article;

(2) Slaughter, or handle in connection with slaughter, any such animals in any manner not in accordance with G.S. 106-549.17(c) of this Article;

(3) Sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce:

a. Any of these articles which (i) are capable of use as human food and (ii) are adulterated or misbranded at the time of sale, transportation, offer for sale or transportation, or receipt for transportation; or

b. Any articles required to be inspected under this Article unless they have been so inspected and passed; or

(4) Do, with respect to any of these articles which are capable of use as human food, any act while they are being transported in intrastate commerce or held for sale after such transportation, which is intended to cause or has the effect of causing the articles to be adulterated or misbranded. (1969, c. 893, s. 9; 1981, c. 376, s. 2; 1991, c. 317, s. 10; 1995, c. 194, s. 7; 1997-142, s. 10.)

§ 106-549.24. Prohibited acts regarding certificate.

(a) No brand manufacturer, printer, or other person, firm, or corporation shall cast, print, lithograph, or otherwise make any device containing any official mark or simulation thereof, or any label bearing any such mark or simulation, or any form of official certificate or simulation thereof, except as authorized by the Commissioner or his authorized representative.

(b) No person, firm, or corporation shall

(1) Forge any official device, mark or certificate;

(2) Without authorization from the Commissioner or his authorized representative use any official device, mark, or certificate, or simulation thereof, or alter, detach, deface, or destroy any official device, mark, or certificate;

(3) Contrary to the regulations prescribed by the Board, fail to use, or to detach, deface, or destroy any official device, mark, or certificate;

(4) Knowingly possess, without promptly notifying the Commissioner or his authorized representative, any official device or any counterfeit, simulated, forged, or improperly altered official certificate or any device or label or any carcass of any animal, or part or product thereof, bearing any counterfeit, simulated, forged, or improperly altered official mark;

(5) Knowingly make any false statement in any shipper's certificate or other nonofficial or official certificate provided for in the regulations prescribed by the Board;

(6) Knowingly represent that any article has been inspected and passed, or exempted, under this Article when, in fact, it has, respectively, not been so inspected and passed, or exempted. (1969, c. 893, s. 10.)

§ 106-549.25. Slaughter, sale and transportation of equine carcasses.

No person, firm, or corporation shall sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce, any carcasses of horses, mules, or other equines or parts of such carcasses, or the meat or meat food products thereof, unless they are plainly and conspicuously marked or labeled or otherwise identified as required by regulations prescribed by the Board to show the kinds of animals from which they were derived. When required by the Commissioner or his authorized representative, with respect to establishments at which inspection is maintained under this Article, such animals and their carcasses, parts thereof, meat and meat food products shall be prepared in establishments separate from those in which cattle, sheep, swine, fallow deer, red deer, bison, or goats are slaughtered or their carcasses, parts thereof, meats or meat food products are prepared. (1969, c. 893, s. 11; 1991, c. 317, s. 11; 1995, c. 194, s. 8; 1997-142, s. 11.)

§ 106-549.26. Inspection of establishment; bribery of or malfeasance of inspector.

The Commissioner or his authorized representative shall appoint from time to time inspectors to make examination and inspection of all cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, and other equines the inspection of which is hereby provided for, and of all carcasses and parts thereof, and of all meats and meat food products thereof, and of the sanitary conditions of all establishments in which such meat and meat food products hereinbefore described are prepared; and said inspectors shall refuse to stamp, mark, tag or label any carcass or any part thereof, or meat food product therefrom, prepared in any establishment hereinbefore mentioned, until the same shall have actually been inspected and found to be not adulterated; and shall perform such other duties as are provided by this and the subsequent Article and by the rules and regulations to be prescribed by said Board and said Board shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this and the subsequent Article, and all inspections and examinations made under this Article shall be such and made in such manner as described in the rules and regulations prescribed by said Board not inconsistent with the provisions of this Article and as directed by the Commissioner or his authorized representative. Any person, firm, or corporation, or any agent or employee of any person, firm, or corporation, who shall give, pay, or offer, directly or indirectly, to any inspector, or any other officer or employee of this State authorized to perform any of the duties prescribed by this and the subsequent Article or by the rules and regulations of the Board or by the Commissioner or his authorized representative any money or other thing of value, with intent to influence said inspector, or other officer or employee of this State in the discharge of any duty herein provided for, shall be deemed guilty of a Class I felony which may include a fine not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000); and any inspector, or other officer or employee of this State authorized to perform any of the duties prescribed by this Article who shall accept any money, gift, or other thing of value from any person, firm, or corporation, or officers, agents, or employees thereof, given with intent to influence his official action, or who shall receive or accept from any person, firm, or corporation engaged in intrastate commerce any gift, money, or other thing of value given with any purpose or intent whatsoever, shall be deemed guilty of a Class I felony and shall, upon conviction thereof, be summarily discharged from office and may be punished by a fine not less than five hundred dollars ($500.00) nor more than ten thousand dollars ($10,000). (1969, c. 893, s. 12; 1991, c. 317, s.12; 1993, c. 539, s. 1298; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 194, s. 9; 1997-142, s. 12.)

§ 106-549.27. Exemptions from Article.

(a) The provisions of this Article requiring inspection of the slaughter of animals and the preparation of the carcasses, parts thereof, meat and meat food products at establishments conducting such operations shall not

(1) Apply to the slaughtering by any person of animals of his own raising, and the preparation by him and transportation in intrastate commerce of the carcasses, parts thereof, meat and meat food products of such animals exclusively for use by him and members of his household and his nonpaying guests and employees; nor

(2) To the custom slaughter by any person, firm, or corporation of cattle, sheep, swine, fallow deer, red deer, bison, or goats delivered by the owner thereof for such slaughter, and the preparation by such

slaughterer and transportation in intrastate commerce of the carcasses, parts thereof, meat and meat food products of such animals, exclusively for use, in the household of such owner, by him, and members of his household and his nonpaying guests and employees: Provided, that all carcasses, parts thereof, meat and meat food products derived from custom slaughter shall be identified as required by the Commissioner, during all phases of slaughtering, chilling, cooling, freezing, packing, meat canning, rendering, preparation, storage and transportation; provided further, that the custom slaughterer does not engage in the business of buying or selling any carcasses, parts thereof, meat or meat food products of any cattle, sheep, swine, goats, fallow deer, red deer, bison, or equines, capable of use as human food, unless the carcasses, parts thereof, meat or meat food products have been inspected and passed and are identified as having been inspected and passed by the Commissioner or the United States Department of Agriculture.

(b) The provisions of this Article requiring inspection of the slaughter of animals and the preparation of carcasses, parts thereof, meat and meat food products shall not apply to operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities or service of such articles to consumers at such establishments. Meat food products coming under this subsection may be stored, processed, or prepared at any freezer locker plant provided such meat food products are identified and kept separate and apart from other meat food products bearing the official mark of inspection while in the freezer locker plant.

(c) In order to accomplish the objectives of this Article, the Commissioner shall exempt any other operations which the Commissioner shall determine would best be exempted to further the purposes of this Article, to the extent such exemptions conform to the Federal Meat Inspection Act and the regulations thereunder.

(d) The slaughter of animals and preparation of articles referred to in paragraphs (a) (2) and (b) of this section shall be conducted in accordance with such sanitary conditions as the Board may by regulations prescribe. Willful violation of any such regulation is a Class 2 misdemeanor.

(e) The adulteration and misbranding provisions of this title, other than the requirement of the inspection legend, shall apply to articles which are not required to be inspected under this section. (1969, c. 893, s. 13; 1971, c. 54, ss. 1, 2; 1991, c. 317, s. 13; 1993, c. 539, s. 799; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 194, s. 10; 1997-142, s. 13.)

§ 106-549.28. Regulation of storage of meat.

The Board may by regulations prescribe conditions under which carcasses, parts of carcasses, meat, and meat food products of cattle, sheep, swine, goats, fallow deer, red deer, bison, horses, mules, or other equines, capable of use as human food, shall be stored or otherwise handled by any person, firm, or corporation engaged in the business of buying, selling, freezing, storing, or transporting, in or for intrastate commerce, such articles, whenever the Board deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Willful violation of any such regulation is a Class 2 misdemeanor. (1969, c. 893, s. 14; 1991, c. 317, s. 14; 1993, c. 539, s. 800; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 194, s. 11; 1997-142, s. 14.)

ARTICLE 49C.

Federal and State Cooperation as to Meat Inspection; Implementation of Inspection.

§ 106-549.29. North Carolina Department of Agriculture and Consumer Services responsible for cooperation.

(a) The North Carolina Department of Agriculture and Consumer Services is hereby designated as the State agency which shall be responsible for cooperating with the Secretary of Agriculture of the United States under the provisions of section 301 of the Federal Meat Inspection Act and such agency is directed to cooperate with the Secretary of Agriculture of the United States in developing and administering the meat inspection program of this State under this and the previous Article in such a manner as will effectuate the purposes of this and the previous Article.

(b) In such cooperative efforts, the North Carolina Department of Agriculture and Consumer Services is authorized to accept from said Secretary advisory assistance in planning and otherwise developing the State program, technical and laboratory assistance and training (including necessary curricular and instructional materials and equipment), and financial and other aid for administration of such a program.

(c) The North Carolina Department of Agriculture and Consumer Services is further authorized to recommend to the said Secretary of Agriculture such officials or employees of this State as the Commissioner shall designate, for appointment to the advisory committees provided for in Section 301 of the Federal Meat Inspection Act; and the Commissioner or his authorized representative shall serve as the representative of the Governor for consultation with said Secretary under paragraph (c) of Section 301 of said act. (1969, c. 893, s. 15; 1985 (Reg. Sess., 1986), c. 1014, s. 155(a); 1997-261, s. 59.)

§ 106-549.29:1: Repealed by Session Laws 1969, c. 893, s. 26.

§ 106-549.30. Refusal of Commissioner to inspect and certify meat.

The Commissioner may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this and the previous Article) refuse to provide, or withdraw, inspection service under Article 49B with respect to any establishment if he determines, after opportunity for a hearing is accorded to the applicant for, or recipient of, such service, that such applicant or recipient is unfit to engage in any business requiring inspection under Article 49B because the applicant or recipient, or anyone responsibly connected with the applicant or recipient, has been convicted, in any federal or state court, of (i) any felony, or (ii) more than one violation of any law, other than a felony, based upon the acquiring, handling, or distributing of unwholesome, mislabeled, or deceptively packaged food or upon fraud in connection with transactions in food. This section shall not affect in any way other provisions of this or the previous Article for withdrawal of inspection services under Article 49B from establishments failing to maintain sanitary conditions or to destroy condemned carcasses, parts, meat or meat food products.

For the purpose of this section a person shall be deemed to be responsibly connected with the business if he was a partner, officer, director, holder, or

owner of ten per centum (10%) or more of its voting stock or employee in a managerial or executive capacity. The determination and order of the Commissioner with respect thereto under this section shall be final and conclusive unless the affected applicant for, or recipient of, inspection service files application for judicial review within 30 days after the effective date of such order in the appropriate court as provided in G.S. 106-549.33. (1969, c. 893, s. 16.)

§ 106-549.31. Enforcement against uninspected meat.

Whenever any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules, or other equines, or any product exempted from the definition of a meat food product, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine is found by any inspector of the Meat and Poultry Inspection Service of the North Carolina Department of Agriculture and Consumer Services upon any premises where it is held for purposes of, or during or after distribution in intrastate commerce, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that is has not been inspected, in violation of the provisions of Article 49B or of the Federal Meat Inspection Act or the Federal Food, Drug and Cosmetic Act, or that such article or animal has been or is intended to be distributed in violation of any such provisions, it may be detained by such inspector, upon approval of his supervisor, for a period not to exceed 20 days, pending action under G.S. 106-549.33, and shall not be moved by any person, firm, or corporation from the place at which it is located when so detained, until released by the area supervisor of the Meat and Poultry Inspection Service. All official marks may be required by such inspector to be removed from such article or animal before it is released unless it appears to the satisfaction of the area supervisor that the article or animal is eligible to retain such marks. (1969, c. 893, s. 17; 1997-261, s. 109.)

§ 106-549.32. Enforcement against condemned meat; appeal.

(a) Any carcass, part of a carcass, meat or meat food product of cattle, sheep, swine, goats, horses, mules or other equines, or any dead, dying, disabled, or diseased cattle, sheep, swine, goat, or equine, that is being transported in intrastate commerce, or is held for sale in this State after such transportation, and that (i) is or has been prepared, sold, transported or otherwise distributed or offered or received for distribution in violation of this or the previous Article, or (ii) is capable of use as human food and is adulterated or misbranded, or (iii) in any other way is in violation of this or the previous Article, shall be liable to be proceeded against and seized and condemned, at any time, on a complaint in any proper court as provided in G.S. 106-549.33 within the jurisdiction of which the article or animal is found. If the article or animal is condemned it shall, after entry of the order be disposed of by destruction or sale as the court may direct and the proceeds, if sold, less the court costs and fees, and storage and other proper expenses, shall be paid into the general fund of this State, but the article or animals shall not be sold contrary to the provisions of this or the previous Article. Provided, that upon the execution and delivery of a good and sufficient bond conditioned that the article or animal shall not be sold or otherwise disposed of contrary to the provisions of this or the previous Article, the court may direct that such article or animal be delivered to the owner thereof subject to such supervision by the authorized representative of the Commissioner as is necessary to insure compliance with the applicable laws. When an order of condemnation is entered against the article or animal and it

is released under bond, or destroyed, court costs and fees, and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or animal. The proceedings in such cases shall be heard by the superior court without a jury, with the right of the aggrieved party to appeal to the Court of Appeals, and all such proceedings shall be at the suit of and in the name of this State. No appeal shall lie from the Court of Appeals.

(b) The provisions of this section shall in no way derogate from authority for condemnation or seizure conferred by other provisions of this or the previous Article, or other laws. (1969, c. 893, s. 18.)

§ 106-549.33. Jurisdiction of superior court.

The superior court is vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this and the previous Article, and shall have jurisdiction in all other kinds of cases arising under this and the previous Article, provided however, all prosecutions for criminal violations under this and the previous Article shall be in any court having jurisdiction over said violation. (1969, c. 893, s. 19.)

§ 106-549.34. Interference with inspector.

Any person who willfully assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this or the previous Article shall be guilty of a Class 2 misdemeanor. For the purposes of this section, "impede," "oppose," and "intimidate," or "interfere" shall include, but not be limited to, the use of profane and indecent language, or any act or gesture, verbal or nonverbal, which tends to cast disrespect on an inspector or the Meat and Poultry Inspection Service. Whoever, in the commission of any such acts, uses a deadly weapon, shall be guilty of a Class 1 misdemeanor. (1969, c. 893, s. 20; 1993, c. 539, s. 801; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-549.35. Punishment for violation.

(a) Any person, firm, or corporation who violates any provision of this or the previous Article or any regulation of the Board for which no other criminal penalty is provided by this or the previous Article is guilty of a Class 2 misdemeanor; but if such violation involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated (except as defined in G.S. 106-549.15(1)h, such person, firm or corporation is guilty of a Class H felony which may include a fine of not more than ten thousand dollars ($10,000). Provided, that no person, firm, or corporation shall be subject to penalties under this section for receiving for transportation any article or animal in violation of this or the previous Article if such receipt was made in good faith, unless such person, firm, or corporation refuses to furnish on request of a representative of the Meat and Poultry Inspection Service the name and address of the person from whom he received such article or animal, and copies of all documents, if any there be, pertaining to the delivery of the article or animal to him.

(b) Nothing in this Article shall be construed as requiring the Commissioner or his authorized representative to report for prosecution or for the institution of condemnation or injunction proceedings, minor violations of this Article whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

(c) The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this

Article or Article 49B, or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1969, c. 893, s. 21; 1995, c. 516, s. 5; 1998-215, s. 17; 1999-408, s. 6.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph of subsection (c).

Session Laws 1999-408, s. 6, effective December 1, 1999, and applicable to acts committed on or after that date, in subsection (a), in the first sentence, substituted "is guilty of a Class 2 misdemeanor" for "shall upon conviction be subject to imprisonment for not more than six months, or a fine of not more than five hundred dollars ($500.00), or both such imprisonment and fine", and substituted "is guilty of a Class H felony which may include" for "shall be subject to imprisonment for not more than three years or", and deleted "or both" following "($10,000)."

§ 106-549.36. Gathering information; reports required; use of subpoena.

(a) The Commissioner shall also have power —

(1) To gather and compile information concerning and, to investigate from time to time the organization, business, conduct, practices, and management of any person, firm, or corporation engaged in intrastate commerce, and the relation thereof to other persons, firms, or corporations;

(2) To require, by general or special orders, persons, firms, and corporations engaged in intrastate commerce, or any class of them, or any of them to file with the Commissioner, in such form as the Commissioner may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commissioner such information as he may require as to the organization, business, conduct, practices, management, and relation to other persons, firms, and corporations, of the person, firm, or corporation filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commissioner may prescribe, and shall be filed with the Commissioner within such reasonable period as the Commissioner may prescribe, unless additional time be granted in any case by the Commissioner.

(b) For the purposes of this and the previous Article the Commissioner shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, firm, or corporation being investigated or proceeded against, and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person, firm, or corporation relating to any matter under investigation. The Commissioner may sign subpoenas and may administer oaths and affirmations, examine witnesses, and receive evidence.

(1) Such attendance of witnesses, and the production of such documentary evidence, may be required at any designated place of hearing. In case of disobedience to a subpoena the Commissioner may invoke the aid of any court designated in G.S. 106-549.33 in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(2) Any of the courts designated in G.S. 106-549.33 within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, firm, or corporation, issue an order requiring such person, firm, or corporation, to appear

before the Commissioner or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(3) Upon the application of the Attorney General of this State at the request of the Commissioner, the superior court shall have jurisdiction to issue writs of mandamus commanding any person, firm, or corporation to comply with the provisions of this or the previous Article or any order of the Commissioner made in pursuance thereof.

(4) The Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending under this Article at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commissioner and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commissioner as hereinbefore provided.

(5) Witnesses summoned before the Commissioner shall be paid the same fees and mileage that are paid witnesses in the courts of this State, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in such courts.

(6) No person, firm, or corporation shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, or other documentary evidence before the Commissioner or in obedience to the subpoena of the Commissioner whether such subpoena be signed or issued by him or his delegate, or in any cause or proceedings, criminal or otherwise, based upon or growing out of any alleged violation of this or the previous Article, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him or it may tend to incriminate him or it or subject him or it to a penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any person so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(c) Any person, firm, or corporation that shall neglect or refuse to attend and testify or to answer any lawful inquiry, or to produce documentary evidence, if in his or its power to do so, in obedience to the subpoena or lawful requirement of the Commissioner shall be guilty of a Class 2 misdemeanor.

(1) Any person, firm, or corporation that shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Article, or that shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person, firm, or corporation subject to this Article or that shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda, of all facts and transactions appertaining to the business of such person, firm, or corporation, or that shall willfully remove out of the jurisdiction of this State, or willfully mutilate, alter, or by any other means falsify

any documentary evidence of any such person, firm, or corporation or that shall willfully refuse to submit to the Commissioner or to any of his authorized agents, for the purpose of inspection and taking copies, any documentary evidence of any such person, firm, or corporation in his possession or within his control, shall be deemed guilty of a Class 2 misdemeanor.

(2) If any person, firm, or corporation required by this Article to file any annual or special report shall fail so to do within the time fixed by the Commissioner for filing the same, and such failure shall continue for 30 days after notice of such default, such person, firm, or corporation shall forfeit to this State the sum of one hundred dollars ($100.00) for each and every day of the continuance of such failure, which forfeiture shall be payable into the general fund of this State, and shall be recoverable in a civil suit in the name of the State brought in the superior court where the person, firm, or corporation has his or its principal office or in Wake County. It shall be the duty of the Attorney General of this State, to prosecute for the recovery of such forfeitures. The costs and expenses of such prosecution shall be paid out of the amount recovered in such action.

(3) Any officer or employee of this State who shall make public any information obtained by the Commissioner without his authority, unless directed by a court, shall be deemed guilty of a Class 2 misdemeanor. (1969, c. 893, s. 22; 1993, c. 539, s. 802; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-549.37. Jurisdiction coterminous with federal law.

The requirements of this Article shall apply to persons, firms, corporation establishments, animals, and articles regulated under the Federal Meat Inspection Act only to the extent provided for in section 408 of said federal act. (1969, c. 893, s. 23.)

§ 106-549.38. Rules and regulations of State Department of Agriculture and Consumer Services.

All rules and regulations of the Department of Agriculture and Consumer Services not inconsistent with the provisions of this Article shall remain in full force and effect until amended or repealed by the Board. (1969, c. 893, s. 27; 1997-261, s. 60.)

§ 106-549.39. Hours of inspection; overtime work; fees.

(a) Overtime Fees. — The Commissioner is not required to furnish meat inspection services during the following times unless the establishment under inspection pays the Department for the services:

(1) More than eight hours in a day.
(2) More than 40 hours in a calendar week.
(3) On a Sunday.
(4) On a legal holiday.

The Commissioner may establish a fee at an hourly rate to be paid by an establishment inspected during the times listed above. The fee shall be credited to the Department as a departmental receipt and applied to the cost of inspecting the establishment.

(b) Inspection Fees. — The Commissioner may establish a fee at an hourly rate to be paid by an establishment preparing an animal listed in this subsection as a meat food product. The fee shall be credited to the Department

as a departmental receipt and applied to the cost of inspecting these animals to be used for food. The animals whose inspection is subject to the fee imposed under this subsection are:

(1) Bison.

(2) Ostriches and other ratites. (1969, c. 893, s. 27(a); 1993, c. 311, s. 2; 1995, c. 194, s. 12.)

§§ 106-549.40 through 106-549.48: Repealed by Session Laws 1969, c. 893, s. 26.

ARTICLE 49D.

Poultry Products Inspection Act.

§ 106-549.49. Short title.

This Article shall be designated as the North Carolina Poultry Products Inspection Act. (1971, c. 677, s. 1.)

§ 106-549.50. Purpose and policy.

(a) Poultry and poultry products are an important source of the nation's total supply of food. It is essential in the public interest that the health and welfare of consumers be protected by assuring that slaughtered poultry and poultry products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged. Unwholesome, adulterated, or misbranded poultry or poultry products are injurious to the public welfare, destroy markets for wholesome, not adulterated, and properly labeled and packaged poultry and poultry products, and result in sundry losses to poultry producers and processors of poultry and poultry products, as well as injury to consumers. The unwholesome, adulterated, mislabeled, or deceptively packaged articles can be sold at lower prices and compete unfairly with the wholesome, not adulterated, and properly labeled and packaged articles, to the detriment of consumers and the public generally. It is hereby found that regulation by the Board and cooperation by this State and the United States as contemplated by this Article are appropriate to protect the health and welfare of consumers and otherwise effectuate the purposes of this Article.

(b) It is hereby declared to be the policy of the General Assembly to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles as hereinafter prescribed to prevent the movement or sale in intrastate commerce of poultry and poultry products which are adulterated or misbranded. It is the intent of the General Assembly that when poultry and poultry products are condemned because of disease, the reason for condemnation in such instances shall be supported by scientific fact, information, or criteria, and such condemnation under this Article shall be achieved through uniform inspection standards and uniform application thereof. (1971, c. 677, ss. 2, 3.)

§ 106-549.51. Definitions.

For purposes of this Article, the following terms shall have the meanings stated below:

(1) "Adulterated" shall apply to any poultry product under one or more of the following circumstances:

a. If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance, such article shall not be considered adulterated under this clause if the quantity of such substance in or on such article does not ordinarily render it injurious to health;

b. 1. If it bears or contains (by reason of administration of any substance to the live poultry or otherwise) any added poisonous or added deleterious substance (other than one which is a pesticide chemical in or on a raw agricultural commodity; a food additive; or a color additive) which may, in the judgment of the Commissioner, make such article unfit for human food;

2. If it is, in whole or in part, a raw agricultural commodity and such commodity bears or contains a pesticide chemical which is unsafe within the meaning of section 408 of the Federal Food, Drug, and Cosmetic Act;

3. If it bears or contains any food additive which is unsafe within the meaning of section 409 of the Federal Food, Drug, and Cosmetic Act;

4. If it bears or contains any color additive which is unsafe within the meaning of section 706 of the Federal Food, Drug, and Cosmetic Act: Provided, that an article which is not otherwise deemed adulterated under paragraphs 2, 3, or 4 shall nevertheless be deemed adulterated if use of the pesticide chemical, food additive, or color additive in or on such article is prohibited by regulations of the Board in official establishments;

c. If it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food;

d. If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health;

e. If it is, in whole or in part, the product of any poultry which has died otherwise than by slaughter;

f. If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health;

g. If it has been intentionally subjected to radiation, unless the use of the radiation was in conformity with a regulation or exemption in effect pursuant to section 409 of the Federal Food, Drug, and Cosmetic Act; or

h. If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or if any substance has been substituted, wholly or in part therefor; or if damage or inferiority has been concealed in any manner; or if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(2) "Animal food manufacturer" means any person engaged in the business of manufacturing or processing animal food derived wholly or in part from carcasses, or parts or products of the carcasses, of poultry.

(3) "Board" means the North Carolina Board of Agriculture.

(4) "Capable of use of human food" shall apply to any carcass, or part or product of a carcass, of any poultry, unless it is denatured or otherwise identified as required by regulations prescribed by the Board to deter its use as human food, or it is naturally inedible by humans.

(5) "Color additive" shall have the same meaning for purposes of this Article as under the Federal Food, Drug, and Cosmetic Act.
(6) "Commissioner" means the North Carolina Commissioner of Agriculture or his authorized representative.
(7) "Container" or "package" includes any box, can, tin, cloth, plastic, or other receptacle, wrapper, or cover.
(8) "Federal Food, Drug, and Cosmetic Act" means the act so entitled, approved June 25, 1938 (52 Stat. 1040), and acts amendatory thereof or supplementary thereto.
(9) "Federal Poultry Products Inspection Act" means the act so entitled, approved August 28, 1957 (71 Stat. 441), as amended by the Wholesome Poultry Products Act (82 Stat. 791).
(10) "Food additive" shall have the same meaning for purposes of this Article as under the Federal Food, Drug, and Cosmetic Act.
(11) "Immediate container" includes any consumer package; or any other container in which poultry products, not consumer packaged, are packed.
(12) "Inspection service" means the official government service within the Department of Agriculture and Consumer Services designated by the Commissioner as having the responsibility for carrying out the provisions of this Article.
(13) "Inspector" means an employee or official of the Department of Agriculture and Consumer Services authorized by the Commissioner to inspect poultry and poultry products under the authority of this Article, or any employee or official of the government of any county or other governmental subdivision of this State authorized by the Commissioner to inspect poultry and poultry products under authority of this Article, under an agreement entered into between the Department and such governmental subdivision.
(14) "Intrastate commerce" means commerce within this State.
(15) "Label" means a display of written, printed, or graphic matter upon any article or the immediate container (not including package liners) of any article.
(16) "Labeling" means all labels and other written, printed, or graphic matter
    a. Upon any article or any of its containers or wrappers, or
    b. Accompanying such article.
(17) "Misbranded" shall apply to any poultry product under one or more of the following circumstances:
    a. If its labeling is false or misleading in any particular;
    b. If it is offered for sale under the name of another food;
    c. If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated;
    d. If its container is so made, formed, or filled as to be misleading;
    e. Unless it bears a label showing
        1. The name and place of business of the manufacturer, packer, or distributor; and
        2. An accurate statement of the quantity of the product in terms of weight, measure, or numerical count;

    Provided, that under paragraph 2 of this subsubdivision e, reasonable variations may be permitted, and exemptions as to small packages or articles not in packages or other containers may be established, by regulations prescribed by the Board;
    f. If any word, statement, or other information required by or under authority of this Article to appear on the label or other labeling is

not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

g. If it purports to be or is represented as a food for which a definition and standard of identity or composition has been prescribed by regulations of the Board under G.S. 106-549.55 unless
   1. It conforms to such definition and standard, and
   2. Its label bears the name of the food specified in the definition and standard and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food;

h. If it purports to be or is represented as a food for which a standard or standards of fill of container have been prescribed by regulations of the Board under G.S. 106-549.55, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

i. If it is not subject to the provisions of subsubdivision g, unless its label bears
   1. The common or usual name of the food, if any there be, and
   2. In case it is fabricated from two or more ingredients, the common or usual name of each such ingredient; except that spices, flavorings, and colorings may, when authorized by the Commissioner be designated as spices, flavorings, and colorings without naming each: Provided, that, to the extent that compliance with the requirements of clause 2 of this subsubdivision i is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Board;

j. If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Board, after consultation with the Secretary of Agriculture of the United States, determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses;

k. If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: Provided, that, to the extent that compliance with the requirements of this subsubdivision k is impracticable, exemptions shall be established by regulations promulgated by the Board; or

l. If it fails to bear on its containers, and in the case of nonconsumer packaged carcasses (if the Commissioner so requires) directly thereon, as the Board may by regulations prescribe, the official inspection legend and official establishment number of the establishment where the article was processed, and, unrestricted by any of the foregoing, such other information as the Board may require in such regulations to assure that it will not have false or misleading labeling and that the public will be informed of the manner of handling required to maintain the article in a wholesome condition.

(18) "Official certificate" means any certificate prescribed by regulation of the Board for issuance by an inspector or other person performing official functions under this Article.

(19) "Official device" means any device prescribed or authorized by the Board for use in applying any official mark.

(20) "Official establishment" means any establishment as determined by the Commissioner at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Article.
(21) "Official inspection legend" means any symbol prescribed by regulation of the Board showing that an article was inspected for wholesomeness in accordance with this Article.
(22) "Official mark" means the official inspection legend or any other symbol prescribed by regulation of the Board to identify the status of any article or poultry under this Article.
(23) "Person" means any individual, partnership, corporation, association, or other business entity.
(24) "Pesticide chemical" shall have the same meaning for purposes of this Article as under the Federal Food, Drug, and Cosmetic Act.
(25) "Poultry" means any domesticated bird, whether live or dead.
(25a) "Poultry composting facility" means a structure or enclosure in which whole, unprocessed poultry carcasses are decomposed by a natural process into an organic, biologically safe by-product that can be used for plant food.
(26) "Poultry product" means any poultry carcass, or part thereof; or any product which is made wholly or in part from any poultry carcass or part thereof, excepting products which contain poultry ingredients only in a relatively small proportion or historically have not been considered by consumers as products of the poultry food industry, and which are exempted by the Board from definition as a poultry product under such conditions as the Board may prescribe to assure that the poultry ingredients in such products are not adulterated and that such products are not represented as poultry products.
(27) "Poultry products broker" means any person engaged in the business of buying or selling poultry products on commission, or otherwise negotiating purchases or sales of such articles other than for his own account or as an employee of another person.
(28) "Processed" means slaughtered, canned, salted, stuffed, rendered, boned, cut up, or otherwise manufactured or processed.
(29) "Raw agricultural commodity" shall have the same meaning for purposes of this Article as under the Federal Food, Drug, and Cosmetic Act.
(30) "Renderer" means any person engaged in the business of rendering carcasses, or parts or products of the carcasses, or poultry, except rendering conducted under inspection or exemption under this Article.
(31) "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container. (1971, c. 677, s. 4; 1995, c. 543, s. 3; 1997-261, s. 61.)

§ 106-549.51A. Article applicable to domesticated rabbits.

The provisions of this Article shall apply to domesticated rabbits. (1971, c. 677, s. 25.)

§ 106-549.52. State and federal cooperation.

(a) The Department of Agriculture and Consumer Services is hereby designated as the State agency which shall be responsible for cooperating with the Secretary of Agriculture of the United States under the provisions of section 5 of the Federal Poultry Products Inspection Act and such agency is directed to

cooperate with the Secretary of Agriculture of the United States in developing and administering the poultry products inspection program of this State under this Article and in developing and administering the program of this State under G.S. 106-549.58 in such a manner as will effectuate the purposes of this Article and said federal act.

(b) In such cooperative efforts, the Department is authorized to accept from said Secretary advisory assistance in planning and otherwise developing the State program, technical and laboratory assistance and training (including necessary curricular and instructional materials and equipment), and financial and other aid for administration of such a program.

(c) The Department is further authorized to recommend to the Secretary of Agriculture such officials or employees of this State as the Commissioner shall designate, for appointment to the advisory committees provided for in section 5 of the Federal Poultry Products Inspection Act; and the Commissioner shall serve as the representative of the Governor for consultation with said Secretary under subsection (c) of section 5 of said act. (1971, c. 677, s. 5; 1985 (Reg. Sess., 1986), c. 1014, s. 155(b); 1997-261, s. 62.)

§ 106-549.53. Inspection; condemnation of adulterated poultry.

(a) For the purpose of preventing the entry into or flow or movement in intrastate commerce of any poultry product which is capable of use as human food and is adulterated, the Commissioner shall, where and to the extent considered by him necessary, cause to be made by inspectors antemortem inspection of poultry in each official establishment engaged in processing poultry or poultry products solely for intrastate commerce.

(b) The Commissioner, whenever processing operations are being conducted, shall cause to be made by inspectors postmortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation and reinspection as he deems necessary of poultry and poultry products capable of use as human food in each official establishment engaged in processing such poultry or poultry products solely for intrastate commerce.

(c) All poultry carcasses and parts thereof and other poultry products found to be adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: Provided, that carcasses, parts, and products, which may by reprocessing be made not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Commissioner determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for food purposes under the supervision of an inspector. (1971, c. 677, s. 6.)

§ 106-549.54. Sanitation of premises; regulations.

(a) Each official establishment slaughtering poultry or processing poultry products solely for intrastate commerce shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Board for the purpose of preventing the entry into or flow or movement in intrastate commerce of poultry products which are adulterated.

(b) The Commissioner shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section. (1971, c. 677, s. 7.)

§ 106-549.55. Labeling standards; false and misleading labels.

(a) All poultry products inspected at any official establishment under the authority of this Article and found to be not adulterated, shall at the time they leave the establishment bear, in distinctly legible form, on their shipping containers and immediate containers as the Commissioner may require, the information required under subdivision (17) of G.S. 106-549.51. In addition, the Commissioner whenever he determines such action is practicable and necessary for the protection of the public, may require nonconsumer packaged carcasses at the time they leave the establishment to bear directly thereon in distinctly legible form any information required under such subdivision (17).

(b) The Board, whenever it determines such action is necessary for the protection of the public, may prescribe:

(1) The styles and sizes of type to be used with respect to material required to be incorporated in labeling to avoid false or misleading labeling in marking or otherwise labeling any articles or poultry subject to this Article;

(2) Definitions and standards of identity or composition for articles subject to this Article and standards of fill of container for such articles not inconsistent with any such standards established under the Federal Food, Drug and Cosmetic Act, or under the Federal Poultry Products Inspection Act, and there shall be consultation between the Commissioner or his authorized representative and the Secretary of Agriculture of the United States prior to the issuance of such standards to avoid inconsistency between such standards and the federal standards.

(c) No article subject to this Article shall be sold or offered for sale by any person in intrastate commerce, under any name or other marking or labeling which is false or misleading, or in any container of a misleading form or size, but established trade names and other marking and labeling and containers which are not false or misleading and which are approved by the Commissioner, are permitted.

(d) If the Commissioner has reason to believe that any marking or labeling or the size or form of any container in use or proposed for use with respect to any article subject to this Article is false or misleading in any particular, he may direct that such use be withheld unless the marking, labeling, or container is modified in such manner as he may prescribe so that it will not be false or misleading. A person who uses or proposes to use the marking, labeling, or container and who does not accept the determination of the Commissioner may commence a contested case under G.S. 150B-23. If directed by the Commissioner, the marking, labeling, or container may not be used pending a final decision. (1971, c. 677, s. 8; 1973, c. 1331, s. 3; 1987, c. 827, s. 36; 1989, c. 770, s. 26.)

§ 106-549.56. Prohibited acts.

(a) No person shall:

(1) Slaughter any poultry or process any poultry products which are capable of use as human food at any establishment processing any such articles solely for intrastate commerce, except in compliance with the requirements of this Article;

(2) Sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce,

a. Any poultry products which are capable of use as human food and are adulterated or misbranded at the time of such sale, transpor-

tation, offer for sale or transportation, or receipt for transportation; or

b. Any poultry products required to be inspected under this Article unless they have been so inspected and passed;

(3) Do, with respect to any poultry products which are capable of use as human food, any act while they are being transported in intrastate commerce or held for sale after such transportation, which is intended to cause or has the effect of causing such products to be adulterated or misbranded;

(4) Sell, transport, offer for sale or transportation, or receive for transportation, in intrastate commerce or from an official establishment, any slaughtered poultry from which the blood, feathers, feet, head, or viscera have not been removed in accordance with regulations promulgated by the Board, except as may be authorized by regulations of the Board;

(5) Use to his own advantage, or reveal other than to the authorized representatives of the State government or any other government in their official capacity, or as ordered by a court in any judicial proceedings, any information acquired under the authority of this Article concerning any matter which is entitled to protection as a trade secret.

(b) No brand manufacturer, printer, or other person shall cast, print, lithograph, or otherwise make any device containing any official mark or simulation thereof, or any label bearing any such mark or simulation, or any form of official certificate or simulation thereof, except as authorized by the Commissioner.

(c) No person shall:

(1) Forge any official device, mark or certificate;

(2) Without authorization from the Commissioner use any official device, mark, or certificate, or simulation thereof, or alter, detach, deface, or destroy any official device, mark, or certificate;

(3) Contrary to the regulations prescribed by the Board, fail to use, or to detach, deface, or destroy any official device, mark, or certificate;

(4) Knowingly possess, without promptly notifying the Commissioner, any official device or any counterfeit, simulated, forged, or improperly altered official certificate or any device or label or any carcass of any poultry, or part or product thereof, bearing any counterfeit, simulated, forged, or improperly altered official mark;

(5) Knowingly make any false statement in any shipper's certificate or other nonofficial or official certificate provided for in the regulations prescribed by the Board; or

(6) Knowingly represent that any article has been inspected and passed, or exempted, under this Article when, in fact, it has, respectively, not been so inspected and passed, or exempted. (1971, c. 677, s. 9.)

§ 106-549.57. No poultry in violation of Article processed.

No establishment processing poultry or poultry products solely for intrastate commerce shall process any poultry or poultry product capable of use as human food except in compliance with the requirements of this Article. (1971, c. 677, s. 10.)

§ 106-549.58. Poultry not for human consumption; records; registration.

(a) Inspection shall not be provided under this Article at any establishment for the slaughter of poultry or the processing of any carcasses or parts or

products of poultry, which are not intended for use as human food, but such articles shall, prior to their offer for sale or transportation in intrastate commerce, unless naturally inedible by humans, be denatured or otherwise identified as prescribed by regulations of the Board to deter their use for human food. No person shall buy, sell, transport, or offer for sale or transportation, or receive for transportation, in intrastate commerce, any poultry carcasses or parts or products thereof which are not intended for use as human food unless they are denatured or otherwise identified as required by the regulations of the Board or are naturally inedible by humans.

(b) The following classes of persons shall, for such period of time as the Board may by regulations prescribe, not to exceed two years unless otherwise directed by the Commissioner for good cause shown, keep such records as are properly necessary for the effective enforcement of this Article in order to insure against adulterated or misbranded poultry products for the American consumer; and all persons subject to such requirements shall, at all reasonable times, upon notice by a duly authorized representative of the Department of Agriculture and Consumer Services, afford such representative access to their places of business and opportunity to examine the facilities, inventory, and records thereof, to copy all such records, and to take reasonable samples of their inventory upon payment of the fair market value therefor:

(1) Any person that engages in the business of slaughtering any poultry or processing, freezing, packaging, or labeling any carcasses, or parts or products of carcasses, of any poultry, for intrastate commerce, for use as human food or animal food;

(2) Any person that engages in the business of buying or selling (as poultry products brokers; wholesalers or otherwise), or transporting, in intrastate commerce, or storing in or for intrastate commerce, any carcasses, or parts or products of carcasses, of any poultry;

(3) Any person that engages in business, in or for intrastate commerce, as a renderer, or engages in the business of buying, selling, or transporting, in intrastate commerce, any dead, dying, disabled, or diseased poultry or parts of the carcasses of any poultry that died otherwise than by slaughter.

(c) No person shall engage in business, in or for intrastate commerce, as a poultry products broker, renderer, or animal food manufacturer, or engage in business in intrastate commerce as a wholesaler of any carcasses, or parts or products of the carcasses, of any poultry, whether intended for human food or other purposes, or engage in business as a public warehouseman storing any such articles in or for intrastate commerce, or engage in the business of buying, selling, or transporting in intrastate commerce any dead, dying, disabled, or diseased poultry, or parts of the carcasses of any poultry that died otherwise than by slaughter, unless, when required by regulations of the Board, he has registered with the Commissioner his name, and the address of each place of business at which, and all trade names under which, he conducts such business.

(d) No person engaged in the business of buying, selling, or transporting in intrastate commerce, dead, dying, disabled, or diseased poultry, or any parts of the carcasses of any poultry that died otherwise than by slaughter, shall buy, sell, transport, offer for sale or transportation, or receive for transportation in intrastate commerce, any dead, dying, disabled, or diseased poultry or parts of the carcasses of any poultry that died otherwise than by slaughter, unless such transaction or transportation is made in accordance with such regulations as the Board may prescribe to assure that such poultry, or the unwholesome parts or products thereof, will be prevented from being used for human food. (1971, c. 677, s. 11; 1997-261, s. 109.)

§ 106-549.59. Punishment for violations; carriers exempt; interference with enforcement.

(a) Any person who violates the provisions of G.S. 106-549.56, 106-549.57, 106-549.58 or 106-549.61 is guilty of a Class 1 misdemeanor; but if such violation involves intent to defraud, or any distribution or attempted distribution of an article that is adulterated (except as defined in G.S. 106-549.51(1)h), such person is guilty of a Class H felony which may include a fine of not more than ten thousand dollars ($10,000). When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Article, other than the penalties for violation of G.S. 106-549.58, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which would cause a reasonable person to believe that such poultry or poultry products were not inspected or marked in accordance with the provisions of this Article or were otherwise not eligible for transportation under this Article or unless the carrier refuses to furnish on request of a representative of the Department of Agriculture and Consumer Services the name and address of the person from whom he received such poultry or poultry products, and copies of all documents, if any there be, pertaining to the delivery of the poultry or poultry products to such carrier.

(c) Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this Article is guilty of a Class 2 misdemeanor which may include a fine of not more than five thousand dollars ($5,000). Whoever, in the commission of any such acts, uses a deadly or dangerous weapon, is guilty of a Class A1 misdemeanor which may include a fine of not more than ten thousand dollars ($10,000). (1971, c. 677, s. 12; 1997-261, s. 109; 1999-408, s. 7.)

Effect of Amendments. — Session Laws 1999-408, s. 7, effective December 1, 1999, and applicable to acts committed on or after that date, in subsection (a), in the first sentence, substituted "is guilty of a Class 1 misdemeanor" for "shall be fined not more than one thousand dollars ($1,000) or imprisoned not more than one year, or both", substituted "is guilty of a Class H felony which may include a fine of" for "shall be fined", and deleted "or imprisoned not more than three years or both" following "($10,000)"; and in subsection (c), in the first sentence, substituted "is guilty of a Class 2 misdemeanor which may include a fine of" for "shall be fined", deleted "or imprisoned not more than three years, or both" following "($5,000)", and in the second sentence, substituted "is guilty of a Class A1 misdemeanor which may include a fine of" for "shall be fined", and deleted "or imprisoned not more than 10 years, or both" following "($10,000)."

§ 106-549.60. Notice of violation.

Before any violation of this Article is reported by the Commissioner to any North Carolina district attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Article shall be construed as requiring the Commissioner or his authorized representative to report for criminal prosecution of this Article whenever he believes that the public interest will be adequately served and compliance with

the Article obtained by a suitable written notice or warning. (1971, c. 677, s. 13; 1973, c. 47, s. 2.)

§ 106-549.61. Regulations authorized.

(a) The Commissioner may by regulations prescribe conditions under which poultry products capable of use as human food shall be stored or otherwise handled by any person engaged in the business of buying, selling, freezing, storing, or transporting, in or for intrastate commerce, such articles, whenever the Commissioner deems such action necessary to assure that such articles will not be adulterated or misbranded when delivered to the consumer. Violation of any such regulation is prohibited.

(b) The Board shall promulgate such other rules and regulations as are necessary to carry out the provisions of this Article.

(c) When opportunity is afforded for submission of comments by interested persons on proposed rules or regulations under this Article, it shall include opportunity for oral presentation of views. (1971, c. 677, s. 14.)

§ 106-549.62. Intrastate operations exemptions.

(a) The Board shall, by regulation and under such conditions, including requirements, as to sanitary standards, practices, and procedures as it may prescribe, exempt from specific provisions of this Article with respect to processing of poultry or poultry products solely for intrastate commerce and distribution of poultry or poultry products only in such commerce:

(1) Retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(2) For such period of time as the Commissioner determines that it would be impracticable to provide inspection and the exemption will aid in the effective administration of this Article, any person engaged in the processing of poultry or poultry products and the poultry or poultry products processed by such person: Provided, however, that no such exemption shall continue in effect more than 120 days after enactment of this Article;

(3) Persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Commissioner determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Article;

(4) The slaughtering by any person of poultry of his own raising, and the processing by him and transportation of the poultry products exclusively for use by him and members of his household and his nonpaying guests and employees;

(5) The custom slaughter by any person of poultry delivered by the owner thereof for such slaughter, and the processing by such slaughterer and transportation of the poultry products exclusively for use, in the household of such owner, by him and members of his household and his nonpaying guests and employees: Provided, that such custom slaughterer does not engage in the business of buying or selling any poultry products capable of use as human food;

(6) The slaughtering and processing of poultry products by any poultry producer on his own premises with respect to sound and healthy poultry raised on his premises and the distribution by any person of the poultry products derived from such operations, if, in lieu of other

labeling requirements, such poultry products are identified with the name and address of such poultry producer, and if they are not otherwise misbranded, and are sound, clean, and fit for human food when so distributed; and

(7) The slaughtering of sound and healthy poultry or the processing of poultry products of such poultry by any poultry producer or other person for distribution by him directly to household consumers, restaurants, hotels, and boardinghouses, for use in their own dining rooms, or in the preparation of meals for sales direct to consumers, if, in lieu of other labeling requirements, such poultry products are identified with the name and address of the processor, and if they are not otherwise misbranded and are sound, clean, and fit for human food when distributed by such processor.

(b) In addition to the specific exemptions authorized in subsection (a), the Board shall, when it determines that the protection of consumers from adulterated or misbranded poultry products will not be impaired by such action, provide by regulation, consistent with subsection (c) for the exemption of the operation and products of small enterprises (including poultry producers), not exempted under subsection (a), which are engaged in slaughtering and/or cutting up poultry for distribution as carcasses or parts thereof, solely for distribution within this State, from such provisions of this Article as it deems appropriate, while still protecting the public from adulterated or misbranded products, under such conditions, including sanitary requirements, as it shall prescribe to effectuate the purposes of this Article.

(c) The exemptions provided for in subdivisions (a)(6) and (7) above shall not apply if the poultry producer or other person engages in the current calendar year in the business of buying or selling any poultry or poultry products other than as specified in such subdivisions. No exemption under subdivisions (a)(6) or (7) or subsection (b) shall apply to any poultry producer or other person who slaughters or processes the products of more than 5,000 turkeys or an equivalent number of poultry of all species in the current calendar year (four birds of other species being deemed the equivalent of one turkey).

(d) The provisions of this Article requiring inspection shall not apply to operations of types traditionally and usually conducted at retail stores and restaurants, when conducted at any retail store or restaurant or similar retail-type establishment for sale in normal retail quantities or service of such articles to consumers at such establishments, if no poultry or poultry products are processed at the establishment for distribution outside this State or otherwise subject to inspection under the Federal Poultry Products Inspection Act.

(e) The provisions of this Article shall not apply to poultry producers with respect to poultry of their own raising on their own farms if (i) such producers slaughter not more than 250 turkeys, or not more than an equivalent number of birds of all species during the calendar year for which this exemption is being determined (four birds of other species being deemed the equivalent of one turkey); (ii) such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms; and (iii) such poultry moves only in intrastate commerce.

(f) The adulteration and misbranding provisions of this Article, other than the requirement of the inspection legend, shall apply to articles which are exempted from inspection under this section, except as otherwise specified under subsections (a), (b), or (e).

(g) The Commissioner may by order suspend or terminate any exemption under subsections (a) or (b) of this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Article. (1971, c. 677, s. 15.)

§ 106-549.63. Commissioner may limit entry of products to establishments.

The Commissioner may limit the entry of poultry products and other materials into any official establishment, under such conditions as he may prescribe to assure that allowing the entry of such articles into such inspected establishments will be consistent with the purposes of this Article. (1971, c. 677, s. 16.)

§ 106-549.64. Refusal of inspection services; hearing; appeal.

(a) The Commissioner may (for such period, or indefinitely, as he deems necessary to effectuate the purposes of this Article) refuse to provide, or withdraw, inspection service under this Article with respect to any establishment if he determines that such applicant or recipient is unfit to engage in any business requiring inspection upon this Article because the applicant or recipient or anyone responsibly connected with the applicant or recipient, has been convicted, in any federal or State court, within the previous 10 years of

(1) Any felony or more than one misdemeanor under any law based upon the acquiring, handling, or distributing of adulterated, mislabeled, or deceptively packaged food or fraud in connection with transactions in food; or

(2) Any felony, involving fraud, bribery, extortion, or any other act or circumstances indicating a lack of the integrity needed for the conduct of operations affecting the public health. For the purpose of this subsection a person shall be deemed to be responsibly connected with the business if he was a partner, officer, director, holder, or owner of ten per centum (10%) or more of its voting stock or employee in a managerial or executive capacity.

(b) Proceedings concerning the refusal or withdrawal of inspection services shall be conducted in accordance with Chapter 150B of the General Statutes. A refusal or withdrawal of inspection services by the Commissioner shall continue in effect pending a final decision in a contested case unless the Commissioner orders otherwise.

(c) Repealed by Session Laws 1987, c. 827, s. 37. (1971, c. 677, s. 17; 1973, c. 1331, s. 3; 1987, c. 827, s. 37.)

§ 106-549.65. Product detained if in violation.

Whenever any poultry product, or any product exempted from the definition of a poultry product, or any dead, dying, disabled, or diseased poultry is found by any inspector of the Meat and Poultry Inspection Service of the Department of Agriculture and Consumer Services upon any premises where it is held for purposes of, or during or after distribution in intrastate commerce, and there is reason to believe that any such article is adulterated or misbranded and is capable of use as human food, or that it has not been inspected, in violation of the provisions of this Article or of any other State or federal law or that it has been or is intended to be, distributed in violation of any such provisions, it may be detained by such representative for a period not to exceed 20 days, pending action under G.S. 106-549.66 or notification of any federal, State, or other governmental authorities having jurisdiction over such article or poultry, and shall not be moved by any person, from the place at which it is located when so detained, until released by such representative. All official marks may be required by such representative to be removed from such article or poultry before it is released unless it appears to the satisfaction of the area supervisor

of the Department of Agriculture and Consumer Services Poultry Inspection Service that the article or poultry is eligible to retain such marks. (1971, c. 677, s. 18; 1997-261, s. 109.)

§ 106-549.66. Seizure or condemnation proceedings.

(a) Any poultry product, or any dead, dying, or disabled, or diseased poultry, that is being transported in intrastate commerce, subject to this Article, or is held for sale in this State after such transportation, and that

(1) Is or has been processed, sold, transported, or otherwise distributed or offered or received for distribution in violation of this Article, or

(2) Is capable of use as human food and is adulterated or misbranded, or

(3) In any other way is in violation of this Article, shall be liable to be proceeded against and seized and condemned, at any time, on an affidavit filed in any superior court within the jurisdiction of which the article or poultry is found. If the article or poultry is condemned it shall, after entry of the judgment, be disposed of by destruction or sale as the court may direct and the proceeds, if sold, less the court costs and fees, and storage and other proper expenses, shall be paid into the general fund of this State, but the article or poultry shall not be sold contrary to the provisions of this Article, or the Federal Poultry Products Inspection Act or the Federal Food, Drug, and Cosmetic Act: Provided, that upon the execution and delivery of a good and sufficient bond conditioned that the article or poultry shall not be sold or otherwise disposed of contrary to the provisions of this Article or the laws of the United States, the court may direct that such article or poultry be delivered to the owner thereof subject to such supervision by authorized representatives of the Commissioner as is necessary to insure compliance with the applicable laws. When an order of condemnation is entered against the article or poultry and it is released under bond, or destroyed, court costs and fees, and storage and other proper expenses shall be awarded against the person, if any, intervening as claimant of the article or poultry. The proceedings in such cases shall conform, as nearly as may be, to civil actions and either party may demand trial by jury of any issue of fact joined in any case, and all such proceedings shall be at the suit of and in the name of the State.

(b) The provisions of this section shall in no way derogate from authority for condemnation or seizure conferred by other provisions of this Article, or other laws. (1971, c. 677, s. 19.)

§ 106-549.67. Superior court jurisdiction; proceedings in name of State.

The superior court is vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this Article, and shall have jurisdiction in all other kinds of cases arising under this Article. All proceedings for the enforcement or to restrain violations of this Article shall be by and in the name of this State. (1971, c. 677, s. 20.)

§ 106-549.68. Powers of Commissioner; subpoenas; mandamus; self-incrimination; penalties.

(a) The Commissioner shall also have power:

(1) To gather and compile information concerning and, to investigate from time to time the organization, business, conduct, practices, and

management of any person engaged in intrastate commerce, and the relation thereof to other persons;

(2) To require, by general or special orders, persons engaged in intrastate commerce, or any class of them, or any of them to file with the Commissioner, in such form as the Commissioner may prescribe, annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commissioner such information as he may require as to the organization, business, conduct, practices, management, and relation to other persons of the person filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commissioner may prescribe, and shall be filed with the Commissioner within such reasonable period as the Commissioner may prescribe, unless additional time be granted in any case by the Commissioner.

(b)(1) For the purposes of this Article the Commissioner shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any documentary evidence of any person being investigated or proceeded against, and may require by subpoena the attendance and testimony of witnesses and the production of all documentary evidence of any person relating to any matter under investigation. The Commissioner may sign subpoenas and may administer oaths and affirmations, examine witnesses, and receive evidence.

(2) Such attendance of witnesses, and the production of such documentary evidence, may be required at any designated place of hearing. In case of disobedience to a subpoena the Commissioner may invoke the aid of any court designated in G.S. 106-549.67 in requiring the attendance and testimony of witnesses and the production of documentary evidence.

(3) Any of the courts designated in G.S. 106-549.67 within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, issue an order requiring such person to appear before the Commissioner or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) Upon the application of the Attorney General of this State at the request of the Commissioner, the superior court shall have jurisdiction to issue writs or [of] mandamus commanding any person to comply with the provisions of this Article or any order of the Commissioner made in pursuance thereof.

(5) The Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending under this Article at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commissioner and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commissioner as hereinbefore provided.

(6) Witnesses summoned before the Commissioner shall be paid the same fees and mileage that are paid witnesses in the courts of this State, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in such courts.

(7) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, or other documentary evidence before the Commissioner or in obedience to the subpoena of the Commissioner whether such subpoena be signed or issued by him or his delegate, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Article, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him or it may tend to incriminate him or it or subject him or it to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(c)(1) Any person that shall neglect or refuse to attend and testify or to answer any lawful inquiry, or to produce documentary evidence, if in his or its power to do so, in obedience to the subpoena or lawful requirement of the Commissioner shall be guilty of a Class 1 misdemeanor.

(2) Any person that shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Article, or that shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any person subject to this Article or that shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda, of all facts and transactions appertaining to the business of any person subject to this Article or that shall willfully remove out of the jurisdiction of this State, or willfully mutilate, alter, or by any other means falsify any documentary evidence of any such person, or that shall willfully refuse to submit to the Commissioner or to any of his authorized agents, for the purpose of inspection and taking copies, any documentary evidence of any person subject to this Article in his or its possession or within his or its control, shall be deemed guilty of a Class 1 misdemeanor.

(3) If any person required by this Article to file any annual or special report shall fail so to do within the time fixed by the Commissioner for filing the same, and such failure shall continue for 30 days after notice of such default, such person shall forfeit to this State the sum of one hundred dollars ($100.00) for each and every day of the continuance of such failure, which forfeiture shall be payable into the general fund of this State, and shall be recoverable in a civil suit in the name of the State brought in the superior court where the person has his or its principal office or in any county in which he or it shall do business. It shall be the duty of the Attorney General of this State, to prosecute for the recovery of such forfeitures. The costs and expenses of such prosecution shall be paid out of the amount recovered in such action.

(4) Any officer or employee of this State who shall make public any information obtained by the Commissioner without his authority, unless directed by a court, shall be deemed guilty of a Class 1 misdemeanor. (1971, c. 677, s. 21; 1993, c. 539, ss. 803-805; 1994, Ex. Sess., c. 14, s. 55; c. 24, s. 14(c).)

§ 106-549.68A. Article applicable to those regulated by federal act.

The requirements of this Article shall apply to persons, establishments, poultry, poultry products and other articles regulated under the Federal Poultry Products Inspection Act only to the extent provided for in section 23 of said federal act. (1971, c. 677, s. 22.)

§ 106-549.69. Inspection costs.

The cost of inspection rendered under the requirements of this Article, shall be borne by this State, except as provided in G.S. 106-549.52 and except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Article, at such rates as the Commissioner may determine shall be borne by such establishments. Sums received by the Department of Agriculture and Consumer Services in reimbursement for sums paid out for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section. (1971, c. 677, s. 23; 1997-261, s. 109.)

ARTICLE 49E.

Disposal of Dead Diseased Poultry at Commercial Farms.

§ 106-549.70. Disposal pit, incinerator, or poultry composting facility required.

Every person, firm or corporation engaged in raising or producing poultry for commercial purposes shall provide and maintain a disposal pit, incinerator, or poultry composting facility of a size and design, approved by the Department of Agriculture and Consumer Services, in which all dead poultry carcasses are disposed. This section does not apply to poultry producers with flocks of 200 or less. The definitions provided in Article 49D of this Chapter apply in this Article. (1961, c. 1197, s. 1; 1995, c. 543, s. 2; 1997-261, s. 109.)

§ 106-549.71. Penalty for violation.

Any person, firm or corporation violating the provisions of this Article is guilty of a Class 1 misdemeanor. (1961, c. 1197, s. 2; 1999-408, s. 8.)

Effect of Amendments. — Session Laws 1999-408, s. 8, effective December 1, 1999, and applicable to acts committed on or after that date, substituted "is guilty of a Class 1 misdemeanor" for "shall, upon conviction, be fined or imprisoned in the discretion of the court."

§ 106-549.72. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 13; 1998-215, s. 18.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

§§ 106-549.73 through 106-549.80: Reserved for future codification purposes.

ARTICLE 49F.

Biological Residues in Animals.

§ 106-549.81. Definitions.

For the purpose of this Article, the following terms shall have the meanings ascribed to them in this section:

(1) "Animal" means any member of the animal kingdom except man.
(2) "Animal feed" means any meat, grain, forage, or other food of any plant, animal or mineral origin, or any combination thereof, which is normally fed to any animal.
(3) "Animal produce" means any product derived from any animal, whether suitable or not for human consumption.
(4) "Biological residue" means any substance, including metabolites, remaining in or on any animal prior to or at the time of slaughter or in any of its tissues after slaughter, or in or on any animal product or animal feed, as the result of treatment with, or exposure, of the animal, animal product, or animal feed to any pesticide, hormone, hormone-like substance, growth promoter, antibiotic, anthelmintic, tranquilizer, or other therapeutic or prophylactic agent.
(5) "Board" means the North Carolina Board of Agriculture.
(6) "Commissioner" means the North Carolina Commissioner of Agriculture or his authorized delegate.
(7) "Person" means any individual, partnership, corporation, association, cooperative or other legal entity.
(8) "State" means the State of North Carolina. (1971, c. 1183, s. 1.)

§ 106-549.82. Detention or quarantine; lifting quarantine; burden of proof.

Any animal, animal product, or animal feed which the Commissioner has reasonable cause to believe contains or bears any biological residue may be immediately detained or quarantined by written order of the Commissioner until it can be determined in a manner acceptable to the Commissioner that the animal, animal feed, or animal product does not contain or bear a biological residue, or that the biological residue therein is within tolerances which are established by, or approved by, the Board, and the detention or quarantine is removed; or the animal, animal product or animal feed is destroyed or otherwise disposed of in a manner acceptable to the Commissioner; or in the case of a live animal, it has been treated in a manner acceptable to the Commissioner to reduce the level of any biological residue to a level acceptable to the Commissioner. The burden of proof under this section shall be on the owner or custodian of such animal, animal feed or animal product. (1971, c. 1183, s. 2.)

§ 106-549.83. Appellate review; order pending appeal; bond.

Any order or [of] quarantine or detention made by the Commissioner may be appealed by the aggrieved party to the superior court of the county wherein

such animal, animal product or animal feed is quarantined or detained. The superior court judge, on at least 24 hours' notice, may hear said appeal in or out of term, in court or in chambers and may affirm, reverse or modify the order of quarantine or detention imposing such conditions as he may deem just and proper. Any party may appeal from the superior court to the Court of Appeals. Pending an appeal from the Commissioner or the superior court, any regular or special superior court judge residing in or holding court in the district may enter such orders as he deems necessary for the preservation or disposition of the animal, animal product or feed, and may require the posting of a bond for the faithful performance of such order. (1971, c. 1183, s. 3.)

§ 106-549.84. Movement of contaminated animals forbidden.

(a) No person shall ship, transport, or otherwise move, or deliver, or receive for movement, any animal, animal product, or animal feed under detention or quarantine pursuant to G.S. 106-549.82, except under written permit of the Commissioner and in accordance with the conditions stated in such written permission, or until the detention or quarantine order has been revoked by written order of the Commissioner.

(b) No person shall ship, transport, or otherwise move, or deliver or receive for movement any animal, animal product, or animal feed which he knows, or by the exercise of reasonable care would know, contains or bears a biological residue which exceeds the tolerances established or approved by the Board. (1971, c. 1183, s. 4.)

§ 106-549.85. Inspection of animals, records, etc.

The Commissioner may enter any place within the State at all reasonable times where any animal, animal product or animal feed is kept to examine the facilities, inventory and/or copy the records thereof, and to take reasonable samples of any such animal, animal product or animal feed after giving notice in writing to the owner or custodian of the premises to be entered. If such person shall refuse to consent to such entry, the Commissioner may apply to any district court judge and such judge may order, without notice, that the owner or custodian of any place where any animal, animal product or animal feed is kept to permit the Commissioner to enter such place for the purposes herein stated and failure by any person to obey such order may be punished as for contempt. (1971, c. 1183, s. 5.)

§ 106-549.86. Investigation to discover violation.

The Commissioner shall make such investigations or inspections as he deems necessary to determine whether any person has violated, or is violating, any provision of this Article or any regulation promulgated thereunder, and when any biological residue is found in or on any animal, animal product, or animal feed, the Commissioner may make such investigation or inspection as he deems necessary to determine the source of the substance which resulted in the biological residue. (1971, c. 1183, s. 6.)

§ 106-549.87. Promulgation of regulation.

The North Carolina Board of Agriculture is hereby authorized to promulgate regulations as it may deem necessary to effectuate the purposes of this Article, including but not limited to, tolerances for biological residues. It shall be unlawful for any person to violate any provision of this Article or any

regulation promulgated by the Board under authority of this Article. (1971, c. 1183, s. 7.)

§ 106-549.88. Penalties.

Any person who violates any provisions of this Article or any regulations thereunder is guilty of a Class 2 misdemeanor. (1971, c. 1183, s. 8; 1999-408, s. 9.)

Effect of Amendments. — Session Laws 1999-408, s. 9, effective December 1, 1999, and applicable to acts committed on or after that date, substituted "is guilty of a Class 2 misdemeanor" for "shall, upon conviction thereof, be subject to a fine of not more than five hundred dollars ($500.00) or imprisonment not to exceed six months, or both fine and imprisonment."

§ 106-549.89. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 14; 1998-215, s. 19.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

§§ 106-549.90 through 106-549.93: Reserved for future codification purposes.

Article 49G.

Production and Sale of Pen-Raised Quail.

§ 106-549.94. Regulation of pen-raised quail by Department of Agriculture and Consumer Services; certain authority of North Carolina Wildlife Resources Commission not affected.

(a) The Department of Agriculture and Consumer Services is given exclusive authority to regulate the production and sale of pen-raised quail for food purposes. The Board of Agriculture shall promulgate rules and regulations for the production and sale of pen-raised quail for food purposes in such a manner as to provide for close supervision of any person, firm, or corporation producing and selling pen-raised quail for food purposes.

(b) The North Carolina Wildlife Resources Commission shall retain its authority to regulate the possession and transportation of live pen-raised quail. (1971, c. 515, ss. 1-4; c. 1114; 1973, c. 1262, s. 18; 1977, c. 905, ss. 1, 2; 1979, c. 830, s. 15; 1997-261, ss. 63, 109.)

§§ **106-549.95, 106-549.96:** Reserved for future codification purposes.

Article 49H.

Production and Sale of Fallow Deer and Red Deer.

§ 106-549.97. Regulation of fallow deer and red deer by Department of Agriculture and Consumer Services; certain authority of North Carolina Wildlife Resources Commission not affected; definitions.

(a) The Department of Agriculture and Consumer Services shall regulate the production and sale of fallow deer and red deer for food purposes. The Board of Agriculture shall adopt rules for the production and sale of fallow deer and red deer for food purposes in such a manner as to provide for close supervision of any person, firm, or corporation producing and selling fallow deer or red deer, or both, for food purposes.

(b) The North Carolina Wildlife Resources Commission shall regulate the possession and transportation of live fallow deer and live red deer and may adopt rules to prevent the release or escape of fallow deer or red deer, or both, upon finding that it is necessary to protect live fallow deer or live red deer, or both, or to prevent damage to the native deer population or its habitat.

(c) The following definitions apply in this Article:

(1) Fallow deer. — A member of the Dama dama species.

(2) Red deer. — A member of the Cervus elephus species. (1991, c. 317, s. 1; 1997-142, s. 1; 1997-261, s. 109.)

§ 106-549.98. Inspection fees.

The Commissioner may establish a fee at an hourly rate to be paid by the owner, proprietor, or operator of each slaughtering, meat-canning, salting, packing, rendering, or similar establishment for the purpose of defraying the expenses incurred in the inspection of fallow deer as required by Article 49B of Chapter 106 of the General Statutes. The Commissioner may establish a fee at an hourly rate to be paid by the owner, proprietor, or operator of each slaughtering, meat-canning, salting, packing, rendering, or similar establishment for the purpose of defraying the expenses incurred in the inspection of red deer as required by Article 49B of Chapter 106 of the General Statutes. (1991, c. 317, s. 1; 1997-142, s. 1.)

Article 50.

Promotion of Use and Sale of Agricultural Products.

§ 106-550. Policy as to promotion of use of, and markets for, farm products.

It is declared to be in the interest of the public welfare that the North Carolina farmers who are producers of livestock, poultry, field crops and other agricultural products, including cattle, sheep, broilers, turkeys, commercial eggs, peanuts, cotton, potatoes, sweet potatoes, peaches, apples, berries, vegetables and other fruits of all kinds, as well as bulbs and flowers and other agricultural products having a domestic or foreign market, shall be permitted

and encouraged to act jointly and in cooperation with growers, handlers, dealers and processors of such products in promoting and stimulating, by advertising and other methods, the increased production, use and sale, domestic and foreign, of any and all of such agricultural commodities. The provisions of this Article, however, shall not include the agricultural products of tobacco, strawberries, strawberry plants, porcine animals, or equines, with respect to which separate provisions have been made. (1947, c. 1018, s. 1; 1951, c. 1172, s. 1; 1957, cc. 260, 1352; 1989 (Reg. Sess., 1990), c. 1027, s. 1.1; 1991, c. 605, s. 2; 1995, c. 521, s. 1; 1998-154, s. 2.)

Cross References. — As to the egg promotion tax, see § 106-245.30 et seq. For provision that after October 1, 1987, no egg assessment shall be collected under Article 50 of Chapter 106, see § 106-245.39.

Effect of Amendments. — The 1998 amendment, effective September 24, 1998, substituted "plants, porcine animals, or equines," for "plants, or porcine animals," in the last sentence.

Legal Periodicals. — For comment on article, suggesting its invalidity as an unlawful delegation of governmental power, see 25 N.C.L. Rev. 396 (1947).

For note questioning the validity of this article as being an unconstitutional delegation of legislative power, see 8 N.C. Cent. L.J. 300 (1977).

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Quoted in Sedman v. Rijdes, 127 N.C. App. 700, 492 S.E.2d 620 (1997).

§ 106-551. Federal Agricultural Marketing Act.

The passage by the Seventy-Ninth Congress of a law designated as Public Law 733, and more particularly Title II of that act, cited as "Agricultural Marketing Act of 1946," makes it all the more important for producers, handlers, processors and others of specific agricultural commodities to associate themselves in action programs, separately and with public and private agencies, to obtain the greatest and most immediate benefits under the provisions of such law, in respect to research, studies and problems of marketing, transportation and distribution. (1947, c. 1018, s. 2.)

§ 106-552. Associations, activity, etc., deemed not in restraint of trade.

No association, meeting or activity undertaken in pursuance of the provisions of this Article and intended to benefit all of the producers, handlers and processors of a particular commodity shall be deemed or considered illegal or in restraint of trade. (1947, c. 1018, s. 3.)

§ 106-553. Policy as to referenda, assessments, etc., for promoting use and sale of farm products.

It is hereby further declared to be in the public interest and highly advantageous to the agricultural economy of the State that farmers, producers and growers commercially producing the commodities herein referred to shall be permitted by referendum to be held among the respective groups and subject to the provisions of this Article, to levy upon themselves an assessment on such respective commodities or upon the acreage used in the production of the same and provide for the collection of the same, for the purpose of financing or contributing towards the financing of a program of advertising and other

methods designed to increase the consumption of and the domestic as well as foreign markets for such agricultural products. Such assessments may also be used for the purpose of financing or contributing toward the financing of a program of production, use and sale of any and all such agricultural commodities. (1947, c. 1018, s. 4; 1951, c. 1172, s. 2.)

§ 106-554. Application to Board of Agriculture for authorization of referendum.

Any existing commission, council, board or other agency fairly representative of the growers and producers of any agricultural commodity herein referred to, and any such commission, council, board or other agency hereafter created for and fairly representative of the growers or producers of any such agricultural commodity herein referred to, may at any time after the passage and ratification of this Article make application to the Board of Agriculture of the State of North Carolina for certification and approval for the purpose of conducting a referendum among the growers or producers of such particular agricultural commodity, for commercial purposes, upon the question of levying an assessment under the provisions of this Article, collecting and utilizing the same for the purposes stated in such referendum. (1947, c. 1018, s. 5.)

§ 106-555. Action by Board on application.

Upon the filing with the Board of Agriculture of such application on the part of any commission, council, board or other agency, the said Board of Agriculture shall within 30 days thereafter meet and consider such application; and if upon such consideration the said Board of Agriculture shall find that the commission, council, board or other agency making such application is fairly representative of and has been duly chosen and delegated as representative of the growers producing such commodity, and shall otherwise find and determine that such application is in conformity with the provisions of this Article and the purposes herein stated, then and in such an event it shall be the duty of the Board of Agriculture to certify such commission, council, board or other agency as the duly delegated and authorized group or agency representative of the commercial growers and producers of such agricultural commodity, and shall likewise certify that such agency is duly authorized to conduct among the growers and producers of such commodity a referendum for the purposes herein stated. (1947, c. 1018, s. 6.)

§ 106-555.1. Official State board for federal assessment programs; no subsequent referenda required.

For the purpose of any federal commodity assessment program, the producers' agency certified by the Board of Agriculture pursuant to G.S. 106-555 shall be deemed to be the official State board for such commodity. No subsequent referenda shall be required under this Article in order for such producers' agency to maintain its status as the official State board for the purposes of such federal commodity assessment program. (1991, c. 99, s. 1.)

§ 106-556. Conduct of referendum among growers and producers on question of assessments.

Upon being so certified by the said Board of Agriculture in the manner hereinbefore set forth, such commission, council, board or other agency shall thereupon be fully authorized and empowered to hold and conduct on the part of the producers and growers of such particular agricultural commodity a

referendum on the question of whether or not such growers and producers shall levy upon themselves an assessment under and subject to and for the purposes stated in this Article. Such referendum may be conducted either on a statewide or area basis. (1947, c. 1018, s. 7.)

§ 106-557. Notice of referendum; statement of amount, basis and purpose of assessment; maximum assessment.

With respect to any referendum conducted under the provisions of this Article, the duly certified commission, council, board or other agency shall, before calling and announcing such referendum, fix, determine and publicly announce at least 30 days before the date determined upon for such referendum, the date, hours and polling places for voting in such referendum, the amount and basis of the assessment proposed to be collected, the means by which such assessment shall be collected if authorized by the growers, and the general purposes to which said amount so collected shall be applied; no annual assessment levied under the provisions of this Article shall exceed one half of one percent (½ of 1%) of the value of the year's production of such agricultural commodity grown by any farmer, producer or grower included in the group to which such referendum is submitted. Provided, that the assessment for the research and promotion programs of the American Dairy Association of North Carolina may be fixed on the volume of milk sold not to exceed one percent (1%) of the statewide blend price paid to all North Carolina producers during the previous calendar year for three and one-half percent (3.5%) milk as computed by the North Carolina Milk Commission. Provided further, that the assessment authorized by this Article and collected by the Commissioner of Agriculture to be paid to the North Carolina Yam Commission, Inc., or other duly certified agencies entitled thereto for research, marketing and promotional programs related to yams or sweet potatoes may be levied at a rate not to exceed two percent (2%) of the value of the year's production of that agricultural commodity grown by any farmer, producer or grower included in the group to which the referendum is submitted, and when authorized by two-thirds or more of the farmers, producers or growers in the area in which the referendum is conducted, the rate of the assessment may remain in effect for the length of time provided in the referendum. Provided further, that the assessment authorized by this Article on peanuts may not exceed two percent (2%) of the price paid to the producer. (1947, c. 1018, s. 8; 1967, c. 774, s. 1; c. 1268; 1981, c. 216, s. 1; 1983, c. 246, s. 1; 1997-371, s. 1.)

§ 106-557.1. Ballot by mail.

(a) As an alternative method of conducting a referendum under the provisions of this Article, the certified agency in its discretion may conduct the referendum by a mail ballot as herein provided. In the event that a certified agency determines in its discretion to conduct a mail ballot, public notice of said mail ballot shall be made at least 30 days before the date of said referendum. Said notice shall contain the same information required by G.S. 106-557, except that the notice will also state that the ballot is to be conducted by mail rather than at polling places. The notice shall also state that official ballots are being mailed on a date specified in the notice to all persons known by the certified agency to be eligible to vote and that any person not receiving by mail an official ballot by a date specified in the notice will have 10 days thereafter to apply for an official ballot at the office of the certified agency. The notice shall state the deadline for the receipt of all ballots and the address of the certified agency.

Official ballots shall be prepared by the certified agency and mailed by first-class mail to the last known address of all persons known by the certified agency to be eligible to vote. As announced in the public notice, said ballots shall be made available for a period of not less than 10 days, to those who are eligible to vote in said referendum and did not receive a ballot by mail.

Before any person shall receive an official ballot, he shall furnish such proof as the certified agency may require of his eligibility to vote in said referendum. The certified agency shall keep a list of those persons who receive official ballots. No person may receive more than one official ballot unless he satisfies the certified agency that his ballot has been lost or destroyed.

No votes shall be counted which are not on official ballots. To be eligible to be counted, ballots must be received by the certified agency at the place and by the deadline previously announced in the public notice of said referendum.

(b) The provisions of this section shall not apply to the North Carolina Potato Association and the North Carolina Soybean Association. (1969, c. 111.)

§ 106-558. Management of referendum; expenses.

The arrangements for and management of any referendum conducted under the provisions of this Article shall be under the direction of the commission, council, board or other agency duly certified and authorized to conduct the same, and any and all expenses in connection therewith shall be borne by such commission, council, board or agency. (1947, c. 1018, s. 9.)

§ 106-559. Basis of referendum; eligibility for participation; question submitted; special provisions for North Carolina Cotton Promotion Association.

Any referendum conducted under the provisions of this Article may be held either on an area or statewide basis, as may be determined by the certified agency before such referendum is called; and such referendum, either on an area or statewide basis, may be participated in by all farmers engaged in the production of such agricultural commodity on a commercial basis, including owners of farms on which such commodity is produced, tenants and sharecroppers. In such referendum, such individuals so eligible for participation shall vote upon the question of whether or not there shall be levied an annual assessment for a period of three years in the amount set forth in the call for such referendum on the agricultural product covered by such referendum. Provided, that notwithstanding any other provision of this Chapter, the North Carolina Cotton Promotion Association, Inc., in 1967 shall hold a referendum, pursuant to law, for the years 1969 and 1970, or for the years 1969 through 1973, in its discretion. Thereafter, the North Carolina Cotton Promotion Association, Inc. shall conduct either triennial or sexennial referendums as provided by law. (1947, c. 1018, s. 10; 1967, cc. 213, 561.)

§ 106-559.1. Basis of vote on milk product assessment.

Notwithstanding any other provision of this Article, any milk product assessment referendum shall be conducted on the basis of one vote per base holder. (1981, c. 216, s. 2.)

§ 106-560. Effect of more than one-third vote against assessment.

If in such referendum with respect to any agricultural commodity herein referred to more than one third of the farmers and producers in the area in

which such referendum is conducted, eligible to participate and voting therein shall vote in the negative and against the levying or collection of such assessment, then in such an event no assessment shall be levied or collected. (1947, c. 1018, s. 11.)

§ 106-561. Effect of two-thirds vote for assessment.

If in such referendum called under the provisions of this Article two thirds or more of the farmers or producers in the area in which such referendum is conducted, eligible to participate and voting therein shall vote in the affirmative and in favor of the levying and collection of such assessment proposed in such referendum on the agricultural commodity covered thereby, then such assessment shall be collected in the manner determined and announced by the agency conducting such referendum. (1947, c. 1018, s. 12.)

§ 106-562. Regulations as to referendum; notice to farm organizations and county agents.

The hours, voting places, rules and regulations and the area within which such referendum herein authorized with respect to any of the agricultural commodities herein referred to shall be established and determined by the agency of the commercial growers and producers of such agricultural commodity duly certified by the Board of Agriculture as hereinbefore provided; the said referendum date, area, hours, voting places, rules and regulations with respect to the holding of such referendum shall be published by such agency conducting the same through the medium of the public press in the State of North Carolina at least 30 days before the holding of such referendum, and direct written notice thereof shall likewise be given to all farm organizations within the State of North Carolina and to each county agent in any county in which such agricultural product is grown. Such notice shall likewise contain a statement of the amount of annual assessment proposed to be levied — which assessment in any event shall not exceed one half of one percent (½ of 1%) of the value of the year's production of such agricultural commodity or such other assessment as shall be authorized by law, grown by any farmer, producer or grower included in the group to which such referendum is submitted — and shall likewise state the method by which such assessment shall be collected and how the proceeds thereof shall be administered and the purposes to which the same shall be applied, which purposes shall be in keeping with the provisions of this Article. (1947, c. 1018, s. 13; 1967, c. 774, s. 2; 1983, c. 246, s. 2.)

§ 106-563. Distribution of ballots; arrangements for holding referendum; declaration of results.

The duly certified agency of the producers of any agricultural product among whom a referendum shall be conducted under the provisions of this Article shall likewise prepare and distribute in advance of such referendum all necessary ballots for the purposes thereof, and shall, under rules and regulations promulgated by said agency, arrange for the necessary poll holders for conducting the said referendum; and following such referendum and within 10 days thereafter the said agency shall canvass and publicly declare the result of such referendum. (1947, c. 1018, s. 14.)

§ 106-563.1. Supervision of referendum on milk product assessment.

Notwithstanding any other provision of this Article, any milk product assessment referendum shall be conducted under the supervision of the

County Extension Chairman in each county in which the referendum is held. (1981, c. 216, s. 3.)

§ 106-564. Collection of assessments; custody and use of funds.

In the event two thirds or more of the farmers eligible for participation in such referendum and voting therein shall vote in favor of such assessment, then the said assessment shall be collected annually or at regular intervals during the year established by the rules and regulations of the duly certified commission, council, board or other agency for the number of years set forth in the call for such referendum, and the collection of such assessment shall be under such method, rules and regulations as may be determined by the agency conducting the same; and the said assessment so collected shall be paid into the treasury of the agency conducting such referendum, to be used together with other funds from other sources, including donations from individuals, concerns or corporations, and grants from State or governmental agencies, for the purpose of promoting and stimulating, by advertising and other methods, the increased use and sale, domestic and foreign, of the agricultural commodity covered by such referendum. Such assessments may also be used for the purpose of financing or contributing toward the financing of a program of production, use and sale of any and all such agricultural commodities. (1947, c. 1018, s. 15; 1951, c. 1172, s. 3; 1965, c. 1046, s. 1; 1975, c. 708, s. 1.)

§ 106-564.1. Alternate method for collection of assessments.

As an alternate method for the collection of assessments provided for in G.S. 106-564, and upon the request of the duly certified agency of the producers of any agricultural products referred to in G.S. 106-550, the Commissioner of Agriculture shall notify, by registered letter, all persons, firms and corporations engaged in the business of purchasing any such agricultural products in this State, that on and after the date specified in the letter the assessments shall be deducted by the purchaser, or his agent or representative, from the purchase price of any such agricultural products. The assessment so deducted, shall, on or before the first day of June of each year following such deduction or at regular intervals during the year following such deductions, be remitted by such purchaser to the Commissioner of Agriculture of North Carolina who shall thereupon pay the amount of the assessments to the duly certified agency of the producers entitled thereto. The books and records of all such purchasers of agricultural products shall at all times during regular business hours be open for inspection by the Commissioner of Agriculture or his duly authorized agents.

For the purposes of this Article the Commissioner may designate the duly certified agency of the producers as his agent to conduct inspections or audits of the books of the purchaser of such agricultural products. If it is discovered, as the result of such inspection or audit, that such purchaser has willfully failed to remit assessments when due, then such purchaser shall be liable to the duly certified producers agency for the reasonable costs of such inspection or audit. Such costs may be recovered by the agency by an action against the purchaser in a court of competent jurisdiction. The agency shall also be entitled to recover from such purchaser a penalty of five percent (5%) of the amount due for each month it remains unpaid, not to exceed twenty percent (20%) of the total amount due.

Any packer, processor or other purchaser who originally purchases from the grower, apples grown in North Carolina, shall collect from the grower thereof

any marketing assessment due under the provisions of Article 50 of Chapter 106 and shall remit the same to the North Carolina Department of Agriculture and Consumer Services. Upon failure of said packer, processor or other purchaser to collect and remit said assessment then the amount of the assessment shall become the obligation of the packer, processor or other purchaser who originally purchased the apples from the grower and he shall become liable therefor to the North Carolina Department of Agriculture and Consumer Services. Failure of the packer, processor or other purchaser to comply with the provisions of this section shall constitute a bar to engaging in said business in this State upon proper notice from the Board of Agriculture. The Board of Agriculture shall have authority to promulgate such rules and regulations as shall be necessary to carry out the purpose and intent of this section. (1953, c. 917; 1969, c. 605, s. 3; 1975, c. 708, s. 2; 1983, c. 395; 1997-261, s. 109.)

§ 106-564.2. Further alternative method for collection of assessments.

As an alternate method for the collection of assessments provided for in G.S. 106-564, the duly certified agency representing the producers of peaches, apples or other tree fruits, is hereby authorized to establish the names, addresses and number of trees or acres of trees and certify same to the Commissioner of Agriculture. The Commissioner of Agriculture shall then notify by registered letter such certified producers that on or before the date specified by the duly certified agency, the assessments shall be paid to the Commissioner of Agriculture by the producers. The date of collections of such assessments may be established by the duly certified agency representing the producers of any agricultural product referred to in G.S. 106-550. (1955, c. 374.)

§ 106-564.3. Alternative method for collection of assessments relating to cattle.

As an alternative method for the collection of assessments provided for in Article 50 of Chapter 106 of the General Statutes, as amended, and as the same relates to all cattle, including those cattle sold for slaughter, upon the request of the duly certified agency of the producers of all cattle, including those which are to be sold for slaughter, the Commissioner of Agriculture shall notify, by registered letter, all livestock auction markets, slaughterhouses, abattoirs, packinghouses, and any and all persons, firms and corporations, engaged in the buying, selling or handling of cattle in this State, and on and after the date specified in the letter, the assessments approved and in force under said referendum shall be deducted by the purchaser, or his agent or representative, from the purchase price of all cattle bought, acquired or sold. It shall be unlawful for any livestock auction market, slaughterhouse, abattoir, packinghouse or the administrators or managers or agents of same or for any person, firm or corporation to acquire, buy or sell any cattle, including cattle for slaughter, without deducting the assessments previously authorized by said referendum. The assessment or assessments for any month so deducted, shall, on or before the twentieth day of the following month, be remitted by such purchaser as above described, to the Commissioner of Agriculture of North Carolina, who shall thereupon pay the amount of the assessments to the duly certified agency of the producers of all such cattle entitled thereto. The books and records of all such livestock auction markets, slaughterhouses, abattoirs, packinghouses, or persons, firms or corporations engaged in buying, acquiring or selling all cattle shall at all times during regular business hours be open for

inspection by the Commissioner of Agriculture or his duly authorized agents. Provided, however, that if any livestock auction market, slaughterhouse, abattoir, packinghouse, or any person, firm or corporation engaged in buying, selling or handling cattle in this State shall fail to collect or pay such assessments so deducted to the Commissioner of Agriculture of North Carolina, as herein provided, then and in such event suit may be brought by the duly certified agency concerned in a court of competent jurisdiction to enforce the collection of such assessments. (1959, c. 1176; 1969, c. 184.)

§ 106-564.4. Alternative method for collection of assessments relating to sweet potatoes.

(a) In the event the producers of sweet potatoes approve an assessment pursuant to G.S. 106-564, which assessment shall be paid by the producer based on the number of acres produced, the producer shall report the number of acres planted and shall remit the assessment due to the Commissioner of Agriculture. Sweet potato producers shall report acreage planted at a time and place determined by the duly certified agency representing the producers of sweet potatoes.

(b) Assessments shall be due on September 1 of each year. Any producer who fails to pay assessments by September 30 of each year shall also pay a penalty of ten percent (10%) of the unpaid assessment, plus a penalty of one percent (1%) of the unpaid assessment for each month the assessment remains unpaid. The Commissioner of Agriculture shall remit all assessments received to the duly certified agency representing the producers of sweet potatoes. The duly certified agency representing the producers of sweet potatoes may conduct inspections and audits of sweet potato producers in order to verify the number of acres of sweet potatoes planted and may bring an action to recover unpaid assessments and penalties and the reasonable costs of such action, including attorneys' fees.

(c) There shall be no refund of assessments collected pursuant to this section.

(d) For the purposes of this section, "producer" shall be defined as a grower of one acre or more of sweet potatoes. (1995, c. 521, s. 2.)

§ 106-565. Subsequent referendum.

In the event such referendum so to be conducted as herein provided shall not be supported by two thirds or more of those eligible for participation therein and voting therein, then the duly certified agency conducting the said referendum shall have full power and authority to call another referendum for the purposes herein set forth in the next succeeding year, on the question of an annual assessment for three years. (1947, c. 1018, s. 16.)

§ 106-566. Referendum as to continuance of assessments approved at prior referendum.

In the event the first such referendum or any subsequent referendum is carried by the votes of two thirds or more of the eligible farmers participating therein and assessments in pursuance thereof are levied annually for the period set forth in the call for such referendum, then the agency conducting such referendum shall in its discretion have full power and authority to call and conduct during the third year of such first period or the last year of any subsequent period another referendum in which the farmers and producers of such agricultural commodity shall vote upon the question of whether or not such assessments shall be continued for the next ensuing three years or

continued for the next ensuing six years. (1947, c. 1018, s. 17; 1965, c. 1046, s. 2.)

§ 106-567. Rights of farmers dissatisfied with assessments; time for demanding refund.

In the event such referendum is carried in the affirmative and the assessment is levied and collected as provided herein and under the regulations to be promulgated by the duly certified agency conducting the same, any farmer or producer upon and against whom such assessments shall have been levied and collected under the provisions of this Article, if dissatisfied with said assessment and the result thereof, shall have the right to demand of and receive from the treasurer of said agency a refund of such assessment so collected from such farmer or producer, provided such demand for refund is made in writing within 30 days from the date on which said assessment is collected or due to be collected, whichever is earlier from such farmer or producer under the rules and regulations of the duly certified commission, council, board or other agency. Provided, however, that as to growers or producers of potatoes, apples or peaches the right of refund of assessments as provided herein shall be contingent upon such growers or producers having paid said assessment on or before the end of the assessment year in which the assessment was levied. The assessment year shall be determined by the duly certified commission, council, board or agency representing the respective commodity: Provided further, that any farmer or producer of potatoes, apples or peaches who fails to make any protest against the assessment and levy in writing, addressed to the duly certified commission, council, board or agency representing the commodity concerned, within 30 days from the date such assessment shall become due and payable, then, and in such event, suit may be brought by the duly certified commission, council, board or agency concerned in a court of competent jurisdiction to enforce the collection of the assessment. Provided further that on and after July 1, 1972, as to growers or producers of apples there shall be no right of refund of assessments levied pursuant to the referendum provided for by Article 50, Chapter 106 of the General Statutes of North Carolina. (1947, c. 1018, s. 18; 1959, c. 311; 1969, c. 605, ss. 1, 2; 1975, c. 708, ss. 3, 4.)

§ 106-567.1. Refund of milk product assessments.

Notwithstanding any other provision of this Article, on and after January 1, 1982, a milk producer shall be entitled to receive a monthly refund of assessments paid by him by making written demand in the first month of each calendar quarter upon the association receiving such assessment. (1981, c. 216, s. 4.)

§ 106-568. Publication of financial statement by treasurer of agency; bond required.

In the event of the levying and collection of assessments as herein provided, the treasurer of the agency conducting same shall within 30 days after the end of any calendar year in which such assessments are collected, publish through the medium of the press of the State a statement of the amount or amounts so received and collected by him under the provisions of this Article. Before collecting and receiving such assessments, such treasurer shall give a bond in the amount of at least the estimated total of such assessments as will be collected, such bond to have as surety thereon a surety company licensed to do business in the State of North Carolina, and to be in the form and amount

approved by the agency conducting such referendum and to be filed with the chairman or executive head of such agency. (1947, c. 1018, s. 19.)

ARTICLE 50A.

Promotion of Agricultural Research and Dissemination of Findings.

§ 106-568.1. Policy as to joint action of farmers.

It is declared to be in the public interest that North Carolina farmers producing agricultural products of all kinds, including cotton, tobacco, peanuts, soybeans, potatoes, vegetables, berries, fruits, livestock, livestock products, poultry and turkeys, and any other agricultural products having domestic and/or foreign markets, be permitted to act jointly in cooperation with each other in encouraging an expanding program of agricultural research and the dissemination of agricultural research findings. (1951, c. 827, s. 1.)

§ 106-568.2. (For applicability, see editor's note) Policy as to referendum and assessment.

It is declared to be in the public interest and highly advantageous to the economic development of the State that farmers, producers, and growers of agricultural commodities using commercial feed and/or fertilizers or their ingredients be permitted by referendum held among themselves to levy upon themselves an assessment of ten cents (10¢) per ton on mixed fertilizers, commercial feed, and their ingredients (except lime and land plaster) to provide funds through the Agricultural Foundation to supplement the established program of agricultural research and dissemination of research facts.

It is further declared to be in the public interest and highly advantageous to the economic development of the State that tobacco producers be permitted by referendum to levy upon themselves an assessment not to exceed ten cents (10¢) per hundred pounds of tobacco marketed to provide funds through the North Carolina Tobacco Research Commission for research and dissemination of research facts concerning tobacco. (1951, c. 827, s. 2; 1981, c. 181, s. 1; 1991, c. 102, s. 1.)

Section Set Out Twice. — The assessment provided in the section above is effective until January 1, 2001. For the assessment applicable on January 1, 2001, see the following section, also numbered § 106-568.2.

§ 106-568.2. (For applicability, see editor's note) Policy as to referendum and assessment.

It is declared to be in the public interest and highly advantageous to the economic development of the State that farmers, producers, and growers of agricultural commodities using commercial feed and/or fertilizers or their ingredients be permitted by referendum held among themselves to levy upon themselves an assessment of fifteen cents (15¢) per ton on mixed fertilizers, commercial feed, and their ingredients (except lime and land plaster) to provide funds through the Agricultural Foundation to supplement the established program of agricultural research and dissemination of research facts.

It is further declared to be in the public interest and highly advantageous to the economic development of the State that tobacco producers be permitted by referendum to levy upon themselves an assessment not to exceed ten cents

§ 106-568.2 is set out twice. See notes.

(10¢) per hundred pounds of tobacco marketed to provide funds through the North Carolina Tobacco Research Commission for research and dissemination of research facts concerning tobacco. (1951, c. 827, s. 2; 1981, c. 181, s. 1; 1991, c. 102, s. 1; 1999-172, s. 1.)

Section Set Out Twice. — The assessment in the section above is effective January 1, 2001. For the assessment applicable until January 1, 2001, see the preceding section, also numbered § 105-568.2.

Editor's Note. — Session Laws 1999-172, s. 1 amended this section to increase the assessment from ten cents to fifteen cents, effective June 9, 1999; however, s. 3 provides that the five cent increase shall not be levied nor collected before January 1, 2001.

Effect of Amendments. — Session Laws 1999-173, s. 1, effective June 9, 1999, substituted "fifteen cents (15¢)" for "ten cents (10¢)" in the first paragraph.

§ 106-568.3. Action of Board of Agriculture on petition for referendum; creation of the Tobacco Research Commission.

(a) The State Board of Agriculture, upon a petition being filed with it so requesting and signed by the governing boards of the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the North Carolina Agricultural Foundation, Inc., shall examine such petition and upon finding that it complies with the provisions of this Article shall authorize the holding of a referendum as hereinafter set out and the governing boards of the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the North Carolina Agricultural Foundation, Inc., shall thereupon be fully authorized and empowered to hold and conduct on the part of the producers and growers of the commodities herein mentioned a referendum on the question of whether or not such growers and producers shall levy upon themselves an assessment under and subject to and for the purposes stated in this Article. Provided, that the petition for a tobacco referendum shall be signed by and, once approved, shall authorize the holding of a referendum by the governing boards of the North Carolina Farm Bureau Federation, Inc., the North Carolina State Grange, the North Carolina Tobacco Foundation, Inc., and the Tobacco Growers Association of North Carolina, Incorporated.

(b) There is hereby created a North Carolina Tobacco Research Commission within the Department of Agriculture and Consumer Services. The Commission shall consist of the Commissioner of Agriculture, or his designee; the President of the North Carolina Farm Bureau Federation, Inc., or his designee; the President of the Tobacco Growers Association of North Carolina, Incorporated, or his designee; the Master of the North Carolina State Grange, or his designee; and, the President of the North Carolina Tobacco Foundation, Inc., or his designee. (1951, c. 827, s. 3; 1991, c. 102, s. 2; 1997-261, s. 109.)

§ 106-568.4. By whom referendum to be managed; announcement.

The governing boards of the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the North Carolina Agricultural Foundation, Inc., shall arrange for and manage any referendum conducted under the provisions of this Article but shall, 60 days before the date upon which it is to be held, fix, determine, and publicly announce in each county the date, hours, and polling places in that county for voting in such referendum, the amount and basis proposed to be collected, the means by which such assessment shall

be collected as authorized by the growers and producers, and the general purposes for which said funds so collected shall be applied. Provided, that the governing boards of the North Carolina Farm Bureau Federation, Inc., the North Carolina State Grange, the North Carolina Tobacco Foundation, Inc., and the Tobacco Growers Association of North Carolina, Incorporated, shall arrange for and manage any referendum for tobacco poundage assessments under the provisions of this Article. (1951, c. 827, s. 4; 1991, c. 102, s. 3.)

§ 106-568.5. When assessment shall and shall not be levied.

If in such referendum more than one third of the farmers and producers eligible to participate therein and voting therein shall vote in the negative and against the levying or collection of such assessment, then in such event no assessment shall be levied or collected, but if two thirds or more of such farmers and producers voting therein shall vote in the affirmative and in favor of the levying or collection of such assessment, then such assessment shall be collected in the manner hereinafter provided. (1951, c. 827, s. 5.)

§ 106-568.6. Determination and notice of date, area, hours, voting places, etc.

The three organizations herein designated to hold such referendum shall fix the date, area, hours, voting places, rules and regulations with respect to the holding of such referendum and cause the same to be published in the press of the State at least 60 days before holding such referendum and shall certify such information to the State Commissioner of Agriculture and to each of the farm organizations of the State. Such notice, so published and furnished to the several agencies, shall contain, in addition to the other information herein required, a statement of the amount of annual assessment proposed to be levied, and the purposes for which such assessment shall be applied. Provided, that the four organizations designated to hold the referendum for tobacco poundage assessments shall perform the functions set forth in this section. (1951, c. 827, s. 6; 1991, c. 102, s. 4.)

§ 106-568.7. Preparation and distribution of ballots; poll holders; canvass and announcement of results.

The governing boards of the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the North Carolina Agricultural Foundation, Inc., shall prepare and distribute in advance of such referendum all necessary ballots and shall under rules and regulations, adopted and promulgated by the organizations holding such referendum, arrange for the necessary poll holders and shall, within 10 days after the date of such referendum, canvass and publicly declare the results thereof. Provided, that for the tobacco poundage assessment referendum, the North Carolina Farm Bureau Federation, Inc., the North Carolina State Grange, the North Carolina Tobacco Foundation, Inc., and the Tobacco Growers Association of North Carolina, Incorporated, shall perform the functions set forth in this section. (1951, c. 827, s. 7; 1991, c. 102, s. 5.)

§ 106-568.8. Collection and disposition of assessment; report of receipts and disbursements; audit.

(a) Fertilizer and feed assessments. In the event two-thirds or more of the eligible farmers and producers participating in said referendum vote in favor

of such assessment, then said assessment shall be collected for a period of six years under rules, regulations, and methods as provided for in this Article. The assessments shall be added to the wholesale purchase price of each ton of fertilizer, commercial feed, and/or their ingredients (except lime and land plaster) by the manufacturer of said fertilizer and feed. The assessment so collected shall be paid by the manufacturer into the hands of the North Carolina Commissioner of Agriculture on the same tonnage and at the same time and in the same manner as prescribed for the reporting of the inspection tax on commercial feeds and fertilizers as prescribed by G.S. 106-284.40 and 106-671. The Commissioner shall then remit the assessment for the total tonnage as reported by all manufacturers of commercial feeds, fertilizers, and their ingredients to the treasurer of the North Carolina Agricultural Foundation, Inc., who shall disburse such funds for the purposes herein enumerated and not inconsistent with provisions contained in the charter and bylaws of the North Carolina Agricultural Foundation, Inc. Signed copies of the receipts for such remittances made by the Commissioner to the treasurer of the North Carolina Agricultural Foundation, Inc., shall be furnished the Commissioner of Agriculture, the North Carolina Farm Bureau Federation, and the North Carolina State Grange. The treasurer of the North Carolina Agricultural Foundation, Inc., shall make an annual report at each annual meeting of the Foundation directors of total receipts and disbursements for the year and shall file a copy of said report with the Commissioner of Agriculture and shall make available a copy of said report for publication.

It shall be the duty of the Commissioner of Agriculture to audit and check the remittances of the assessment by the manufacturer to the Commissioner in the same manner and at the same time as audits and checks are made of remittances of the inspection tax on commercial feeds and fertilizers.

Any commercial feed excluded from the payment of the inspection fee required by G.S. 106-284.40 shall nevertheless be subject to the assessment provided for by this Article and to quarterly tonnage reports to the Department of Agriculture and Consumer Services as provided for in G.S. 106-284.40(c).

(b) Tobacco Poundage Assessments. In the event two-thirds or more of the eligible farmers and producers participating in the tobacco referendum vote in favor of the tobacco poundage assessment authorized under this Article, then said assessment shall be collected for a period of six years under rules, regulations, and methods adopted by the North Carolina Tobacco Research Commission. The North Carolina Tobacco Research Commission is exempt from the provisions of Chapter 150B of the General Statutes.

The assessments collected shall be remitted to the Department of Agriculture and Consumer Services to be expended under the direction of the Tobacco Research Commission for research and dissemination of research facts concerning tobacco. Any person that receives assessment funds from the Tobacco Research Commission shall file quarterly written reports with the Tobacco Research Commission on the receipt and expenditure of assessment funds. The Tobacco Research Commission may transfer assessments to the North Carolina Tobacco Foundation, Inc., to be held and invested by the Tobacco Foundation until such time as the Commission shall direct their expenditure for the purposes set forth in this section. (1951, c. 827, s. 8; 1967, c. 631, s. 1; 1975, c. 646; 1981, c. 181, s. 1; 1989, c. 770, s. 27; 1991, c. 102, s. 6; 1995, c. 239, s. 1; 1997-261, s. 109; 1999-172, s. 2.)

Effect of Amendments. — Session Laws 1999-172, s. 2, effective June 9, 1999, in subsection (a), substituted "the assessment" for "said ten cents (10¢) per ton" in the fourth sentence of the first paragraph and substituted "the assessment" for "ten cents (10¢)" in the second paragraph.

§ 106-568.9. Refunds to farmers.

In the event such a referendum is carried in the affirmative and the assessment is levied and collected as herein provided and under the regulations to be promulgated by the duly certified agencies conducting the same, any farmer upon whom and against whom any such assessment shall have been added and collected under the provisions of this Article, if dissatisfied with the said assessment, shall have the right to demand of and receive from the treasurer of said North Carolina Agricultural Foundation, Inc., a refund of such amount so collected from such farmer or producer provided such demand for refund is made in writing within 30 days from the date of which said assessment is collected from such farmer or producer. Provided, that the Department of Agriculture and Consumer Services shall make tobacco poundage assessment refunds to tobacco farmers when such demand for refund is made in writing by the tobacco farmer within 30 days of the close of the marketing season. (1951, c. 827, s. 9; 1991, c. 102, s. 7; 1997-261, s. 109.)

§ 106-568.10. Subsequent referenda; continuation of assessment.

If the assessment is defeated in the referendum, the governing boards of the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the North Carolina Agricultural Foundation, Inc., shall have full power and authority to call another referendum for the purposes herein set out in the next succeeding year on the question of the annual assessment for six years. In the event the assessment carried in a referendum by two-thirds or more of the eligible farmers participating therein, such assessment shall be levied annually for the six years set forth in the call for such referendum and a new referendum may be called and conducted during the sixth year of such period on the question of whether or not such assessment shall be continued for the next ensuing six years. Provided, that if the tobacco poundage assessment is defeated in the referendum, the governing boards of the North Carolina Farm Bureau Federation, Inc., the North Carolina State Grange, the North Carolina Tobacco Foundation, Inc., and Tobacco Growers Association of North Carolina, Incorporated, may call another referendum in the next succeeding year on the question of the annual assessment for six years. If the tobacco assessment carried in a referendum by two-thirds or more of the eligible farmers participating therein, the assessment shall be levied annually for the six years set forth in the call for the referendum and a new referendum may be called and conducted during the sixth year of the period on the question of whether or not the assessment shall be continued for the next ensuing six years. (1951, c. 827, s. 10; 1967, c. 631, s. 2; 1991, c. 102, s. 8.)

§ 106-568.11. Effect of more than one-third vote against assessment.

If in such referendum called under the provisions of this Article more than one third of the farmers and producers in the State of North Carolina, eligible to participate and voting therein, shall vote in the negative and against the levying or collection of such assessment, then in such an event no assessment shall be levied or collected. (1951, c. 827, s. 11.)

§ 106-568.12. Effect of two-thirds vote in favor of assessment.

If in such referendum called under the provisions of this Article two thirds or more of the farmers or producers in the State of North Carolina, eligible to

participate and voting therein, shall vote in the affirmative and in favor of the levying and collection of such assessment proposed in such referendum on the commodities covered thereby, then such assessment shall be collected in the manner prescribed herein (determined and announced by the agencies conducting such referendum). (1951, c. 827, s. 12.)

Article 50B.

North Carolina Agricultural Hall of Fame.

§ 106-568.13. North Carolina Agricultural Hall of Fame created.

There is hereby created and established as an agency of the State of North Carolina the North Carolina Agricultural Hall of Fame. (1953, c. 1129, s. 1.)

State Government Reorganization. — The North Carolina Agricultural Hall of Fame was transferred to the Department of Agriculture by § 143A-61, enacted by Session Laws 1971, c. 864.

§ 106-568.14. Board of directors; membership; compensation.

The North Carolina Agricultural Hall of Fame shall be under the general supervision and control of a board of directors consisting of the following: the Commissioner of Agriculture of the State of North Carolina, who shall act as chairman; the Director of the North Carolina Agricultural Extension Service; the State Supervisor of Vocational Agriculture; the President of the North Carolina Farm Bureau Federation; the Master of the State Grange, the foregoing being ex officio members; and three members who shall be appointed by the Governor of North Carolina. All of said members shall serve without compensation. (1953, c. 1129, s. 2.)

§ 106-568.15. Terms of directors.

One of the appointive members shall be appointed for a term of two years, one for a term of four years and one for a term of six years. The successor to each of the appointive members shall be appointed for a term of six years, and in case of a vacancy, the Governor is authorized to appoint a successor for the remainder of the unexpired term. The ex officio members shall serve so long as they hold their respective offices or positions which entitle them to ex officio membership on said board of directors. (1953, c. 1129, s. 3.)

§ 106-568.16. Admission of candidates to Hall of Fame.

The said board is hereby empowered to formulate rules and regulations governing acceptance and admission of candidates to said North Carolina Agricultural Hall of Fame, provided that no name shall be accepted until an authentic and written record of achievements of said person in agricultural activities shall have been presented to and accepted by a majority vote of said board created by this Article, and provided that both men and women are eligible for recognition. (1953, c. 1129, s. 4.)

§ 106-568.17. Acceptance of gifts, bequests and awards; display thereof.

The said board is hereby empowered to accept and receive gifts, bequests, and awards which are to become the sole property of said North Carolina Agricultural Hall of Fame and are to be kept in a proper manner in a suitable room or hall in some state-owned building in Raleigh, provided that duplicates of such gifts, bequests, and awards may be displayed in a suitable room or hall in the School of Agriculture of the North Carolina State College of Agriculture and Engineering at Raleigh, North Carolina. (1953, c. 1129, s. 5.)

Cross References. — For designation of North Carolina State College of Agriculture and Engineering as North Carolina State University at Raleigh, see §§ 116-2, 116-4.

ARTICLE 50C.

Promotion of Sale and Use of Tobacco.

§ 106-568.18. Policy as to joint action of farmers.

It is hereby declared to be in the public interest that the farmers of North Carolina who produce flue-cured tobacco be permitted and encouraged to act jointly in promoting and stimulating, by organized methods and through the medium established for such purpose, export trade for flue-cured tobacco and the use of tobacco everywhere. (1959, c. 309, s. 1.)

Editor's Note. — For provisions regarding the creation of a nonprofit corporation established pursuant to the final judgment entered in State of North Carolina v. Philip Morris Incorporated, Et Al. (98 CVS 14377), for the receipt and distribution of funds received by the state see the editor's note under § 55A-3-07 regarding Session Laws 1999-2, ss. 1-6.

§ 106-568.19. Policy as to referendum on question of annual assessment.

For the purpose of raising reasonable and necessary funds for producer participation in the operations of the agency set up under farmer sponsorship for the promotion of export trade in flue-cured tobacco and the use of tobacco everywhere, it is proper, desirable, necessary and in the public interest that the farmers in this State engaged in the production of flue-cured tobacco shall have the opportunity and privilege of participating in a referendum to be held as hereinafter provided, in which referendum there shall be determined the question of whether or not the farmers of the State engaged in the production of flue-cured tobacco shall levy upon themselves an annual assessment for the purposes herein stated. (1959, c. 309, s. 2.)

§ 106-568.20. Referendum on assessment for next three years.

During the year 1989 or 1990 upon the exact date in such year as may be determined in the manner hereinafter set forth and under rules and regulations as established under the provisions of this Article, there shall be held in every county in North Carolina in which flue-cured tobacco is produced a referendum to be participated in by all farmers engaged in the production of flue-cured tobacco in which referendum said farmers shall vote upon the question of whether or not there shall be levied an annual assessment for a period of three years 1989, 1990 and 1991, or 1990, 1991, and 1992, such

amount as may have been theretofore or as may be thereafter determined by the Board of Directors of Tobacco Associates, Inc., but not more than four dollars ($4.00) per acre per year on all flue-cured tobacco acreage in the State of North Carolina. Those farmers entitled to share in the crop of flue-cured tobacco or in the proceeds of such crop because of sharing in the risk of production shall be deemed to be engaged in the production of such tobacco. (1959, c. 309, s. 3; 1987, c. 294, s. 1; 1989, c. 349, s. 1.)

§ 106-568.21. Effect of more than one-third vote against assessment in referendum.

If in such referendum more than one-third of the tobacco farmers eligible to participate therein and voting therein shall vote in the negative and against the levying or collection of such assessment, then no assessment shall be levied or collected pursuant to that referendum. (1959, c. 309, s. 4; 1987, c. 294, s. 2.)

§ 106-568.22. Effect of two-thirds vote for assessment in referendum.

If in such referendum two-thirds or more of the eligible tobacco farmers voting therein shall vote in the affirmative and in favor of the levying or collection of such assessment to be determined by the board of directors of Tobacco Associates, Incorporated, but in an amount of not more than four dollars ($4.00) per acre per year on all flue-cured tobacco acreage in the State of North Carolina, then such assessment shall be collected in the manner hereinafter provided. (1959, c. 309, s. 5; 1987, c. 294, s. 3; 1989, c. 349, s. 2.)

§ 106-568.23. Regulations as to referendum; notice to farm organizations and county agents.

The exact date, on which such referendum shall be held and the hours, voting places, and rules and regulations under which such referendum shall be conducted, shall be established and determined by the board of directors of the North Carolina corporation known and designated as Tobacco Associates, Incorporated, established under the leadership of farm organizations in the State of North Carolina for the purpose of stimulating, developing and expanding export trade for flue-cured tobacco and the use of tobacco everywhere; the said referendum date, hours, voting places, rules and regulations with respect to the holding of such referendum shall be published through the medium of the public press in the State of North Carolina by said board of directors at least 15 days before the holding of such referendum, and direct written notice thereof shall likewise be given to all farm organizations within the State of North Carolina and to each county agent in any county in which flue-cured tobacco is grown. (1959, c. 309, s. 6; 1987, c. 294, s. 4.)

§ 106-568.24. Distribution of ballots; arrangements for holding referendum; declaration of results.

The said board of directors of Tobacco Associates, Incorporated, shall likewise prepare and distribute in advance of said referendum all necessary ballots for the purpose thereof, and shall under the rules and regulations promulgated by said board arrange for the necessary poll holders for conducting the said referendum; and following such referendum and within 10 days thereafter the said board of directors shall canvass and publicly declare the results of such referendum. (1959, c. 309, s. 7; 1987, c. 294, s. 5.)

§ 106-568.25. Question at referendum.

Said referendum shall be upon the question of whether or not the farmers eligible for participation therein and voting therein shall favor an assessment upon themselves for the period of the next three tobacco marketing years, in an amount in each of said years as determined by or to be determined by the board of directors of Tobacco Associates, Incorporated but not more than four dollars ($4.00) per acre per year on all flue-cured tobacco acreage in the State of North Carolina, for the purpose of providing farmer participation in the fund and through the agency established for the stimulation, expansion and development of export markets for flue-cured tobacco and the encouragement of the use of flue-cured tobacco everywhere. (1959, c. 309, s. 8; 1987, c. 294, s. 6; 1989, c. 349, s. 3.)

§ 106-568.26. Collection of assessments; custody and use of funds.

In the event two-thirds or more of the eligible farmers voting therein shall vote in favor of such assessment, then the said assessment shall be collected annually for the years herein set forth and under such method, rules and regulations as may be determined by the board of directors of the said Tobacco Associates, Incorporated, and the said assessment so collected shall be paid into the treasurer [treasury] of said Tobacco Associates, Incorporated, to be used along with funds from other sources, for the purpose of stimulating, developing and expanding export trade for flue-cured tobacco and encouraging the use of flue-cured tobacco everywhere. (1959, c. 309, s. 9.)

§ 106-568.27. Required affirmative vote of directors of Tobacco Associates, Incorporated.

No assessment shall be made pursuant to this Article unless same shall receive the affirmative vote of not less than two-thirds of the members of the board of directors of Tobacco Associates, Incorporated, including the affirmative vote of not less than two thirds of such board members who were elected by North Carolina farm organizations. (1959, c. 309, s. 10.)

§ 106-568.28. Right of farmers dissatisfied with assessments; time for demanding refund.

In the event any referendum authorized by this Article is carried in the affirmative by such two-thirds vote and the assessment is levied and collected as herein provided and under the regulations to be promulgated by the board of directors of Tobacco Associates, Incorporated, any farmer or tobacco producer upon whom and against whom any such annual assessment shall have been levied and collected under the provisions of this Article, if dissatisfied with the said assessment, shall have the right to demand of and receive from the treasurer of said Tobacco Associates, Incorporated, a refund of such annual assessment so collected from such farmer or producer of tobacco, provided such demand for refund is made in writing within 30 days from the last date on which such assessment is collected from such farmer or producer or deducted from the proceeds of the sale of tobacco of such farmer or producer. (1959, c. 309, s. 11; 1987, c. 294, s. 7.)

§ 106-568.29. Subsequent referendum after defeat of assessment.

In the event any referendum conducted as provided for in this Article shall not be supported by two-thirds or more of those voting therein, then the board

of directors of Tobacco Associates, Incorporated shall have full power and authority to call another referendum for the purposes herein set forth in any succeeding year, on the question of an annual assessment for the next three tobacco marketing years or less. If the referendum is carried as provided in this Article, then the assessments may be levied and collected as provided in this Article. (1959, c. 309, s. 12; 1989, c. 349, s. 4.)

§ 106-568.30. Referendum as to continuance of assessments approved at prior referendum.

In the event any referendum, held at any time under the provisions of this Article, is carried by the vote of two-thirds or more of the eligible farmers participating therein and assessments in pursuance thereof are being levied annually, then the board of directors of Tobacco Associates, Incorporated shall, in its discretion, have full power and authority to call and conduct another referendum in which the farmers and producers of flue-cured tobacco shall vote upon the question of whether or not assessments under this Article shall be continued for the next three tobacco marketing years. If the referendum is carried as provided in this Article, then assessments may be levied and collected as provided in this Article. (1959, c. 309, s. 13; 1987, c. 294, s. 8.)

§ 106-568.31. Filing and publication of financial statement by treasurer of Tobacco Associates, Incorporated.

The treasurer of Tobacco Associates, Incorporated shall, within 60 days after the end of any fiscal year, file with the State Auditor a financial statement as of the end of the fiscal year and a detailed statement of operations for the year ended. Further a condensed statement of the financial condition and operating expenses for said fiscal year shall be published in a newspaper of general circulation, if one exists, in each county from which assessments are collected. (1959, c. 309, s. 14; 1987, c. 294, s. 9.)

§ 106-568.32: Repealed by Session Laws 1987, c. 294, s. 11.

§ 106-568.33. Effect of Article on prior acts.

Insofar as the provisions of this Article are different from and in conflict with the provisions of Chapter 511, Session Laws of 1947 and Chapter 63, Session Laws of 1951, to the extent of such conflict the provisions of this Article shall be applicable and shall supersede and prevail over the provisions of said former acts and all provisions of this Article shall be in full effect. So long as assessments are made under this Article, no assessment shall be made and collected under the provisions of Chapter 511, Session Laws of 1947, as amended. (1959, c. 309, s. 16.)

§ 106-568.34. Alternate method for levy of assessment.

At any time when it may be found by the Board of Directors of Tobacco Associates, that it is not reasonably feasible to base the authorization of an assessment or the making of an assessment or the collection of an assessment on a "per-acre" unit, then the Board of Directors of Tobacco Associates, by an affirmative vote of not less than two thirds of its members (which vote shall include the affirmative vote of not less than two thirds of the board members who were elected by North Carolina farm organizations), may use a "tobacco

poundage" unit as the basis for the authorization or making or collecting an assessment. No alternative assessment for any year after 1988 shall exceed one-fifth cent (⅕¢) per pound of the flue-cured tobacco marketed by each farmer. The amount of any alternate assessment, based upon a "tobacco poundage" unit as permitted by the provisions of this section shall not be related to or limited by the amount of the assessment which could be authorized, made or collected if it were based upon a "per-acre" unit. (1973, c. 81; 1979, c. 474, s. 1; 1987, c. 294, s. 10; 1989, c. 349, s. 5.)

§ 106-568.35. Alternate provision for referendum voting by mail.

(a) At any time when it may be found that it is not desirable or reasonably possible to conduct a referendum by written ballots to be cast at polling places (as provided in G.S. 106-568.23 and 106-568.24 of this Article), the board of directors of Tobacco Associates, Incorporated, by an affirmative vote of not less than two-thirds of its members (which vote shall include the affirmative vote of not less than two thirds of such board members who were elected by North Carolina farm organizations), may prescribe and provide for a vote by mail by written or printed ballot.

(b) In the event that the board of directors shall decide to conduct the referendum by mail vote, the board shall prescribe the rules and regulations under which such mail referendum shall be conducted; shall provide the necessary ballots and cause them to be mailed to the farmers of North Carolina who are engaged in the production of flue-cured tobacco; shall provide envelopes for the return of such ballots by individual voters; shall cause to be published through the medium of the public press in the State of North Carolina notice of the holding of such referendum at least 15 days before the mailing out of the ballots; shall give direct written notice of such proposed mail referendum to all statewide farm organizations within the State of North Carolina and to each county agent in each county in which flue-cured tobacco is grown; shall provide a closing date for the return of the ballots; shall provide for the receipt and safeguarding of such ballots; and, within 30 days of the date set as the latest date for the return of such ballots, shall canvass the ballots and publish and declare the results of such referendum. (1975, c. 125; 1987, c. 294, s. 12.)

§ 106-568.36. Maximum levy after 1988.

The maximum amount which may be authorized in any referendum held pursuant to the provisions of this Article during 1989 or thereafter, and the maximum amount which may be assessed, collected or levied for any year after 1988 by the Board of Directors of Tobacco Associates pursuant to the provisions of this Article, is four dollars ($4.00) per acre per year on all flue-cured tobacco acreage in the State, or, under the alternate method for levy of assessment set out in G.S. 106-568.34, one-fifth cent (⅕¢) per pound of the flue-cured tobacco marketed by each farmer. (1979, c. 474, s. 2; 1987, c. 294, s. 13; 1989, c. 349, s. 6.)

§ 106-568.37. Report on use of assessments.

The Board of Directors of the Tobacco Associates, Incorporated shall make an annual written report of the financial transactions and a financial statement concerning the receipts and disbursements of the revenue from the assessment. A copy of the report shall be provided by the Board of Directors of the Tobacco Associates, Incorporated to the Commissioner of Agriculture, the Dean

of the College of Agriculture and Life Sciences at North Carolina State University, the North Carolina Farm Bureau Federation, the North Carolina State Grange, and the Bright Belt Warehouse Association. (1989, c. 349, s. 7.)

Article 51.

Inspection and Regulation of Sale of Antifreeze Substances and Preparations.

§§ 106-569 through 106-579: Repealed by Session Laws 1975, c. 179, s. 16.

Cross References. — For North Carolina Antifreeze Law of 1975, see § 106-579.1 et seq.

Article 51A.

North Carolina Antifreeze Law of 1975.

§ 106-579.1. Short title.

This Article shall be known as the "North Carolina Antifreeze Law of 1975." (1975, c. 719, s. 1.)

Editor's Note. — Session Laws 1975, c. 719, effective July 1, 1975, repealed Article 51 and enacted this Article. Where appropriate, the historical citations to the sections of the repealed Article have been added to corresponding sections of this Article.

§ 106-579.2. Purpose.

It is desirable that there should be uniformity between the requirements of the several states. Therefore, the Board and Commission are directed, consistent with the purposes of this Article, to so enforce this Article as to strive for achievement of such uniformity and are also authorized and empowered to cooperate with and enter into agreements with any other agency of this State, or any other state regulating antifreeze, for the purpose of carrying out the provisions of this Article and securing uniformity of regulations in conformity to the primary standards established by this Article. (1975, c. 719, s. 2.)

§ 106-579.3. Definitions.

As used in this Article, the following words and phrases have the following meanings:

(1) "Advertisement" means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of antifreeze products.

(2) "Antifreeze" means any substance or preparation sold, distributed or intended for use as the cooling liquid, or to be added to the cooling liquid, in the cooling system of internal combustion engines of motor vehicles to prevent freezing of the cooling liquid or to lower its freezing point.

(3) "Antifreeze-coolant" or "antifreeze and summer coolant" or "summer coolant" means any substance as defined in (2) above which also is

sold, distributed or intended for raising the boiling point of water or for the prevention of engine overheating whether or not used as a year-round cooling system fluid. Unless otherwise stated, the term "antifreeze" includes "antifreeze," "antifreeze-coolant," "antifreeze and summer coolant," and "summer coolant."

(4) "Board" means the North Carolina State Board of Agriculture, as defined by G.S. 106-2.

(5) "Commissioner" means the Commissioner of Agriculture of the State of North Carolina.

(6) "Distribute" means to hold with intent to sell, offer for sale, to sell, barter or otherwise supply to the consumer.

(7) "Home consumer-sized package" as used in G.S. 106-579.9(12) shall refer to packages of one fluid U.S. gallon or less.

(8) "Label" means any display of written, printed, or graphic matter on, or attached to, a package, or to the outside individual container or wrapper of the package.

(9) "Labeling" means (i) the labels and (ii) any other written, printed or graphic matter accompanying a package.

(10) "Package" means (i) a sealed tamperproof retail package, drum, or other container designed for the sale of antifreeze directly to the consumer or (ii) a container from which the antifreeze may be installed directly by the seller into the cooling system, but does not include shipping containers containing properly labeled inner containers.

(11) "Person," as used in this Article, shall be construed to mean both the singular and plural as the case demands, and shall include individuals, partnerships, corporations, companies and associations. (1949, c. 1165; 1975, c. 719, s. 3.)

§ 106-579.4. Registrations.

On or before the first day of July of each year, and before any antifreeze may be distributed for the permit year beginning July 1, the manufacturer, packager, or person whose name appears on the label shall make application to the Commissioner on forms provided by the latter for registration for each brand of antifreeze which he desires to distribute. The application shall be accompanied by specimens or facsimiles of labeling for all container sizes to be distributed, when requested by the Commissioner; a license and inspection fee of two hundred fifty dollars ($250.00) for each brand of antifreeze and a properly labeled sample of the antifreeze shall also be submitted at this time. The Commissioner may inspect, test, or analyze the antifreeze and review the labeling. If the antifreeze is not adulterated or misbranded, if it meets the standards established and promulgated by the Board, and if the said antifreeze is not such a type or kind that is in violation of this Article, the Commissioner shall thereafter issue a written license or permit authorizing the sale of such antifreeze in this State for the fiscal year in which the license or inspection fee is paid. If the antifreeze is adulterated or misbranded, if it fails to meet standards promulgated by the Board, or is in violation of this Article or regulations thereunder, the Commissioner shall refuse to register the antifreeze, and he shall return the application to the applicant, stating how the antifreeze or labeling is not in conformity. If the Commissioner shall, at a later date, find that a properly registered antifreeze product has been materially altered or adulterated, or a change has been made in the name, brand or trademark under which the antifreeze is sold, or that it violates the provisions of this Article, or that it violates regulations, definitions or standards duly promulgated by the Board, he shall notify the applicant that the license

authorizing sale of the antifreeze is canceled. No antifreeze license shall be canceled unless the registrant shall have been given an opportunity to be heard before the Commissioner or his duly designated agent and to modify his application in order to comply with the requirements of this Article and regulations, definitions, and standards promulgated by the Board. All fees received by the Commissioner shall be placed in the Department of Agriculture and Consumer Services fund for the purpose of supporting the antifreeze enforcement and testing program. (1949, c. 1165; 1975, c. 719, s. 4; 1997-261, s. 109.)

§ 106-579.5. Adulteration.

Antifreeze shall be deemed to be adulterated:

(1) If, in the form in which it is sold and directed to be used, it would be injurious to the cooling system in which it is installed, or if, when used in such cooling system, it would make the operation of the engine dangerous to the user.

(2) If its strength, quality, or purity falls below the standard of strength, quality, or purity established by the Board for the particular type or composition of antifreeze product. (1949, c. 1165; 1975, c. 719, s. 5.)

§ 106-579.6. Misbranding.

Antifreeze shall be deemed to be misbranded:

(1) If it does not bear a label which (i) specifies the identity of the product, (ii) states the name and place of business of the registrant, (iii) states the correct net quantity of contents (in terms of liquid measure) separately and accurately in a uniform location upon the principal display panel, and (iv) contains a statement warning of any hazard of substantial injury to human beings which may result from the intended use or reasonably foreseeable misuse of the antifreeze, as provided by applicable federal and State product safety laws.

(2) If the label on a container of less than five gallons, or the labeling for a container of five gallons or more, does not contain a statement or chart showing the appropriate amount, percentage, proportion or concentration of the antifreeze to be used to provide (i) claimed protection from freezing at a specified degree or degrees of temperature, (ii) claimed protection from corrosion, or (iii) claimed increase of boiling point or protection from overheating.

(3) If its labeling contains any claim that it has been approved or recommended by the Commissioner or the State of North Carolina.

(4) If its labeling is false, deceptive, or misleading. (1949, c. 1165; 1975, c. 719, s. 6.)

CASE NOTES

Failure to Label Properly Constitutes Misbranding and Deceptive Practice. — The failure to label drums of antifreeze properly is statutorily deemed to be a misbranding, which is deceptive as a matter of law. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

Defendant's failure properly to label drums of antifreeze constituted a misbranding under former § 106-571(2), and such misbranding was a deceptive practice within the meaning of § 75-1.1 as a matter of law. State ex rel. Edmisten v. Zim Chem. Co., 45 N.C. App. 604, 263 S.E.2d 849 (1980).

§ 106-579.7. Rules and regulations.

(a) The Board is authorized to promulgate such reasonable rules, regulations and standards for antifreezes as are specifically authorized in this Article and such other reasonable rules and regulations as may be necessary for the efficient enforcement of this Article and the protection of the public. The Board is authorized to promulgate regulations banning the distribution in North Carolina of any type of product not suitable for antifreeze usage in modern internal combustion engines or motor vehicles, whether by reason of potential damage to the cooling system, improper heat transfer from the engine, absence of a convenient and suitable test method for measuring freeze protection, or other reason bearing upon the ultimate effect of the product when used in such automotive cooling systems. Before the issuance, amendment, or repeal of any rule, regulation or standard authorized by this Article, the Board shall publish the proposed regulation, amendment, or notice to repeal an existing regulation in a manner reasonably calculated to give interested parties, including all current registrants, adequate notice and shall afford all interested persons an opportunity to present their views thereon, orally or in writing, within a reasonable period of time. After consideration of all views presented by interested persons, the Board shall take appropriate action as dictated by the material weight of objective information presented to the Board.

(b) The Commissioner shall administer this Article by inspections, chemical analyses and other appropriate methods. The Commissioner shall also execute all orders, rules and regulations established by the Board. All authority vested in the Commissioner by virtue of the provisions of this Article may, with like force and effect, be executed by such agents of the Commissioner as he shall designate for such purpose; provided, however, that confidential formula information referred to in G.S. 106-579.11 must be confined to the files of the administrative chemist specifically designated by the Commissioner to handle such information. (1949, c. 1165; 1975, c. 719, s. 7.)

§ 106-579.8. Inspection, sampling and analysis.

The Commissioner, or his authorized agent, shall have free access at reasonable hours to all places and property in this State where antifreeze is manufactured, stored, transported, or distributed, or offered or intended to be offered, for sale, including the right to inspect and examine all antifreeze there found, and to take reasonable samples of such antifreeze for analysis together with specimens of labeling. All samples so taken shall be properly sealed and sent to the Department of Agriculture and Consumer Services laboratories for examination together with all labeling appertaining thereto. It shall be the duty of the Commissioner to examine promptly all samples received in connection with the administration and enforcement of this Article and to report the results of such examination to the owner and registrant of the antifreeze. (1949, c. 1165; 1975, c. 179, s. 8; 1997-261, s. 109.)

§ 106-579.9. Prohibited acts.

It shall be unlawful to:

(1) Distribute any antifreeze which is adulterated or misbranded.

(2) Distribute any antifreeze which has been banned by the Board.

(3) Distribute any antifreeze which has not been registered in accordance with G.S. 106-579.4 or whose labeling is different from that accepted for registration; provided, that any antifreeze declared to be discontinued by the registrant must be registered by the registrant for one full year after distribution is discontinued; provided further, that any

antifreeze in channels of distribution after the aforesaid registration period may be confiscated and disposed of by the Commissioner, unless the antifreeze is acceptable for registration and is continued to be registered by the manufacturer or the person offering the antifreeze for wholesale or retail sale.

(4) Refuse to permit entry or inspection or to permit the acquisition of a sample of antifreeze as authorized by G.S. 106-579.8.

(5) Dispose of any antifreeze that is under "stop sale" or "withdrawal from distribution" order in accordance with G.S. 106-579.10.

(6) Distribute any antifreeze unless it is in the registrant's or manufacturer's unbroken package or is installed by the seller into the cooling system of the purchaser's vehicle directly from the registrant's or manufacturer's package, and the label on such package if less than five gallons, or the labeling of such package if five gallons or more, does not bear the information required by G.S. 106-579.6(1), (2), (3), and (4).

(7) Use the term "ethylene glycol" in connection with the name of a product which contains other glycols unless it is qualified by the word "base," "type," or similar word, and unless the product meets the following requirements:

a. It consists essentially of ethylene glycol;

b. If it contains suitable glycols other than ethylene glycol, that no more than a maximum of fifteen percent (15%) of such other glycols be present;

c. It contains a minimum total glycol content of ninety-three percent (93%) by weight;

d. The specific gravity is corrected to give reliable freezing-point readings on a commercial ethylene glycol type hydrometer; and

e. The freezing point of a fifty percent (50%) by volume aqueous mixture of the antifreeze shall not be above -34° F.

(8) Refuse, when requested, to permit a purchaser to see the container from which antifreeze is drawn for installation into the purchaser's vehicle.

(9) Refill any container bearing a registered label, unless by the registrant or his duly designated jobber, under regulations established by the Board.

(10) Distribute any antifreeze for which a practical, rapid means for measuring the freeze protection by the user is not readily available, whether by hydrometer or other means.

(11) Distribute antifreeze which is in violation of the Federal Poison Prevention Packaging Act and regulations and related federal and State product safety laws and regulations.

(12) Distribute antifreeze in home consumer-sized packages which are constructed of either transparent or translucent packaging materials.

(13) Disseminate any false or misleading advertisement relating to an antifreeze product. (1975, c. 719, s. 9.)

§ 106-579.10. Enforcement.

(a) When the Commissioner finds any antifreeze being distributed in violation of any of the provisions of this Article or of any of the rules and regulations duly promulgated and adopted under this Article by the Board, he may issue and enforce a written or printed "stop sale" or "withdrawal from distribution" order, warning the distributor not to dispose of any of the lot of antifreeze in any manner until written permission is given by the Commissioner or the court. Copies of such orders shall also be sent by certified mail to

the registrant and to the person whose name and address appears on the labeling of the antifreeze. The Commissioner shall release for distribution the lot of antifreeze so withdrawn when said provisions of this Article and applicable rules and regulations have been complied with. If compliance is not obtained within 30 days of the date of notification to the registrant and the person whose name and address appears on the label, the Commissioner may begin proceedings for condemnation.

(b) Notwithstanding the provisions of subsection (a) of this section, any lot of antifreeze not in compliance with said provisions and regulations shall be subject to seizure upon complaint of the Commissioner to the district court in the county in which said antifreeze is located. In the event the court finds said antifreeze to be in violation of this Article and its duly adopted regulations, it may then order the condemnation of said antifreeze and the same shall be disposed of in any manner consistent with the rules and regulations of the Board and the laws of the State at the expense of the claimants thereof, under the supervision of the Commissioner; and all court costs and fees, and storage and other proper expenses, shall be taxed against the claimant of such article or his agent; provided, however, that in no instance shall the disposition of said antifreeze be ordered by the court without first giving 30 days' notice, by certified mail at his last known address, to the owner of same, if he is known to the Commissioner, and to the registrant, if the antifreeze is registered, at the address shown on the label or on the registration certificate, so that such persons may apply to the court for the release of said antifreeze or for permission to process or relabel said antifreeze so as to bring it into compliance with this Article. When the violation can be corrected by proper labeling, processing of the product, or other action, the court, after all costs, fees and expenses incurred by the Commissioner have been paid and a good and sufficient bond, conditioned that such article shall be so corrected, has been executed, may by order direct that such article be delivered to the claimant thereof for such action as necessary to bring it into compliance with this Article and regulations under the supervision of the Commissioner. The expense of such supervision shall be paid by the claimant. Such bond shall be returned to the claimant of the article on representation to the court by the Commissioner that the antifreeze is no longer in violation of this Article, and that the expenses of such supervision have been paid.

(c) A copy of the analysis made by any chemist of the Department of Agriculture and Consumer Services of any antifreeze certified to by him shall be administered as evidence in any court of the State on trial of any issue involving the merits of antifreeze as defined and covered by this Article.

(d) When the Commissioner finds any antifreeze being distributed in violation of any of the provisions of this Article or of any of the rules and regulations duly promulgated and adopted by the Board, he may request, and the person whose name and address appears on the labeling or the person who is primarily responsible for the product must promptly supply to him, the distribution data for such product in this State, so as to assure that violative products are not further distributed herein and that an orderly withdrawal from distribution may be attained where necessary to protect the public interest. (1949, c. 1165; 1975, c. 719, s. 10; 1997-261, s. 109.)

§ 106-579.11. Submission of formula.

When application for a license or permit to sell antifreeze in this State is made to the Commissioner, he may require the applicant to furnish a statement of the formula or contents of such antifreeze, which said statement shall conform to rules and regulations established by the Commissioner; provided, however, that the statement of formula or contents may state the

content of inhibitor ingredients in generic terms if such inhibitor ingredients total less than five percent (5%) by weight of the antifreeze and if in lieu thereof the manufacturer, packer, seller or distributor furnishes the Commissioner with satisfactory evidence, other than by disclosure of the actual chemical names and percentages of the inhibitor ingredients, that the said antifreeze is in conformity with this Article and any rules and regulations promulgated and adopted by the Board. All statements of content, formulas or trade secrets furnished under this section shall be privileged and confidential and shall not be made public or open to the inspection of any person, firm, association or corporation other than the Commissioner. All such statements of contents shall not be subject to subpoena nor shall the same be exhibited or disclosed before any administrative or judicial tribunal by virtue of any order or subpoena of such tribunal unless with the consent of the applicant furnishing such statements to the Commissioner; provided, however, that in emergency situations information may be revealed to physicians or to other qualified persons for use in preparation of antidotes. The disclosure of any such information, except as provided in this section, shall be a Class 2 misdemeanor. (1949, c. 1165; 1975, c. 719, s. 11; 1993, c. 539, s. 806; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-579.12. Violation.

(a) Any person who shall be adjudged to have violated any provision of this Article, or any regulation of the Board adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates any provision of this Article after written notice from the Commissioner, the court may determine that each day during which the violation continued or is repeated constitutes a separate violation subject to the foregoing penalties.

(b) Nothing in this Article shall be construed as requiring the Commissioner to: (i) report for prosecution, or (ii) institute seizure proceedings, or (iii) issue a "stop sale" or "withdrawal from distribution" order, as a result of minor violations of the Article, or when he believes the public interest will best be served by suitable notice of warning in writing to the registrant or the person whose name and address appears on the labeling.

(c) It shall be the duty of each district attorney to whom any violation is reported to cause appropriate proceedings to be instituted and prosecuted in a court of competent jurisdiction without delay.

(d) The Commissioner is hereby authorized to apply for and the court to grant a temporary restraining order and a preliminary or permanent injunction restraining any person from violating or continuing to violate any of the provisions of this Article or any rules or regulations promulgated under the Article notwithstanding the existence of other remedies at law.

(e) Any person adversely affected by an act, order, or ruling made pursuant to the provisions of this Article may within 30 days thereafter bring action in the Superior Court of Wake County for judicial review of such act, order or ruling according to the provisions of Article 33 of Chapter 143 of the General Statutes. (1949, c. 1165; 1973, c. 47, s. 2; 1975, c. 719, s. 12; 1993, c. 539, s. 807; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Article 33 of Chapter 143, referred to in this section, was repealed by Session Laws 1973, c. 1331, s. 2, as amended by Session Laws 1975, c. 69, s. 4. See now § 150B-43 et seq.

§ 106-579.13. Publications.

(a) The Commission [Commissioner] may publish or furnish, upon request, a list of the brands and classes or types of antifreeze inspected by the State Chemist during the fiscal year which have been found to be in accord with this Article and for which a license or permit for sale has been issued.

(b) The Commissioner may cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this Article including the nature of the charge and the disposition thereof.

(c) The Commissioner may also cause to be disseminated such information regarding antifreezes as he deems necessary in the interest of protection of the public. Nothing in this section shall be construed to prohibit the Commissioner from collecting, reporting, and illustrating the results of the investigations of the Department. (1975, c. 719, s. 13.)

§ 106-579.14. Exclusive jurisdiction.

Jurisdiction in all matters pertaining to the distribution, sale and transportation of antifreeze by this Article are vested exclusively in the Board and Commissioner. (1975, c. 719, s. 15.)

Article 52.

Agricultural Development.

§ 106-580. Short title.

This Article may be cited as the "Agricultural Development Act." (1959, c. 1177, s. 1.)

§ 106-581. Intent and purpose.

It is hereby declared to be the intent and purpose of this Article to provide for a plan of assistance to the farmers and other citizens of this State in increasing agricultural income by making available to the various counties of the State the full resources of the Agricultural Extension Service, and other facilities, within the said counties, by means of the Farm and Home Development Program and the Rural Development Program as authorized by Title 7, United States Code, and other existing agricultural agencies. (1959, c. 1177, s. 2.)

§ 106-581.1. Agriculture defined.

For purposes of this Article, the terms "agriculture" and "agricultural" shall refer to the cultivation of soil for production of crops, including but not limited to fruits, vegetables, flowers and ornamental plants, the planting and production of trees and timber, and the raising of livestock, for individual and public use, consumption, and marketing. Further, for purposes of this Article, aquaculture is considered a form of agriculture pursuant to G.S. 106-758. (1991, c. 81, s. 1.)

§ 106-582. Counties authorized to utilize facilities to promote programs.

The several counties of this State are hereby authorized to utilize the facilities of existing extension and other agricultural advisory committees for

the purpose of installing and promoting the Farm and Home Development Program and/or the Rural Development Program, or other program within the purview of this Article, in the said counties; or, the several counties may, within their discretion, with the cooperation of the Agricultural Extension Service, create such new additional committees as may be needed for this purpose. (1959, c. 1177, s. 3.)

§ 106-583. Policy of State; cooperation of departments and agencies with Agricultural Extension Service.

It is declared to be the policy of the State of North Carolina to promote the efficient production and utilization of the products of the soil as essential to the health and welfare of our people and to promote a sound and prosperous agriculture and rural life as indispensable to the maintenance of maximum prosperity. For the attainment of these objectives the North Carolina Department of Agriculture and Consumer Services, the School of Agriculture of North Carolina College and each and every other department and agency of the State of North Carolina is hereby empowered to cooperate with the Agricultural Extension Service and the committees authorized by this Article to provide: Development of new and improved methods of production, marketing, distribution, processing and utilization of plant and animal commodities at all stages from the original producer through to the ultimate consumer; development of present, new, and extended uses and markets for agricultural commodities and by-products as food or in commerce, manufacture or trade; introduction and breeding of new and useful agricultural crops, plants and animals, particularly those plants and crops which may be adapted to utilization in chemical and manufacturing industries; research, counsel and advice on new and more profitable uses of our resources of agricultural manpower, soils, plants, animals and equipment than those to which they are now devoted; methods of conservation, development, and use of land, forest, and water resources for agricultural purposes; guidance in the design, development, and more efficient and satisfactory use of farm buildings, farm homes, farm machinery, including the application of electricity, water and other forms of power; techniques relating to the diversification of farm enterprises, both as to the type of commodities produced, and as to the types of operations performed, on the individual farm; and assistance in appraising opportunities for making fuller use of the natural, human and community resources in the various counties of this State to the end that the income and level of living of rural people be increased. (1959, c. 1177, s. 4; 1997-261, s. 109; 1997-443, s. 11A.118(a).)

Cross References. — For designation of North Carolina State College of Agriculture and Engineering as North Carolina State University at Raleigh, see § 116-2.

Editor's Note. — Session Laws 1997-443, s. 11A.118(a), effective August 28, 1997, purported to substitute "Health and Human Services" for "Human Resources" however this phrase does not appear in this section.

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Cited in Sedman v. Rijdes, 127 N.C. App. 700, 492 S.E.2d 620 (1997).

§ 106-584. Maximum use of existing research facilities.

In effectuating the purposes of this Article, maximum use may be made of existing research facilities owned or controlled by the State of North Carolina or by the federal government and of the facilities of the State and federal extension services. (1959, c. 1177, s. 5.)

§ 106-585. Appropriations by counties; funds made available by Congress.

The several counties of this State are hereby authorized to make such appropriations and expend such funds as shall be necessary to defray any part of the expenses of the programs authorized by this Article, including the salaries of the extension agents, special agents and other necessary personnel, and any funds made available by the Congress of the United States for this purpose may be accepted and used therefor. (1959, c. 1177, s. 6.)

§ 106-586. Authority granted by Article supplementary.

The authority granted by this Article is in addition to that granted to the Extension Service by the Congress of the United States and in no way infringes upon the administrative authority of the director of the Extension Service or the existing policies of the Extension Service. (1959, c. 1177, s. 7.)

§ 106-587. Local appropriations.

Each county and city in this State is authorized to make appropriations for the purposes of this Article and to fund them by levy of property taxes pursuant to G.S. 153A-149 and G.S. 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. (1959, c. 1177, s. 8; 1973, c. 803, s. 10.)

§§ 106-588 through 106-600: Reserved for future codification purposes.

ARTICLE 53.

Grain Dealers.

§ 106-601. Definitions.

(a) "Cash buyer" means any grain dealer who pays the producer, or his representative at the time of obtaining title, possession or control of grain, the full agreed price of such grain in coin or currency, lawful money of the United States, certified checks, cashier's checks or drafts issued by a bank.

(b) "Commissioner" means the North Carolina Commissioner of Agriculture.

(c) "Department" means the North Carolina Department of Agriculture and Consumer Services.

(d) "Grain" as used herein shall be construed to include, but not by way of limitation, corn, wheat, rye, oats, sorghum, barley, mixed grain and soybeans.

(e) "Grain dealer" means any person owning, controlling or operating an elevator, mill, warehouse or other similar structure or truck or tractor-trailer unit or both who buys, solicits for sale or resale, processes for sale or resale, contracts for storage or exchange, or transfers grain of a North Carolina

producer. The term "grain dealer" shall exclude producers or groups of producers buying grain for consumption on their farms.

(f) "Person" means an individual, partnership, corporation, association, syndicate or other legal entity.

(g) "Producer" means the owner, tenant or operator of land in this State who has an interest in and receives all or any part of the proceeds from the sale of the grain produced thereon. (1973, c. 665, s. 1; 1997-261, s. 109.)

OPINIONS OF ATTORNEY GENERAL

Person who hauls grain of producer without transfer of title of the grain is not required to be licensed under this article. See opinion of Attorney General to Mr. James A. Graham, Commissioner of Agriculture, 43 N.C.A.G. 404 (1974).

§ 106-602. License required.

No person shall act or hold himself out as a grain dealer without first having obtained a license as herein provided. (1973, c. 665, s. 2.)

CASE NOTES

Cited in In re Watson Seafood & Poultry Co., 66 Bankr. 635 (Bankr. E.D.N.C. 1986).

§ 106-603. Application for license or renewal thereof.

Every grain dealer before transacting business within the State of North Carolina shall on or before July 1, 1974, and annually on or before June 15 of each year thereafter, file a written application for a license or for the renewal of a license with the Commissioner. The application shall be on a form furnished by the Commissioner and shall contain the following information:

(1) The name and address of the applicant and that of its local agent or agents, if any, and the location of its principal place of business within this State.

(2) The kinds of grain the applicant proposes to handle.

(3) The type of grain business proposed to be conducted. (1973, c. 665, s. 3.)

§ 106-604. License fee; bond required; exemption.

All applications shall be accompanied by an initial or renewal license fee of fifty dollars ($50.00) plus thirty dollars ($30.00) per certificate or decal for each separate buying station or truck and a good and sufficient bond in the amount of ten thousand dollars ($10,000) to satisfy the initial license application. A fee of five dollars ($5.00) shall be charged for each duplicate license, certificate or decal. "Cash buyers" upon written request to the Commissioner showing proof satisfactory to the Commissioner that the person is a "cash buyer" under this Article shall be exempted from bonding requirements hereunder. The exemption shall be granted within 20 days of the receipt of the exemption request or unless the Commissioner requests the dealer to provide additional necessary information or unless the request is denied. (1973, c. 665, s. 4; 1989, c. 544, s. 1.)

§ 106-605. Execution, terms and form of bond; action on bond.

(a) Such bond shall be signed by the grain dealer and by a company authorized to execute surety bonds in North Carolina and shall be made payable to the State of North Carolina. The bond shall be conditioned on the grain dealer's faithful performance of his duties as a grain dealer and his compliance with this Article, and shall be for the use and benefit of any person from whom the grain dealer has purchased grain and who has not been paid by the grain dealer. The bond shall be given for the period for which the grain dealer's license is issued.

(b) Any person claiming to be injured by nonpayment, fraud, deceit, negligence or other misconduct of a grain dealer may institute a suit or suits against said grain dealer and his sureties upon the bond in the name of the State, without any assignment thereof. (1973, c. 665, s. 5; 1979, c. 589, s. 1.)

§ 106-606. Posting of license; decal on truck, etc.

The grain dealer license shall be posted in a conspicuous place in the place of business. In the case of a licensee operating a truck or tractor-trailer unit, the licensee is required to have a decal that the license is in effect and that a bond has been filed, such decal to be carried in each truck or tractor-trailer unit used in connection with the purchase of grain from producers. (1973, c. 665, s. 6.)

§ 106-607. Renewal of license.

Licenses shall be renewed upon application and payment of renewal fees on or before the fifteenth day of June following the date of expiration of any license hereunder issued. Applications received after June 15 of any year shall be subject to a late filing fee of twenty dollars ($20.00) in addition to other applicable fees. (1973, c. 665, s. 7; 1989, c. 544, s. 3.)

§ 106-608. Disposition of fees.

All fees payable under this Article shall be collected by the North Carolina Department of Agriculture and Consumer Services for the administration of this Article. (1973, c. 665, s. 8; 1997-261, s. 109.)

§ 106-609. Records to be kept by dealers; uniform scale ticket.

It shall be the duty of every person doing business as a grain dealer in this State to keep records of grain transactions for reasonable periods of time and in accordance with good business practices.

The Board of Agriculture may, by regulation, require the use of, and prescribe the form of a uniform scale ticket by all grain dealers. (1973, c. 665, s. 9; 1983, c. 482.)

§ 106-610. Grounds for refusal, suspension or revocation of license.

The Commissioner may refuse to grant or renew license, may suspend or may revoke any license upon a showing by substantial and competent evidence that:

(1) The dealer has suffered a final money judgment to be entered against him and such judgment remains unsatisfied; or
(2) The dealer has failed to promptly and properly account and pay for grain; or
(3) The dealer has failed to keep and maintain business records of his grain transactions as required herein; or
(4) The dealer has engaged in fraudulent or deceptive practices in the transaction of his business as a dealer; or
(5) The dealer has failed to collect from a producer and remit to the Commissioner of Agriculture such assessments as have been approved by the producers and are required to be collected under the provisions of Article 50 of Chapter 106 of the General Statutes; or
(6) The dealer or applicant has been convicted, pled guilty or nolo contendere within three years in any state or federal court of a crime involving moral turpitude;
(7) The dealer has failed either to file the required bond or to keep such bond in force. (1973, c. 665, s. 10; 1979, c. 589, s. 2.)

§ 106-611. Procedure for denial, suspension, or revocation of license; effect of revocation.

(a) A denial, suspension, or revocation of a license under this Article shall be made in accordance with Chapter 150B of the General Statutes.

(b) A license may not be suspended for more than one year. A person whose license is revoked may not obtain another license under this Article until at least two years have elapsed from the date of the final decision revoking the license or, if the decision is appealed, from the date of the final judgment sustaining the revocation. (1973, c. 611, s. 11; c. 1331, s. 3; 1987, c. 827, s. 38.)

§ 106-612. Commissioner's authority to investigate.

In furtherance of any such investigation, inspection or hearing, the Commissioner or his duly authorized agent shall have full authority to make any and all necessary investigations relative to the complaint or matter being investigated; and they shall have free and unimpeded access during normal business hours to all buildings, yards, warehouses, storage and transportation facilities in which grain is kept, stored, handled, or transported, or where records of grain transactions are kept. (1973, c. 665, s. 12.)

§ 106-613. Rules and regulations.

The Board of Agriculture may adopt such rules and regulations as may be necessary to carry out the administration and enforcement of this Article. (1973, c. 665, s. 13.)

§ 106-614. Violation a misdemeanor.

Any person who violates any provision of this Article or any rule or regulation of the Board of Agriculture promulgated hereunder shall be guilty of a Class 2 misdemeanor. In case of a continuing violation or violations, each day and each violation occurring constitutes a separate and distinct offense. (1973, c. 665, s. 14; 1993, c. 539, s. 808; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-615. Operation without license unlawful; injunction for violation.

It shall be unlawful for any person to be a grain dealer without securing a license as herein provided. In addition to the criminal penalties provided for

herein, the Commissioner of Agriculture may apply to any superior court judge and the court may temporarily restrain or preliminarily or permanently enjoin any violation of this Article. (1973, c. 665, s. 15.)

§§ 106-616 through 106-620: Reserved for future codification purposes.

Article 54.

Adulteration of Grains.

§ 106-621. Definitions.

For purposes of this Article, the following words or terms shall mean as follows:

(1) Adulterated grain: Grain which contains any substance, such as, but not limited to, Captan, carbon tetrachloride, Malathion, Parathion, DDT, Dieldrin, Thiram, Endrin, Heptachlor, Maneb, Methoxychlor, 2, 6-dichloro, 4- nitroaniline, pentachloronitrobenzene, hexachlorobenzene, Demeton, Phorate, Carbophenothion, in excess of the tolerance for human or animal consumption established for such substances by the laws of the State or the regulations of the North Carolina Department of Agriculture and Consumer Services, or both the State and the Department.

(2) Commissioner: North Carolina Commissioner of Agriculture.

(3) Grain: Corn, soybeans, milo, barley, oats, rye, and mixtures of them.

(4) Grain dealer: Any person owning, controlling or operating an elevator, mill, warehouse or other similar structure or truck or tractor-trailer unit or both who buys, solicits for sale or resale, processes for sale or resale, contracts for storage or exchange or transfers grain after obtaining title to the grain of a North Carolina producer. The term "grain dealer" shall exclude producers, groups of producers, or contract feeders buying grain for consumption in their operations.

(5) Person: Any individual, partnership, corporation, association, syndicate or other legal entity. (1975, c. 659, s. 1; 1997-261, s. 109.)

§ 106-622. Prohibited acts.

It shall be unlawful for any person to commit a prohibited act under G.S. 106-122 with adulterated grain as defined in this Article and as the particular grain qualifies as adulterated food under G.S. 106-129. (1975, c. 659, s. 2.)

§ 106-623. Penalty.

Any person violating the provisions of this Article shall be subject to the provisions of G.S. 106-123, 106-124 and 106-125. (1975, c. 659, s. 3.)

§ 106-624. Sign furnished by Commissioner.

It shall be the duty of the Commissioner to cause to be prepared and furnished for a fee of ten dollars ($10.00) each to all grain dealers, as defined in this Article, in the State a sign not less than 11 x 15 inches, which shall contain information that it is a violation of law for any person to sell, offer for sale or deliver adulterated grain. Said sign shall also set out the penalties for violation of this Article. Duplicate signs, and replacement for signs lost, stolen,

worn or otherwise unusable, shall be purchased from the Department of Agriculture and Consumer Services for a fee of five dollars ($5.00) per sign. (1975, c. 659, s. 4; 1989, c. 544, s. 2; 1997-261, s. 109.)

§ 106-625. Posting of sign.

It shall be the duty of the owner, manager, or person in charge of the elevator, mill, warehouse or other similar structure to post in a conspicuous place, in view of the public, a sign or signs furnished to the grain dealer by the Commissioner pursuant to this Article. (1975, c. 659, s. 5.)

§ 106-626. Nonposting not a defense.

It shall not be a defense to a prosecution under this Article that the sign required to be posted by G.S. 106-625 hereof was not posted on the date of the alleged violation. (1975, c. 659, s. 6.)

§ 106-627. Determination of adulteration.

For purposes of evidence under this Article, the grain dealer or his agent, upon receipt or pending receipt of suspected adulterated grain, may, at his discretion, call any law-enforcement officer to verify the sampling technique, [and] origin of sampled grain and subsequently send or request the law-enforcement officer to send the sample of grain in a sealed package to the Department of Agriculture and Consumer Services for inspection and analysis in order to protect only the chain of evidence.

Upon [a] finding by the Department that said sample is adulterated grain, the Department shall notify the grain dealer of the results and return the sample to the original sender in a sealed package. (1975, c. 659, s. 7; 1997-261, s. 66.)

§ 106-628. Applicability of Article.

The terms of this Article shall not apply to grain sold, offered for sale or delivered for purposes of planting. (1975, c. 659, s. 8.)

§§ 106-629 through 106-633: Reserved for future codification purposes.

Article 55.

North Carolina Bee and Honey Act of 1977.

§ 106-634. Declaration of policy.

The General Assembly hereby declares that it is in the public interest to promote and protect the bee and honey industry in North Carolina and to authorize the Commissioner of Agriculture and the Board of Agriculture to perform services and conduct activities to promote, improve, and enhance the bee and honey industry in North Carolina particularly relative to small beekeepers; to regulate all bees of the superfamily *Apoidea* in any stage of development; the causal agents of their disease or disorders, and their pests; to protect the bee and honey industry in North Carolina from bee diseases and disorders and to provide regulatory services in the areas of pollination of

plants, honeybee poisonings, thefts, bee management and marketing. (1977, c. 238, s. 1.)

Cross References. — As to the aerial application of pesticides which are toxic to bees, see § 143-443.

§ 106-635. Definitions.

As used in this Article:

(1) The term "apiary" means bees, comb, hives, appliances, or colonies, wherever they are kept, located, or found.

(2) The term "bee(s)" means insects of the superfamily *Apoidea;* in particular, the honeybees, *Apis mellifera* (L). It includes all life stages of such insects, their genetic material, and dead remains.

(3) The term "beeyard" means a location or site where bees are located in hives.

(4) The term "Board" means the North Carolina Board of Agriculture.

(5) The term "Brazilian or African bee" means bees of the subspecies *Apis mellifera Adansonii* and their progeny.

(6) The term "colony" means one hive and its contents, including bees, comb, and appliances.

(7) The term "comb" includes all materials which are normally deposited into hives by bees. It does not include extracted honey or royal jelly, trapped pollen, and processed beeswax.

(8) The term "commercial beekeeper" means a beekeeper who owns or operates 200 or more colonies of bees, or a beekeeper who moves bees across state lines.

(9) The term "Commissioner" means the North Carolina Commissioner of Agriculture or his designated agents.

(10) The term "Department" means the North Carolina Department of Agriculture and Consumer Services.

(11) The term "disease" means any infectious disease, parasite, or pest that detrimentally affects bees.

(12) The term "disorder" means any disease, poisoning, pest, parasite, or predator damage, toxic substance injury, or undesirable trait or genetic strain of the bee that detrimentally affects bees or the bee and honey industry.

(13) The term "exposed" means having been in circumstances where the possibility of infection or damage by a disease or disorder occurred. Bees in an apiary where disease or disorder is present or where there has been an exchange of equipment with a diseased apiary may be considered exposed.

(14) The term "health certificate" means a statement issued by the State Entomologist certifying that bees or regulated articles are apparently free of disease or disorder based on an inspection or freedom from exposure to disease or disorder.

(15) The term "hive" means any receptacle or container, or part of receptacle or container, which is made or prepared for the use of bees, or which is inhabited by bees.

(16) The term "honey" means for the purpose of defining honey as a regulated article in the control of bee diseases or disorders, the natural food product made by the honeybees from the nectar of flowers, the saccharine exudation of plants, honeydew, sugar, corn syrup, or any other material along with any adulterants.

(17) The term "honeybees" means honey-producing insects of the genus *Apis.*

(18) The term "honeyflow" means the seasonal yielding of nectar by honey plants.
(19) The term "honey plants" means blooming plants from which bees gather nectar or pollen.
(20) The term "infested or infected" means showing symptoms of or having been exposed to the causal agent of a bee disease or disorder to such a degree that there is a possibility of the infected organisms or material transmitting the disease or disorder to other bees.
(21) The term "moveable frame hive" means any hive where the frames can be removed without damaging the comb.
(22) The term "permit" means an authorization to allow movement or other action involving bees or regulated articles.
(23) The term "regulated article" means any bees, bee equipment, comb, beeswax, honey, pollen, causal agents of disease, toxic substances, products of the hive, containers, and any other item regulated under this Article or pursuant regulations.
(24) The term "symptomless carrier" means to possess or bear a disease or disorder in a suppressed state having the potential for spreading the disease or disorder. (1977, c. 238, s. 2; 1997-261, s. 67.)

§ 106-636. Powers and duties of Commissioner generally.

The Commissioner shall promote the bee and honey industry in North Carolina. The Commissioner may perform services, cooperate in research activities, conduct investigations, publish information and cooperate with the beekeeping industry to protect and improve beekeeping in North Carolina. He may work toward enhancing honey plants and improving honeybees. He may investigate thefts of honeybees, equipment or products; cooperate in preventative measures; and assist in prosecution of suspects. (1977, c. 238, s. 3.)

§ 106-637. Authority of Board to accept gifts, enter contracts, etc.

The Board is authorized to accept gifts, grants, or donations from any source for the purpose of promoting and protecting the bee and honey industry. The Board is authorized to issue grants or enter contracts or agreements for the furtherance of the purpose of this Article. (1977, c. 238, s. 4.)

§ 106-638. Authority of Board to adopt regulations, standards, etc.

The Board may adopt regulations and set procedures for the purpose of carrying out the provisions of this Article. The Board may adopt minimum standards for colony strength and disease tolerance levels for hives rented for pollination of crops, and the Commissioner shall certify hives meeting those standards. The Board may adopt regulations to regulate or prohibit entrance into North Carolina of bees or regulated articles to protect the bee and honey industry from bee diseases, disorders, overcrowding of honey pasture, or other encroachments deemed by the Board not to be in the best interest of the beekeepers of North Carolina. The Board may adopt regulations relating to, but shall not be limited to, providing for inspection of bees; and surveying and developing regulations to control, eradicate, abate, prevent exposure to, or prevent the introduction of or movement into or within North Carolina of bee diseases, disorders, pests or enemies of bees; or products that are a threat to beekeeping in North Carolina. The diseases, disorders, and products regulated shall include, but not be confined to bee diseases, poisons, bee pests, pollen,

causal agents of disease, bee parasites and predators and toxic substances. The Board may regulate undesirable species or strains of bees including but not limited to Brazilian or African strains of bees. Regulations may include articles, exposed to infection or infestation, bees, honey, honeycomb, beeswax, beeswax refuse, royal jelly, containers, and beekeeping equipment to include sale, exposure and shipment of said and like items. The Board may adopt regulations governing beeyards or sites of commercial beekeepers. The Board is authorized to adopt regulations and set fees for extra or special inspections, issuance of certificates, permits, registrations, and regulatory activities. (1977, c. 238, s. 5.)

Cross References. — As to the aerial application of pesticides which are toxic to bees, see § 143-443.

§ 106-639. Regulations for control and prevention of diseases and disorders.

The Board may adopt regulations and procedures for the disposition of bees infected or infested with diseases or disorders, beekeeping equipment, and other regulated articles kept or moved in violation of this Article and pursuant regulations. Such regulations may authorize the Commissioner to quarantine, destroy, confiscate, or otherwise dispose of, eradicate, establish cleanup areas, and require owners to disinfect, fumigate, treat with drugs, or destroy bees or articles at their own expense or to take measures to eradicate bee diseases or disorders.

The Board shall have authority to either allow, require, or forbid use of drugs in the control of bee diseases or disorders, and may define as infested or infected symptomless carriers of a disease or disorder, declare bees that have been treated with disease-masking drugs to be infested or infected, and consider bees or articles which have been exposed to a disease or disorder to be infected or infested.

The Board may also adopt regulations governing beeswax salvage operations and honey house sanitation for disease prevention. (1977, c. 238, s. 6.)

§ 106-639.1. Permit to sell bees.

Prior to selling bees in North Carolina, a person shall obtain a permit from the Commissioner. Application for the permit shall be made on a form provided by the Commissioner, and shall be accompanied by a nonrefundable fee of twenty-five dollars ($25.00). The Commissioner may deny, suspend, or revoke a permit for any violation of this Article or rules adopted to implement the Article. Permits shall expire annually on December 31 and may be renewed upon payment of a fee of twenty-five dollars ($25.00). All proceedings concerning the denial, suspension, or revocation of a permit shall be conducted in accordance with the Administrative Procedure Act, Chapter 150B of the General Statutes. No permit shall be required for (i) the sale of less than 10 bee hives in a calendar year, (ii) a one-time going-out-of-business sale of less than 50 bee hives, or (iii) the renting of bees for pollination purposes or the movement of bees to gather honey. (1991, c. 349, s. 1.)

§ 106-640. Authority of Commissioner to protect industry from diseases and disorders, etc.

The Commissioner shall protect the bee and honey industry from diseases and disorders of the honeybee (*Apis mellifera*) and other insects in the

superfamily (*Apoidea*) and shall provide services and enforce provisions of this Article and pursuant regulations. The Commissioner may adopt regulations for prohibiting or regulating the movement of bees and regulated articles into and from quarantine or cleanup areas and enforce procedures for control and cleanup of diseases or disorders in such areas.

The Commissioner is authorized to establish post-entry quarantines and issue hold orders for inspection of bees or regulated articles imported into North Carolina. (1977, c. 238, s. 7.)

§ 106-641. Giving false information to Commissioner; hives; certificates, permits, etc.

It is unlawful to knowingly give false information to the Commissioner concerning diseased bees or bees exposed to disease, their treatment, or disposition.

The Commissioner may require that bees be kept in moveable frame hives and be maintained in an inspectable condition or in other hives where an inspection for disease or disorder can be readily made.

The Board may adopt regulations for issuance of health certificates, moving permits, and the registration of honeybees and may require marking or identification of honeybee colonies or apiaries. (1977, c. 238, s. 8.)

§ 106-642. Emergency action by Commissioner.

The Commissioner may take emergency action with respect to Board authority in the provisions of this Article if needed to protect the bee and honey industry in North Carolina. Such action shall remain in force until rescinded by the Commissioner or acted on by the Board. (1977, c. 238, s. 9.)

§ 106-643. Designation of persons to administer Article; inspections, etc.

The Commissioner shall have the authority to designate such employees of the Department or persons collaborating with the Department as may seem expedient to carry out the duties and exercise the powers provided by this Article. The Commissioner is authorized to survey or inspect premises for the presence of bees or other regulated articles, inspect colonies for bee diseases and disorders, and otherwise enforce the provisions of this Article and pursuant regulations. The Commissioner or his designated agent shall have authority to inspect vehicles or other means of transportation and their cargo suspected of carrying bees or regulated articles, and enter upon any premises to inspect any bees or regulated articles to determine the presence or absence of diseases or disorders.

Such inspections and other activities may be conducted with the permission of the owner or person in charge. If permission is denied the Commissioner or his designated agent, such inspections and other activities may be conducted in a reasonable manner, with a warrant, with respect to any premises or vehicles. Such warrant shall be issued pursuant to Article 4A of Chapter 15. A superior court or district court judge may issue confiscation orders on any bees or articles for which confiscation is authorized in this Article or pursuant regulations. (1977, c. 238, s. 10.)

§ 106-644. Penalties.

(a) If anyone shall attempt to prevent inspection as provided in this Article or shall otherwise interfere with the Commissioner of Agriculture, or any of his

agents, while engaging in the performance of his duties under this Article, or shall violate any provisions of this Article or any regulation of the Board of Agriculture adopted pursuant to this Article, he shall be guilty of a Class 3 misdemeanor. Each day's violation shall constitute a separate offense.

(b) The Commissioner may assess a civil penalty of not more than ten thousand dollars ($10,000) against a person who violates this Article or a rule adopted to implement this Article. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation. No civil penalty may be assessed under this section unless the person has been given the opportunity for a hearing pursuant to the Administrative Procedure Act, Chapter 150B of the General Statutes. If not paid within 30 days after the effective date of a final decision by the Commissioner, the penalty may be collected by any lawful means for the collection of a debt.

The clear proceeds of civil penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1977, c. 238, s. 11; 1991, c. 349, s. 2; 1993, c. 539, s. 809; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 20.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph of subsection (b).

§§ 106-645 through 106-654: Reserved for future codification purposes.

ARTICLE 56.

North Carolina Commercial Fertilizer Law.

§ 106-655. Short title.

This Article shall be known as the "North Carolina Commercial Fertilizer Law." (1977, c. 303, s. 1.)

Editor's Note. — Session Laws 1977, c. 303 repealed the North Carolina Fertilizer Law of 1947, Article 2 of Chapter 106, and enacted this Article. Where appropriate, the historical citations to the repealed Article have been placed under the sections of this Article.

CASE NOTES

Cited in Barber v. Continental Grain Co., 124 N.C. App. 310, 477 S.E.2d 77 (1996).

§ 106-656. Purpose of Article.

The purpose of this Article shall be to assure the manufacturer, distributor, and consumer of the correct quality and quantity of all commercial fertilizer sold in this State, and to assure the safe handling of fluid fertilizers. (1977, c. 303, s. 2.)

§ 106-657. Definitions.

When used in this Article:

(1) The term "brand name" means the name under which any individual mixed fertilizer or fertilizer material is offered for sale, and may

include a trademark, but shall not include any numeral other than the grade of the fertilizer.

(2) The term "bulk fertilizer" means a commercial fertilizer distributed in non-package form.

(3) The term "commercial fertilizer" includes both fluid and dry mixed fertilizer and/or fertilizer materials.

(4) The term "contractor" means any person, firm, corporation, wholesaler, retailer, distributor or any other person, who for hire or reward applies commercial fertilizer to the soil or crop of a consumer; provided, that this shall not apply to any consumer applying commercial fertilizer to only the land or crop that he owns or to which he otherwise holds rights, for the production of his own crops.

(5) The term "distributor" means any person who offers for sale, sells, barters, or otherwise supplies mixed fertilizer or fertilizer materials.

(6) The term "fertilizer material" means any substance containing either nitrogen, phosphorus, potassium, or any other recognized plant food element or compound which is used primarily for its plant food content or for compounding mixed fertilizers. Not included in this definition are all types of unmanipulated animal and vegetable manures and mulches for which no plant food content is claimed.

(7) The term "fluid fertilizer" means a nonsolid commercial fertilizer.

(8) The term "fortified mulch" means substances composed primarily of plant remains or mixtures of such substances to which plant food has been added and for which plant food is claimed.

In "fortified mulches" the minimum percentages of total nitrogen, available phosphate and soluble or available potash are to be guaranteed and the guarantee stated in multiples of quarter (.25) percentages; provided, however, that such percentages shall not exceed one percent (1%), respectively, subject to the same limits and tolerances set forth in this Chapter.

(9) The term "grade" means the percentage of total nitrogen, available phosphate and soluble potash only stated in the order given in this subdivision, and, when applied to mixed fertilizers, shall be in whole numbers only for all packages larger than 16 ounces.

(10) The term "manipulated manures" means substances composed primarily of excreta, plant remains or mixtures of such substances which have been processed in any manner, including the addition of plant foods, artificially drying, grinding and other means.

In "manipulated manures" the minimum percentages of total nitrogen, available phosphate and soluble potash are to be guaranteed, and the guarantee stated in multiples of half (.50) percentages. Additions of plant food shall be limited to one-half (.50) percent each of nitrogen, phosphorus and potash.

(11) The term "manufacturer" means a person engaged in the business of preparing, mixing, or manufacturing commercial fertilizers or the person whose name appears on the label as being responsible for the guarantee. The term "manufacture" means preparing, mixing, or combining fertilizer materials chemically or physically, including the simultaneous application of two or more fertilizer materials, by a manufacturer or contract applicator.

(12) The term "mixed fertilizers" means products resulting from the combination, mixture, or simultaneous application of two or more fertilizer materials for use in, or claimed to have value in promoting plant growth.

(13) The term "mulch" means substances composed primarily of plant remains or mixtures of such substances to which no plant food has been added and for which no plant food is claimed.

(14) The term "natural organic fertilizer" means material derived from either plant or animal products containing one or more elements (other than carbon, hydrogen and oxygen) which are essential for plant growth. These materials may be subjected to biological degradation processes under normal conditions of aging, rainfall, sun-curing, air drying, composting, rotting, enzymatic, or anaerobic/aerobic bacterial action, or any combination of these. These materials shall not be mixed with synthetic materials, or changed in any physical or chemical manner from their initial state except by physical manipulations such as drying, cooking, chopping, grinding, shredding or pelleting.

(15) The term "official sample" means any sample of commercial fertilizer taken by the Commissioner or his authorized agent according to the method prescribed in subsection (b) of G.S. 106-662.

(16) The term "organic fertilizer" means a material containing carbon and one or more elements other than hydrogen and oxygen essential for plant growth.

(17) The term "percent" or "percentage" means the percentage by weight.

(18) The term "person" includes individuals, partnerships, associations, firms, agencies, and corporations, or other legal entity.

(19) The term "retailer" means any person who sells or delivers fertilizer to a consumer.

(20) The term "sale" means any transfer of title or possession, or both, exchange or barter of tangible personal property, conditional or otherwise for a consideration paid or to be paid, and this shall include any of said transactions whereby title or ownership is to pass and shall further mean and include any bailment, loan, lease, rental or license to use or consume tangible personal property for a consideration paid in which possession of said property passes to the bailee, borrower, lessee, or licensee.

(21) The term "sell" means the alienation, exchange, transfer or contract for such transfer of property for a fixed price in money or its equivalent.

(22) The term "specialty fertilizer" means any fertilizer distributed primarily for use on noncommercial crops such as gardens, lawns, shrubs, flowers, golf courses, cemeteries and nurseries.

(23) The term "ton" means a net ton of two thousand pounds avoirdupois.

(24) The term "unmanipulated manures" means substances composed primarily of excreta, plant remains or mixtures of such substances which have not been processed in any manner.

(25) The term "wholesaler" shall mean any person who sells to any other person for the purpose of resale, and who also may sell to a consumer.

(26) Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular.

(27) The term "fertilizer coated seed" means seed which has been coated with commercial fertilizer. (1947, c. 1086, s. 3; 1951, c. 1026, ss. 1, 2; 1955, c. 354, s. 1; 1959, c. 706, ss. 1, 2; 1961, c. 66, ss. 1, 2; 1977, c. 303, s. 3; 1981, c. 448, ss. 1-4; 1983, c. 146, s. 1; 1993, c. 216, s. 3.)

CASE NOTES

Official Sample. — Nitrogen content sample, which was obtained from a storage tank on plaintiffs' farm some time following delivery of nitrate solution, was not obtained from an approved source under the Commissioner's rule and did not comply with the manner approved by the Commissioner. Barber v. Continental Grain Co., 124 N.C. App. 310, 477 S.E.2d 77 (1996).

§ 106-658. Enforcing official.

This Article shall be administered by the Commissioner of Agriculture of the State of North Carolina, or his authorized agent, hereinafter referred to as the "Commissioner." (1947, c. 1086, s. 2; 1977, c. 303, s. 4.)

CASE NOTES

Cited in Barber v. Continental Grain Co., 124 N.C. App. 310, 477 S.E.2d 77 (1996).

§ 106-659. Minimum plant food content.

Superphosphate containing less than eighteen percent (18%) available phosphate, or any mixed fertilizer in which the guarantees for the nitrogen, available phosphate, or soluble potash are in fractional percentages shall not be offered for sale, sold, or distributed in this State; provided, however, packages of 16 fluid ounces or less when in liquid form, or 16 ounces or less avoirdupois when in a dry form, may be sold in fractional percentages, but such packages are not exempt from any other requirements of this Article. (1947, c. 1086, s. 10; 1951, c. 1026, s. 7; 1973, c. 611, s. 6; 1975, c. 126; 1977, c. 303, s. 5; 1983, c. 146, s. 4; 1987, c. 292, s. 1; 1993, c. 216, s. 4.)

§ 106-660. Registration of brands; licensing of manufacturers and distributors; fluid fertilizers.

(a) Each brand of commercial fertilizer for tobacco, specialty fertilizer, fertilizer materials, manipulated manure and fortified mulch shall be registered by the person whose name appears upon the label before being offered for sale, sold or distributed in this State, except those brands expressly produced for experimental and demonstration purposes only. Other fertilizers may be manufactured and sold without registration after obtaining a license as required in G.S. 106-661(a). The application for registration shall be submitted in duplicate to the Commissioner for his approval on forms furnished by the Commissioner, and shall include a fee of five dollars ($5.00) per brand and grade for all packages greater than five pounds. The registration fee for packages of five pounds or less shall be thirty dollars ($30.00). All approved registrations expire on June 30 of each year. The application shall include such information as deemed necessary by the Board of Agriculture.

(b) The distributor of any brand and grade of commercial fertilizer shall not be required to register the same if it has already been registered under this Article by a person entitled to do so and such registration is then outstanding.

(c) The grade of any brand of mixed fertilizer shall not be changed during the registration period, but the guaranteed analysis may be changed in other respects and the sources of materials may be changed: Provided, prompt notification of such change is given to the Commissioner and the change is noted on the container or tag: Provided, further, that the guaranteed analysis shall not be changed if it, in any way, lowers the quality of the fertilizer: Provided, further, that if at a subsequent registration period, the registrant desires to make any change in the registration of a given brand and grade of fertilizer, said registrant shall notify the Commissioner of such change 30 days in advance of such registration. If the Commissioner, after consultation with the director of the agricultural experiment station decides that such change materially lowers the crop producing value of the fertilizer, he shall notify the registrant of his conclusions, and if the registrant registers the brand and grade with the proposed changes, then the Commissioner shall give due

publicity to said changes through the Agricultural Review or by such other means as he may deem advisable.

(d) Any person desiring to manufacture or distribute fertilizers not required to be registered shall first secure a license. Application for said license shall be made on forms provided by the Commissioner and shall be accompanied by a reasonable fee to be determined by the Board of Agriculture. The Board shall charge a maximum of one hundred dollars ($100.00) for said license. Said license shall be renewable annually on the first day of July. Said license may be suspended, revoked or terminated for a violation of this Article or any rule promulgated thereunder.

(e) When fluid fertilizer is offered for sale or sold in this State, the method of transfer of custody shall be by weight expressed in pounds, and shall be invoiced in such a manner as to show the name of the seller, the name of the purchaser, the date of sale, the grade, and the net weight; provided, however, that fluid fertilizer may be measured in gallons of 231 cubic inches and its equivalent expressed in pounds, with a formula for converting from gallons to pounds shown on the invoice.

(f) Repealed by Session Laws 1983, c. 146, s. 2.

(g) Before any anhydrous ammonia installation shall be built in this State, a general layout of such installation shall be submitted in duplicate and approved by the Commissioner. In order that such a layout may be approved it must conform to the minimum standards and rules and regulations, relating to safe handling, storage, distribution and/or application adopted by the Board of Agriculture. All storage tanks, transfer or transport containers, applicator containers, and attached equipment shall conform to the minimum standards adopted by the Board of Agriculture. It shall be the duty of the contractors referred to in G.S. 106-657(4) to obtain, maintain and operate in accordance with the minimum standards and rules and regulations adopted by the Board of Agriculture, any and all equipment which he may use in the application of anhydrous ammonia. It shall be the duty of the Commissioner to inspect and ascertain whether or not the provisions of this section are complied with. (1947, c. 1086, s. 4; 1949, c. 637, s. 1; 1951, c. 1026, ss. 3-6; 1959, c. 706, ss. 3-5; 1961, c. 66, ss. 3, 4; 1973, c. 611, ss. 1-4; 1977, c. 303, s. 6; 1981, c. 448, ss. 5, 6; 1983, c. 146, ss. 2, 3; 1987, c. 292, s. 2; 1989, c. 544, s. 5.)

§ 106-661. Labeling.

(a) Any commercial fertilizer offered for sale, sold, or distributed in this State in bags, barrels, or other containers shall have placed on or affixed to the container the net weight and the data in written or printed form, required by G.S. 106-660(a), either (i) on tags to be affixed to the end of the package or (ii) directly on the package. In case the brand name appears on the package, the grade shall also appear on the package, immediately preceding the guaranteed analysis or as a part of the brand name. The size of the type of numerals indicating the grade on the containers shall not be less than two inches in height for containers of 100 pounds or more; not less than one inch for containers of 50 to 99 pounds; and not less than ½ inch for packages of 25 to 49 pounds. On packages of less than 25 pounds, the grade must appear in numerals at least one half as large as the letters in the brand name. In case of fertilizers sold in containers on which the brand name or other designations of the distributor do not appear, the grade must appear in a manner prescribed by the Commissioner on tags attached to the container.

(b) If transported in bulk, the net weight and the data, in written or printed form, as required by G.S. 106-660(a), shall accompany delivery and be supplied to the purchaser.

(c) If mixed fertilizer is sold or intended to be sold in bags weighing more than 100 pounds, each bag must have a tag attached thereto, of a type

approved by the Commissioner, showing the grade of the fertilizer contained therein. Such tag must be attached on the end of each bag, approximately at the center of the sewed end of the bag: Provided, that in lieu of such tag the grade of the fertilizer may be printed on the end of the bag in readily legible numerals.

(d) All labels and registrations shall carry identical guarantees for each fertilizer product requiring registration. (1947, c. 1086, s. 5; 1949, c. 637, s. 2; 1955, c. 354, s. 2; 1975, c. 127; 1977, c. 303, s. 7; 1981, c. 448, s. 7; 1989, c. 770, s. 28.)

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under prior law.*

Warranty of Contents. — Manufacturers and vendors of commercial fertilizers impliedly warrant that they contain the ingredients specified on the tags placed on the bags, according to the requirements of the statute. Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141 (1926).

Compliance with Statute Warranted. — When plaintiffs, as manufacturers, dealers or agents, sold commercial fertilizers to defendant, they would be held to have warranted that they had complied with the statute, and that the articles delivered as commercial fertilizers were truthfully branded as required by the statute. Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 453 (1925).

Note for Purchase Price of Fertilizers Not Complying with Statute. — If the contents of the bags or packages delivered to defendant by plaintiffs were not in fact commercial fertilizers of the analysis guaranteed on each bag or package, as required, there was no consideration for the note given for the purchase price of the articles bought by defendant, and plaintiffs were not entitled to recover on said note. Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 453 (1925).

The rule of caveat emptor, as applied at common law in the sale of articles of personal property, is not applicable to the sale of commercial fertilizers in this State. Swift & Co. v. Etheridge, 190 N.C. 162, 129 S.E. 453 (1925); Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141 (1926).

The burden of proof is upon the manufacturer to show, in an action against a purchaser for the purchase price, that the goods were at least merchantable, and that the ingredients used in their manufacture were in accordance with the specifications upon the tags placed on the bags under the requirements of the statute. Swift & Co. v. Aydlett, 192 N.C. 330, 135 S.E. 141 (1926).

A waiver by the purchaser of any demand for damages on account of any deficiencies in the ingredients of fertilizers, except such as may be ascertained in the manner specified in the statute, is valid and enforceable. Armour Fertilizer Works v. Aiken, 175 N.C. 398, 95 S.E. 657 (1918).

§ 106-662. Sampling, inspection and testing.

(a) It shall be the duty of the Commissioner to sample, inspect, make analysis of, and test commercial fertilizers offered for sale, sold, or distributed within the State at such time and place and to such an extent as he may deem necessary to determine whether such commercial fertilizers are in compliance with the provisions of this Article. The Commissioner is authorized with permission or under court warrant to enter upon any public or private premises during regular business hours or at any time business is being conducted therein in order to have access to commercial fertilizers subject to the provisions of this Article and the rules and regulations thereto.

(b) The methods of sampling shall be as follows:

(1) For the purposes of analysis by the Commissioner and for comparison with the guarantee supplied to the Commissioner in accordance with G.S. 106-660 and 106-661, the Commissioner, shall take an official sample of not less than one pound from containers of commercial fertilizer. No sample shall be taken from less than five containers. Portions shall be taken from containers as shown in the following table:

5 to 10 containers	all containers
11 to 20 containers	10 containers
21 to 40 containers	15 containers
above 40 containers	20 containers

Ten cores from bulk lots or as specified by the Association of Official Analytical Chemists (A.O.A.C.).

(2) A core sampler shall be used that removes a core from a bag or other container in a horizontal position from a corner to the diagonal corner at the other end of the package, and the cores taken shall be mixed, and if necessary, shall be reduced after thoroughly mixing, to the quantity of sample required. The composite sample taken from any lot of commercial fertilizer under the provisions of this subdivision shall be placed in a tight container and shall be forwarded to the Commissioner with proper identification marks.

(3) The Board of Agriculture may modify the provisions of this subsection to bring them into conformity with any changes that may hereafter be made in the official methods of and recommendations for sampling commercial fertilizers which shall have been adopted by the Association of Official Analytical Chemists or by the Association of American Plant Food Control Officials. Thereafter, such methods and recommendations shall be used in all sampling done in connection with the administration of this Article in lieu of those prescribed in subdivisions (1) and (2) of this subsection.

(4) All samples taken under the provisions of this section shall be taken from original unbroken bags or containers, the contents of which have not been damaged by exposure, water or otherwise; provided, that any commercial fertilizer offered for sale, sold or distributed in bulk may be sampled in a manner approved by the Commissioner.

(5) The Commissioner shall refuse to analyze all samples except those taken under the provisions of this section and no sample, unless so taken, shall be admitted as evidence in the trial of any suit or action wherein there is called into question the value or composition of any lot of commercial fertilizer distributed under the provisions of this Article.

(6) In the trial of any suit or action wherein there is called in question the value or composition of any lot of commercial fertilizer, a certificate signed by the fertilizer chemist and attested with the seal of the Department of Agriculture and Consumer Services, setting forth the analysis made by the chemist of the Department of any sample of said commercial fertilizer, drawn under the provisions of this section and analyzed by them under the provisions of the same, shall be prima facie proof that the lot of fertilizer represented by the sample was of the value and constituency shown by said analysis. And the said certificate of the chemist shall be admissible in evidence.

(c) The methods of analysis shall be those adopted as official by the Board of Agriculture and shall conform to sound laboratory practices as evidenced by methods prescribed by the Association of Official Analytical Chemists of the United States. In the absence of methods prescribed by the Board, the Commissioner shall prescribe the methods of analysis.

(d) The result of official analysis of any commercial fertilizer which has been found to be subject to penalty shall be forwarded by the Commissioner to the registrant at least 10 days before the report is submitted to the purchaser. If, during that period, no adequate evidence to the contrary is made available to the Commissioner, the report shall become official. Upon request the Commissioner shall furnish to the registrant a portion of any sample found subject to penalty.

(e) Any purchaser or consumer may take and have a sample of mixed fertilizer or fertilizer material analyzed for available plant food, if taken in accordance with the following rules and regulations:

(1) At least five days before taking a sample, the purchaser or consumer shall notify the manufacturer or seller of the brand in writing, at his permanent address, of his intention to take such a sample and shall request the manufacturer or seller to designate a representative to be present when the sample is taken.

(2) The sample shall be drawn in the presence of the manufacturer, seller, or representative designated by either party together with two disinterested adult persons; or in case the manufacturer, seller, or representative of either refuses or is unable to witness the drawing of such a sample, a sample may be drawn in the presence of three disinterested adult persons; provided, any such sample shall be taken with the same type of sampler as used by the inspector of the Department of Agriculture and Consumer Services in taking samples and shall be drawn, mixed, and divided, as directed in subdivisions (1), (2), (3), and (4) of subsection (b) of this section, except that the sample shall be divided into two parts each to consist of at least one pound. Each of these is to be placed into a separate, tight container, securely sealed, properly labeled, and one sent to the Commissioner for analysis and the other to the manufacturer. A certificate statement in a form which will be prescribed and supplied by the Commissioner must be signed by the parties taking and witnessing the taking of the sample. Such certificate is to be made and signed in duplicate and one copy sent to the Commissioner and the other to the manufacturer or seller of the brand sampled. The witnesses of the taking of any sample, as provided for in this section, shall be required to certify that such sample has been continuously under their observation from the taking of the sample up to and including the delivery of it to an express agency, a post office or to the office of the Commissioner.

(3) Samples drawn in conformity with the requirements of this section shall have the same legal status in the courts of the State, as those drawn by the Commissioner or any official inspector appointed by him as provided for in subsection (b) of this section.

(4) No suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought unless it shall be shown by an analysis of a sample taken and analyzed in accordance with the provisions of this Article, that the said lot of fertilizer as represented by a sample or samples taken in accordance with the provisions of this section does not conform to the provisions of this Article with respect to the composition of the mixed fertilizer or fertilizer material, unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question has, in the manufacture of other goods offered in this State during such season, employed such ingredients as are prohibited by the provisions of this Article, or unless it shall appear to the Commissioner that the manufacturer of such fertilizer has offered for sale during that season any kind of dishonest or fraudulent goods or unless it shall appear to the Commissioner that the manufacturer of the fertilizer in question, or a representative, agent or employee of the manufacturer, has violated any provisions of G.S. 106-663. (1947, c. 1086, s. 7; 1955, c. 354, s. 3; 1973, c. 1304, s. 1; 1977, c. 303, s. 8; 1981, c. 448, s. 8; 1997-261, ss. 68, 69.)

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under prior law.*

This section does not apply to actions for damages for breach of an express warranty of fitness of the fertilizer for the purposes for which it was warranted. Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974).

When a litigant alleges that his losses are the result of false statements concerning fertilizer which constitute an express warranty of fitness, he is not required to comply with the provisions of this section. Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974).

It is impossible for any farmer suffering damages from the breach of an express warranty of fitness to satisfy the requirements of this statute. Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974).

But Does Apply to Action for Breach of Implied Warranty. — An action to recover damages for breach of implied warranty is in essence an action based on the inherent defects of the goods and is within the scope of this section. Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974).

Section 25-2-315 does not repeal or limit the scope of subdivision (e) (4) of this section, since § 25-2-102 provides that the Uniform Commercial Code does not "impair or repeal any statute regulating sales to ... farmers." Potter v. Tyndall, 22 N.C. App. 129, 205 S.E.2d 808 (1974).

Nitrogen content sample, which was obtained from a storage tank on plaintiffs' farm some time following delivery of nitrate solution, was not obtained from an approved source under the Commissioner's rule and did not comply with the manner approved by the Commissioner. Barber v. Continental Grain Co., 124 N.C. App. 310, 477 S.E.2d 77 (1996).

Applied in L. Harvey & Son Co. v. Jarman, 76 N.C. App. 191, 333 S.E.2d 47 (1985).

§ 106-663. False or misleading statements.

It shall be unlawful to make, in any manner whatsoever, any false or misleading statement or representation with regard to any commercial fertilizer offered for sale, sold, or distributed in this State, or to use any misleading or deceptive trademark or brand name in connection therewith. The Commissioner is authorized to refuse, suspend, revoke or terminate the license of any manufacturer or to refuse, suspend, revoke or terminate the registration of such commercial fertilizer for any violations of this section. (1947, c. 1086, s. 12; 1977, c. 303, s. 9; 1981, c. 448, s. 9.)

§ 106-664. Determination and publication of commercial values.

For the purpose of determining the commercial values to be applied under the provisions of G.S. 106-665, the Commissioner shall determine and publish annually the values per pound of nitrogen, available phosphate, and soluble potash in commercial fertilizers in this State. The values so determined and published shall be used in determining and assessing penalties. (1947, c. 1086, s. 9; 1977, c. 303, s. 10; 1993, c. 216, s. 5.)

§ 106-665. Plant food deficiency.

(a) The Commissioner, in determining for administrative purposes, whether any commercial fertilizer is deficient in plant food, shall be guided solely by the official sample as defined in subdivision (15) of G.S. 106-657, and as provided for in subsections (b), (c), and (d) of G.S. 106-662.

(b) If the analysis shall show that any commercial fertilizer falls short of the guaranteed analysis in any ingredient, a penalty shall be assessed in accordance with the following provisions:

(1) For total nitrogen, available phosphate, or available potash: A penalty of three times the value of the deficiency if the deficiency is in excess of the following investigational allowances.

Guarantee Percentage	*Total Nitrogen*	*Available Phosphoric Acid*	*Soluble Potash Percentage*
4 or less	0.49	0.67	0.41
5	0.51	0.67	0.43
6	0.52	0.67	0.47
7	0.54	0.68	0.53
8	0.55	0.68	0.60
9	0.57	0.68	0.65
10	0.58	0.69	0.70
12	0.61	0.69	0.79
14	0.63	0.70	0.87
16	0.67	0.70	0.94
18	0.70	0.71	1.01
20	0.73	0.72	1.08
22	0.75	0.72	1.15
24	0.78	0.73	1.21
26	0.81	0.73	1.27
28	0.83	0.74	1.33
30	0.86	0.75	1.39
32 or more	0.88	0.76	1.44

Provided that when the found relative value of a sample is equal to or exceeds the guaranteed relative value, an overage in primary nutrients may compensate for a deficiency in another primary nutrient up to 10% of the guarantee of the deficient nutrient, not to exceed two units. No compensation shall be allowed toward a deficiency if the overage does not compensate for the entire amount of the deficiency or if the deficiency exceeds 10% of the guarantee or the deficiency exceeds two units. If more than one primary nutrient is in penalty status, no compensation shall be allowed.

(2) Should the basicity or acidity as equivalent of calcium carbonate of any sample of fertilizer be found upon analysis to differ more than five percent (5%) (or 100 pounds of calcium carbonate equivalent per ton) from the guarantee, a penalty of fifty cents (50¢) per ton for each 50 pounds calcium carbonate equivalent, or fraction thereof in excess of the 100 pounds allowed, shall be assessed and paid as is prescribed in subsection (c) of this section.

(3) Chlorine: If the chlorine content of any lot of fertilizer branded for tobacco shall exceed the maximum amount guaranteed by more than 0.5 of one percent, a penalty shall be assessed equal to ten percent (10%) of the value of the fertilizer for each additional 0.5 of one percent of excess or fraction thereof.

(4) Water insoluble nitrogen: A penalty of three times the value of the deficiency shall be assessed, if such deficiency is in excess of 0.15 of one percent on goods guaranteed up to and including five-tenths percent; 0.20 of one percent on goods guaranteed from five-tenths percent to one percent; 0.30 of one percent on goods guaranteed from one percent to two percent; 0.50 of one percent on goods guaranteed above two percent and up to and including five percent; and 1.00 percent on goods guaranteed over five percent.

(5) Nitrate nitrogen: A penalty of three times the value of the deficiency shall be assessed if the deficiency shall exceed 0.20 of one percent for goods guaranteed up to and including five-tenths percent; 0.25 of one percent for goods guaranteed from five-tenths to one percent; 0.30 of

one percent for goods guaranteed from one to two percent; and 0.35 of one percent for goods guaranteed above two percent up to four percent. Tolerances for goods guaranteed above four percent shall be the same as for total nitrogen.

(6) Total magnesium: If the magnesium content is as much as 0.2 unit plus 5 percent of the guarantee below the minimum amount guaranteed, a penalty of one dollar ($1.00) per ton shall be assessed for each 0.15 of one percent additional deficiency or fraction thereof.

(7) Total calcium: If the calcium content is as much as 0.2 unit plus 5 percent of the guarantee below the minimum amount guaranteed, a penalty of one dollar ($1.00) per ton shall be assessed for each 0.35 of one percent additional deficiency or fraction thereof.

(8) Sulfur: If the sulfur content is as much as 0.2 unit plus 5 percent of the guarantee below the minimum amount guaranteed in the case of all mixed fertilizers, including mixed fertilizers branded for tobacco, a penalty of one dollar ($1.00) per ton for each 0.50 of one percent additional excess or fraction thereof, shall be assessed.

(9) Deficiencies or excesses in any other constituent or constituents covered under subdivisions (6) and (7), subsection (a), G.S. 106-660 which the registrant is required to or may guarantee shall be evaluated by the Commissioner and penalties therefor shall be prescribed by the Commissioner in fertilizer regulations.

(10) For micro-nutrients as are not specifically covered in this Article, a tolerance of twenty-five percent (25%) of the guarantee will be allowed for each element, not to exceed ½ unit (.5%) on guarantees up to 15 units or percent and not to exceed one unit (1%) on guarantees above 15 units or percent.

(c) All penalties assessed under this section shall be paid to the consumer of the lot of fertilizer represented by the sample analyzed within three months from the date of notice by the Commissioner to the distributor, receipts taken therefor, and promptly forwarded to the Commissioner; provided, that in no case shall the total assessed penalties exceed the commercial value of the goods to which it applies. If said consumer cannot be found, the clear proceeds of the penalty assessed shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Such sums as shall be found to be payable to consumers on lots of fertilizer against which said penalties were assessed shall not be subject to claim by the consumer after 12 months from the date of assessment. (1947, c. 1086, s. 8; 1955, c. 354, s. 4; 1977, c. 303, s. 11; 1983, c. 146, s. 5; 1993, c. 216, s. 6; 1997-261, s. 109; 1998-215, s. 21.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, in the second sentence of subsection (c), substituted "the clear proceeds" for "the amount" and substituted "shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2" for "shall be paid to the Commissioner who shall deposit the same in the Department of Agriculture and Consumer Services fund, of which the State Treasurer is custodian."

§ 106-666. "Stop sale," etc., orders.

(a) When the Commissioner finds that a lot of commercial fertilizer is being offered or exposed for sale in violation of any of the provisions of this Article, the Commissioner shall issue and enforce a written or printed "stop sale, use, or removal" order to the owner or custodian of any lot of commercial fertilizer and shall cause the fertilizer to be held at a designated place until (i) the law has been complied with and the commercial fertilizer is released in writing by the Commissioner or (ii) the violation has been otherwise legally disposed of by written authority. The Commissioner shall release the commercial fertilizer so

withdrawn when the requirements of the provisions of this Article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal.

(b) If any manufacturer, dealer, or agent fails to pay a penalty owed on commercial fertilizer within 90 days after notice of assessment by the Commissioner, the Commissioner may issue and enforce a written or printed "stop sale, use, or removal" order to that manufacturer, dealer, or agent and shall cause any commercial fertilizer distributed and offered by that manufacturer, dealer, or agent for sale in the State to be held until (i) the penalties are paid in full and the commercial fertilizer is released in writing by the Commissioner or (ii) the penalties have been otherwise legally disposed of by written authority. The Commissioner shall release the commercial fertilizer so withdrawn when the requirements of the provisions of this Article have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (1947, c. 1086, s. 18; 1955, c. 354, s. 5; 1977, c. 303, s. 12; 1993, c. 216, s. 1.)

§ 106-667. Seizure, condemnation and sale.

Any lot of commercial fertilizer not in compliance with the provisions of this Article shall be subject to seizure on complaint of the Commissioner to a court of competent jurisdiction in the area in which said commercial fertilizer is located. In the event the court finds the said commercial fertilizer to be in violation of this Article and orders the condemnation of said commercial fertilizer, it shall be disposed of in any manner consistent with the quality of the commercial fertilizer and the laws of the State; provided, that in no instance shall the disposition of said commercial fertilizer be ordered by the court without first giving the claimant an opportunity to apply to the court for the release of said commercial fertilizer or for permission to process or relabel said commercial fertilizer to bring it into compliance with this Article. (1947, c. 1086, s. 19; 1977, c. 303, s. 13.)

§ 106-668. Punishment for violations.

Each of the following offenses shall be a Class 1 misdemeanor and any person upon conviction thereof shall be punished as provided by law for the punishment of Class 1 misdemeanors:

(1) To manufacture, offer for sale, or sell in this State any mixed fertilizer or fertilizer materials containing any substance that is injurious to crop growth or deleterious to the soil, or to use in such mixed fertilizer or fertilizer materials as a filler any substance with the effect of defrauding the purchaser.

(2) To offer for sale or to sell in this State for fertilizer purposes any raw or untreated leather, hair, wool waste, hoof, horn, rubber or similar nitrogenous materials, the plant food content of which is largely unavailable, either as such or mixed with other fertilizer materials.

(3) To make any false or misleading representation in regard to any mixed fertilizer or fertilizer material shipped, sold or offered for sale by him in this State, or to use any misleading or deceptive trademark or brand in connection therewith. The sale or offer for sale of any mixture of nitrogenous fertilizer materials under a name or other designation descriptive of only one of the components of the mixture shall be considered deceptive and fraudulent.

The Commissioner is authorized to refuse registration for any commercial fertilizer with respect to which this section is violated.

(4) The filing with the Commissioner of any false statement of fact in connection with the registration under G.S. 106-660 of any commercial fertilizer.

(5) Forcibly obstructing the Commissioner or any official inspector authorized by the Commissioner in the lawful performance by him of his duties in the administration of this Article.

(6) Knowingly taking a false sample of commercial fertilizer for use under provisions of this Article; or knowingly submitting to the Commissioner for analysis a false sample thereof; or making to any person any false representation with regard to any commercial fertilizer sold or offered for sale in this State for the purpose of deceiving or defrauding such other person.

(7) The fraudulent tampering with any lot of commercial fertilizer so that as a result thereof any sample of such commercial fertilizer taken and submitted for analysis under this Article may not correctly represent the lot; or tampering with any sample taken or submitted for analysis under this Article, if done prior to such analysis and disposition of the sample under the direction of the Commissioner.

(8) The delivery to any person by the fertilizer chemist or his assistants or other employees of the Commissioner of a report that is willfully false and misleading on any analysis of commercial fertilizer made by the Department in connection with the administration of this Article.

(9) Selling or offering for sale in this State commercial fertilizer without marking the same as required by G.S. 106-661.

(10) Selling or offering for sale in this State commercial fertilizer containing less than the minimum content required by G.S. 106-659.

(11) Failure of any manufacturer, importer, jobber, agent, or dealer to have applied for and to have been issued a permit as required by G.S. 106-671 before selling, offering, or exposing for sale or distributing commercial fertilizers in this State.

(12) Failure of any manufacturer or contractor to procure a license under the provisions of G.S. 106-660(d) before beginning operations within the State. (1947, c. 1086, s. 20; 1959, c. 706, ss. 10, 11; 1977, c. 303, s. 14; 1993, c. 539, s. 810; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-669. Effect of violations on license and registration.

The Commissioner is authorized to suspend, revoke or terminate the license of any manufacturer or to refuse, suspend, revoke or terminate the registration of any commercial fertilizer upon proof that the manufacturer has been guilty of fraudulent or deceptive practices, or in the evasion or attempted evasion of this Article or any rule promulgated thereunder. (1947, c. 1086, s. 17; 1977, c. 303, s. 15; 1981, c. 448, s. 10.)

§ 106-670. Appeals from assessments and orders of Commissioner.

Nothing contained in this Article shall prevent any person from appealing to a court of competent jurisdiction from any assessment of penalty or other final order or ruling of the Commissioner or Board of Agriculture. (1947, c. 1086, s. 22; 1977, c. 303, s. 16.)

§ 106-671. Inspection fees; reporting system.

(a) For the purpose of defraying expenses on the inspection and of otherwise determining the value of commercial fertilizers in this State, there shall be paid to the Department of Agriculture and Consumer Services a charge of twenty-five cents (25¢) per ton on all commercial fertilizers other than packages of five pounds or less. Inspection fees shall be paid on all tonnage

distributed into North Carolina to any person not having a valid reporting permit. On individual packages of five pounds or less there shall be paid in lieu of the tonnage fee an annual registration fee of twenty-five dollars ($25.00) for each brand offered for sale, sold, or distributed; provided that any per annum (fiscal) tonnage of any brand sold in excess of one hundred tons may be subject to the charge of twenty-five cents (25¢) per ton on any amount in excess of one hundred tons as provided herein. Whenever any manufacturer of commercial fertilizer shall have paid the charges required by this section his goods shall not be liable to further tax, whether by city, town, or county; provided, this shall not exempt the commercial fertilizers from an ad valorem tax.

(b) Reporting System. — Each manufacturer, importer, jobber, firm, corporation or person who distributes commercial fertilizers in this State shall make application to the Commissioner for a permit to report the tonnage of commercial fertilizer sold and shall pay to the North Carolina Department of Agriculture and Consumer Services an inspection fee of twenty-five cents (25¢) per ton. The Commissioner is authorized to require each such distributor to keep such records as may be necessary to indicate accurately the tonnage of commercial fertilizers sold in the State, and as are satisfactory to the Commissioner. Such records shall be available to the Commissioner, or his duly authorized representative, at any and all reasonable hours for the purpose of making such examination as is necessary to verify the tonnage statement and the inspection fees paid. Each registrant shall report monthly the tonnage sold to non-registrants on forms furnished by the Commissioner. Such reports shall be made and inspection fees shall be due and payable monthly on the fifteenth of each month covering the tonnage and kind of commercial fertilizers sold during the past month. If the report is not filed and the inspection fee paid by the last day of the month it is due, the amount due shall bear a penalty of ten percent (10%), which shall be added to the inspection fee due. If the report is not filed and the inspection fee paid within 60 days of the date due, or if the report or tonnage be false, the Commissioner may revoke the permit. (1947, c. 1086, s. 6; 1949, c. 637, s. 3; 1959, c. 706, ss. 6, 7; 1973, c. 611, s. 5; 1977, c. 303, s. 17; 1991, c. 98, s. 2; 1997-261, s. 109.)

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under prior law.*

Action to Secure Tax Wrongfully Collected. — The Board of Agriculture is a department of the state government, and an action against it to recover money alleged to have been wrongfully collected by it as a license tax cannot be maintained, the State not having given its consent to be sued in that respect. Lord & Polk Chem. Co. v. Board of Agric., 111 N.C. 135, 15 S.E. 1032 (1892).

Property Tax. — The statute will not be so construed as to relieve manufacturers of fertilizers or fertilizing material, paying this inspection tax, from the payment of property tax required by the Constitution. Pocomoke Guano Co. v. Biddle, 158 N.C. 212, 73 S.E. 996 (1912).

§ 106-672. Declaration of policy.

The General Assembly hereby finds and declares that it is in the public interest that the State regulate the activities of those persons engaged in the business of preparing, mixing, or manufacturing commercial fertilizers, in order to insure the manufacturer, distributor and consumer of the correct quantity and quality of all commercial fertilizer sold or offered for sale in this State. It shall therefore be the policy of this State to regulate the activities of those persons engaged in the business of preparing, mixing or manufacturing commercial fertilizer. (1977, c. 303, s. 18.)

§ 106-673. Authority of Board of Agriculture to make rules and regulations.

Because legislation with regard to commercial fertilizer sold or offered for sale in this State must be adapted to complex conditions and standards involving numerous details with which the General Assembly cannot deal directly and in order to effectuate the purposes and policies of this Article, and in order to insure the manufacturer, distributor, and consumer of the correct quality and quantity of all commercial fertilizer sold or offered for sale in this State, the Board of Agriculture shall have the authority to make rules and regulations with respect to:

(1) The maximum chlorine guarantee permitted for tobacco fertilizer;
(2) The maximum chlorine guarantee permitted in tobacco top dressers;
(3) Which grades of fertilizer may be branded top dressers;
(4) The labeling of the grade of fertilizer when such fertilizer is sold in plain or unbranded bags;
(5) The labeling requirements for all containers of liquid commercial fertilizer for direct application to the soil;
(6) The bag sizes which may be used in the sale of commercial fertilizer;
(7) The labeling requirements for packages containing a combination of any nonfertilizer material and mixed tobacco fertilizer;
(8) Registration and labeling requirements for grades and brands of fertilizer carrying any guarantee of boron; the tolerance allowances for the percentage of boron in fertilizer mixtures;
(9) The required composition for boron-landplaster mixtures before they may be registered and sold for use on peanuts in this State; the labeling requirements for each container of such mixture;
(10) The monetary penalties assessed for excesses or deficiencies of boron and all other minor elements above or below the tolerances allowed;
(11) The registration and labeling of general crop grades and tobacco grades;
(12) The method, and the time limitations for the reporting to the Commissioner of Agriculture of the tonnage of each grade of fertilizer shipped to each destination in the State by each manufacturer or firm having fertilizer registered in this State;
(13) The required composition, before such mixtures may be registered and sold in this State, of fertilizer-pesticide, landplaster-pesticide, and fertilizer-landplaster-pesticide, when to be used for peanuts alone;
(14) The labeling and bag requirements of fertilizer- landplaster-pesticide mixtures;
(15) The standards and requirements which must be met before fertilizer-pesticide mixtures may be registered in this State. These requirements may include, but are not limited to, approval in North Carolina of both the pesticide and the fertilizer grades, approval of the mixture by the Board of Agriculture, and any labeling requirements;
(16) The standards and requirements which must be complied with before fertilizers-pesticides may, without registering the mixture, be mixed for direct application at the farmer's request;
(17) Requests for mixing any pesticide with fertilizer, for products not previously approved by the Board of Agriculture;
(18) Packaging requirements for fertilizer-pesticide mixtures sold either in bulk or in bags, such that dusting, spillage, sifting, or a loss of any fertilizer-pesticide mixture will not occur;
(19) The percentages of nitrogen required to be in nitrogen solutions, before such solutions may be registered and sold in this State;

(20) The labeling of fertilizer products to ascertain their compliance to the Fertilizer or Lime and Landplaster Law;
(21) Requesting substantiating data to back up claims made about a fertilizer product; registration may be denied if such data is not furnished;
(22) The denial of approval of the registration of fertilizer products when such products will not, when used as directed, supply deficient needs of a plant;
(23) Safety requirements for the movement, handling and storage of fluid fertilizers;
(24) Standards and requirements for equipment and tanks for handling liquid fertilizer;
(25) Refusing registration as a result of information or recommendations from the director of research stations;
(26) Establishing minimum guarantees permissible for registering secondary elements and micronutrients;
(27) Establishing minimum standards for containment of fertilizer materials in storage to prevent contamination of groundwater and surface water; and
(28) Standards and labeling requirements for specialty fertilizers. (1947, c. 1086, s. 15; 1949, c. 637, s. 4; 1977, c. 303, s. 19; 1991, c. 100, s. 1; 1993, c. 216, s. 2.)

§ 106-674. Short weight.

If any commercial fertilizer in the possession of the consumer is found by the Commissioner to be short in weight, the registrant of said commercial fertilizer shall within 30 days after official notice from the Commissioner pay to the consumer a penalty equal to four times the value of the actual shortage. The Commissioner may in his discretion allow reasonable tolerance for short weight due to loss through handling and transporting. (1947, c. 1086, s. 16; 1977, c. 303, s. 20.)

§ 106-675. Publication of information concerning fertilizers.

The Commissioner shall publish at least annually, in such forms as he may deem proper, complete information concerning the sales of commercial fertilizers, together with a report of the results of the analyses based on official samples of commercial fertilizers sold or offered for sale within the State; such data on their production and use as he may consider advisable; provided, however, that the information concerning production and use of commercial fertilizers shall be shown separately for periods July first to December thirty-first and January first to June thirtieth of each year, and that no disclosure shall be made of the operations of any person. (1947, c. 1086, s. 14; 1959, c. 706, s. 9; 1977, c. 303, s. 21.)

§ 106-676. Sales or exchanges between manufacturers, etc.

Nothing in this Article shall be construed to restrict or avoid sales or exchanges of commercial fertilizers to each other by importers or manufacturers who mix fertilizer materials for sale or as preventing the free and unrestricted shipments of commercial fertilizers to manufacturers who have registered their brands as required by the provisions of this Article. (1947, c. 1086, s. 21; 1977, c. 303, s. 22.)

§ 106-677. Grade-tonnage reports.

Each person registering commercial fertilizers under this Article shall furnish the Commissioner with a written statement of the tonnage of each grade of fertilizer sold by him in this State. This information shall be held in confidence by the Commissioner. Said statement shall include all sales for the periods of July first to and including December thirty-first and of January first to and including June thirtieth of each year. The Commissioner may suspend, revoke or terminate the registration of said commercial fertilizer and suspend, revoke or terminate the license of any person failing to comply with this section within 30 days of the close of each period. All information published by the Department of Agriculture and Consumer Services pursuant to this section shall be classified so as to prevent the identification of information received from individual registrants. All information received pursuant to this section shall be held confidential by the Department and its employees. (1947, c. 1086, s. 13; 1977, c. 303, s. 23; 1981, c. 448, s. 11; 1997-261, s. 109.)

§§ 106-678 through 106-699: Reserved for future codification purposes.

ARTICLE 57.

Nuisance Liability of Agricultural and Forestry Operations.

§ 106-700. Legislative determination and declaration of policy.

It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products. When other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits. As a result, agricultural and forestry operations are sometimes forced to cease. Many others are discouraged from making investments in farm and forest improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed to be a nuisance. (1979, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 892, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

CASE NOTES

Applied in Baucom's Nursery Co. v. Mecklenburg County, 62 N.C. App. 396, 303 S.E.2d 236 (1983).

Quoted in Durham v. Britt, 117 N.C. App. 250, 451 S.E.2d 1 (1994).

Cited in Mayes v. Tabor, 77 N.C. App. 197, 334 S.E.2d 489 (1985).

§ 106-701. When agricultural and forestry operation, etc., not constituted nuisance by changed conditions in locality.

(a) No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality thereof after the same has been in operation for more than one year, when such operation was not a nuisance at the time the operation began; provided, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or its appurtenances.

(b) For the purposes of this Article, "agricultural operation" includes, without limitation, any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.

(b1) For the purposes of this Article, "forestry operation" shall mean those activities involved in the growing, managing, and harvesting of trees, but not sawmill operations.

(c) The provisions of subsection (a) shall not affect or defeat the right of any person, firm, or corporation to recover damages for any injuries or damages sustained by him on account of any pollution of, or change in condition of, the waters of any stream or on the account of any overflow of lands of any such person, firm, or corporation.

(d) Any and all ordinances of any unit of local government now in effect or hereafter adopted that would make the operation of any such agricultural or forestry operation or its appurtenances a nuisance or providing for abatement thereof as a nuisance in the circumstance set forth in this section are and shall be null and void; provided, however, that the provisions of this subsection shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural or forestry operation or any of its appurtenances. Provided further, that the provisions shall not apply whenever a nuisance results from an agricultural or forestry operation located within the corporate limits of any city at the time of enactment hereof.

(e) This section shall not be construed to invalidate any contracts heretofore made but insofar as contracts are concerned, it is only applicable to contracts and agreements to be made in the future. (1979, c. 202, s. 1; 1991 (Reg. Sess., 1992), c. 892, s. 1.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

CASE NOTES

Nuisance Claim Not Barred by Federal Law. — Compliance with the provisions of the Federal Watershed Protection and Flood Prevention Act (16 U.S.C. § 1001, et seq.) would not serve as a bar to a plaintiff's nuisance claim by virtue of the Supremacy Clause of the United States Constitution. This act does not specifically preempt or conflict with state law and therefore has no effect on plaintiff's common law right to bring a nuisance claim. Durham v. Britt, 117 N.C. App. 250, 451 S.E.2d 1 (1994).

Fundamental Changes in Activity. — The legislature intended this section to cover any agricultural operation, without limitation, when the operation was initially begun, but did not intend it to cover situations in which a party fundamentally changes the nature of the agricultural activity which had theretofore been covered under the statute. Durham v. Britt, 117 N.C. App. 250, 451 S.E.2d 1 (1994).

Turkey Production Changed to Hog Production. — The change in the nature of the agricultural use of land from the operation of turkey houses to the operation of a hog production facility was not included in this section so

as to continue to be considered as not constituting a nuisance. Durham v. Britt, 117 N.C. App. 250, 451 S.E.2d 1 (1994).

Applied in Mayes v. Tabor, 77 N.C. App. 197, 334 S.E.2d 489 (1985).

§§ 106-702 through 106-705: Reserved for future codification purposes.

Article 57A.

Civil Liability of Farmers.

§ 106-706. Exemption from civil liability for farmers permitting gleaning.

Any farmer, as an owner, lessee, occupant, or otherwise in control of land, who allows without compensation another person to enter upon the land for the purpose of removing any crops remaining in the farmer's fields following the harvesting of the crops, owes that person the same duty of care the farmer owes a trespasser. (1991 (Reg. Sess., 1992), c. 868, s. 1.)

Article 58.

North Carolina Biologics Law of 1981.

§ 106-707. Short title and purpose.

This Article shall be known as "The North Carolina Biologics Law of 1981." The purpose of the law is to provide for the production and sale of biologics for the prevention or treatment of disease in animals other than man and to establish controls for the sale and use of biologics in North Carolina. (1981, c. 552, s. 1.)

Cross References. — For purchase and resale by Department of Agriculture of products for control of animal diseases, see § 106-307.1.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

§ 106-708. Definitions.

For purposes of this Article, the following words, terms and phrases are defined as follows:

(1) "Animal" means all birds and mammals, other than man, to which biologics may be administered.
(2) "Biologics" means preparations made from living organisms and their products, including serums, vaccines, antigens and antitoxins which are used for the treatment or prevention of diseases in animals other than humans, or in the diagnosis of diseases.
(3) "Board" means the North Carolina Board of Agriculture.
(4) "Commissioner" means the Commissioner of Agriculture.
(5) "Department" means the Department of Agriculture and Consumer Services. (1981, c. 552, s. 1; 1997-261, s. 70.)

§ 106-709. Rules and regulations.

The Board of Agriculture shall adopt rules and regulations necessary for the implementation and administration of this Article. (1981, c. 552, s. 1.)

§ 106-710. Biologics production license.

(a) No person shall engage in the production of biologics except in:
(1) An establishment licensed by the Department;
(2) An establishment licensed by the United States Department of Agriculture; or
(3) An establishment producing biologics only for use by the owner or operator of the establishment for animals owned by him, if the biologics are registered with the Commissioner.

(b) Any establishment applying for a license to produce biologics shall be inspected by the Commissioner. Approval shall be based on compliance with the rules and regulations adopted by the board.

(c) Application for a license to produce biologics shall be made on forms provided by the Commissioner and shall be accompanied by a reasonable fee as established by the board.

(d) Upon approval, a license shall be granted upon payment of the annual license fee of one hundred dollars ($100.00) for each establishment licensed, and an additional fee of fifty dollars ($50.00) for each product produced at any time during the year. This license shall be renewed annually. The annual renewal fee shall be paid on or before the first day of July of each year. (1981, c. 552, s. 1.)

§ 106-711. License revocation or suspension.

The Commissioner, upon a finding that a licensed establishment producing biologics is not in compliance with this Article or any rules or regulations promulgated thereunder, may revoke or suspend the license in accordance with Chapter 150B of the General Statutes. (1981, c. 552, s. 1; 1987, c. 827, s. 1.)

§ 106-712. Registration of biologics.

(a) No person shall offer for sale or use any biologic in North Carolina unless it is registered with the Commissioner. The registration shall be made on forms provided by the Commissioner. The forms shall require the applicant to provide information showing that the biologic:
(1) Is produced under procedures approved by the Commissioner;
(2) Is safe and noninjurious to animals when used as directed;
(3) Is labeled for proper handling, use and contents;
(4) Is produced in an establishment licensed under this Article; and
(5) Is not in violation of this Article or any rule or regulation promulgated thereunder.

(b) The application for registration shall also include a protocol of methods of production in detail which is followed in the production of the biologic, a sample of the label to be placed on the biologic, and any other information prescribed by the board as necessary for the implementation of this Article. (1981, c. 552, s. 1.)

§ 106-713. Revocation or suspension of registration.

The Commissioner, upon a finding that a registered biologic is being produced, sold or distributed in violation of this Article or any rules or regulations promulgated thereunder, may revoke or suspend the regulation in accordance with Chapter 150B of the General Statutes. (1981, c. 552, s. 1; 1987, c. 827, s. 1.)

§ 106-714. Penalties for violation.

(a) Any person adjudged to have violated any provision of this Article or the rules and regulations promulgated thereunder is guilty of a Class 2 misdemeanor. The Attorney General or his representative has concurrent jurisdiction with the district attorneys of this State to prosecute violations under this section.

(b) The Commissioner may apply to the Superior Court for an injunction to restrain and prevent violations of this Article or the rules and regulations promulgated thereunder irrespective of whether there exists an adequate remedy elsewhere at law. (1981, c. 552, s. 1; 1993, c. 539, s. 811; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 106-715. Civil penalties.

The Commissioner may assess a civil penalty of not more than five thousand dollars ($5,000) against any person who violates a provision of this Article or any rule promulgated thereunder. In determining the amount of the penalty, the Commissioner shall consider the degree and extent of harm caused by the violation.

The clear proceeds of civil penalties assessed pursuant to this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1995, c. 516, s. 15; 1998-215, s. 22.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the second paragraph.

§§ 106-716 through 106-718: Reserved for future codification purposes.

Article 59.

Northeastern North Carolina Farmers Market Commission.

§§ 106-719 through 106-725: Repealed by Session Laws 1999-44, s. 6, effective May 13, 1999.

Editor's Note. — Former sections 106-722 through 106-725 had been reserved for future codification purposes.

Article 60.

Southeastern North Carolina Farmers Market Commission.

§§ 106-726 through 106-734: Repealed by Session Laws 1999-44, s. 7, effective May 13, 1999.

Editor's Note. — Former sections 106-729 through 106-734 had been reserved for future codification purposes.

ARTICLE 61.

Preservation of Farmland.

§ 106-735. Short title and purpose.

(a) This article shall be known as "The Farmland Preservation Enabling Act."

(b) The purpose of this Article is to authorize counties to undertake a series of programs to encourage the preservation of farmland as defined herein. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

Editor's Note. — Session Laws 1998-223, ss. 3 to 8, creates the Commission on Small Family Farm Preservation in the General Assembly, to consist of 19 members. The Commission may file an interim report to the 1999 Regular Session and shall file a final report prior to the convening of the 2000 Regular Session.

§ 106-736. Farmland preservation programs authorized.

A county may by ordinance establish a farmland preservation program under this Article. The ordinance may authorize qualifying farms, as defined in G.S. 106-737, to take advantage of one or more of the benefits authorized by the remaining sections of this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-737. Qualifying farmland.

In order for farmland to qualify under this Article, it must be real property that:

(1) Is participating in the farm present-use-value taxation program established by G.S. 105-277.2 through 105-277.7 or is otherwise determined by the county to meet all the qualifications of this program set forth in G.S. 105-277.3;

(2) Is certified by the Soil Conservation Service of the United States Department of Agriculture as being a farm on which at least two-thirds of the land is composed of soils that (i) are best suited for providing food, seed, fiber, forage, timber, and oil seed crops, (ii) have good soil qualities, (iii) are favorable for all major crops common to the county where the land is located, (iv) have a favorable growing season, and (v) receive the available moisture needed to produce high yields an average of eight out of 10 years; or on which at least two-thirds of the land has been actively used in agricultural, horticultural or forestry operations as defined in G.S. 105-277.2(1), (2), and (3) during each of the five previous years, measured from the date on which the determination must be made as to whether the land in question qualifies;

(3) Is managed in accordance with the Soil Conservation Service defined erosion control practices that are addressed to highly erodable land; and

(4) Is the subject of a conservation agreement, as defined in G.S. 121-35, between the county and the owner of such land that prohibits nonfarm use or development of such land for a period of at least 10 years, except for the creation of not more than three lots that meet applicable county zoning and subdivision regulations. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-737.1. Revocation of conservation agreement.

By written notice to the county, the landowner may revoke this conservation agreement. Such revocation shall result in loss of qualifying farm status. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-738. Voluntary agricultural districts.

(a) An ordinance adopted under this Article shall provide:

(1) For the establishment of voluntary agricultural districts consisting initially of at least the number of contiguous acres of qualifying farmland or the number of qualifying farms deemed appropriate by the board of county commissioners;

(2) For the formation of such districts upon the execution by the owners of the requisite acreage of an agreement to sustain agriculture in the district;

(3) That the form of this agreement must be reviewed and approved by an agricultural advisory board established under G.S. 106-739 or some other county board or official;

(4) That each such district have a representative on the agricultural advisory board established under G.S. 106-739.

(b) The purpose of such agricultural districts shall be to increase identity and pride in the agricultural community and its way of life and to increase protection from nuisance suits and other negative impacts on properly managed farms. The county may take such action as it deems appropriate to encourage the formation of such districts and to further their purposes and objectives. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-739. Agricultural advisory board.

An ordinance adopted under this Article shall provide for the establishment of an agricultural advisory board, organized and appointed as the county shall deem appropriate. The county may confer upon this advisory board authority to:

(1) Review and make recommendations concerning the establishment and modification of agricultural districts;

(2) Review and make recommendations concerning any ordinance or amendment adopted or proposed for adoption under this Article;

(3) Hold public hearings on public projects likely to have an impact on agricultural operations, particularly if such projects involve condemnation of all or part of any qualifying farm;

(4) Advise the board of county commissioners on projects, programs, or issues affecting the agricultural economy or way of life within the county;

(5) Perform other related tasks or duties assigned by the board of county commissioners. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-740. Public hearings on condemnation of farmland.

An ordinance adopted under this Article may provide that no State or local public agency or governmental unit may formally initiate any action to condemn any interest in qualifying farmland within a voluntary agricultural district until such agency has requested the local agricultural advisory board established under G.S. 106-739 to hold a public hearing on the proposed condemnation.

(1) Following a public hearing held pursuant to this section, the board shall prepare and submit written findings and a recommendation to the decision-making body of the agency proposing acquisition.

(2) The board designated to hold the hearing shall have 30 days after receiving a request under this section to hold the public hearing and submit its findings and recommendations to the agency.
(3) The agency may not formally initiate a condemnation action while the proposed condemnation is properly before the advisory board within these time limitations. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-741. Record notice of proximity to farmlands.

(a) Any county that has a computerized land records system may require that such records include some form of notice reasonably calculated to alert a person researching the title of a particular tract that such tract is located within one-half mile of a poultry, swine, or dairy qualifying farm or within 600 feet of any other qualifying farm or within one-half mile of a voluntary agricultural district.
(b) In no event shall the county or any of its officers, employees, or agents be held liable in damages for any misfeasance, malfeasance, or nonfeasance occurring in good faith in connection with the duties or obligations imposed by any ordinance adopted under subsection (a).
(c) In no event shall any cause of action arise out of the failure of a person researching the title of a particular tract to report to any person the proximity of the tract to a qualifying farm or voluntary agricultural district as defined in this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-742. Waiver of water and sewer assessments.

(a) A county may provide by ordinance that its water and sewer assessments be held in abeyance, with or without interest, for farms, whether inside or outside of a voluntary agricultural district, until improvements on such property are connected to the water or sewer system for which the assessment was made.
(b) The ordinance may provide that, when the period of abeyance ends, the assessment is payable in accordance with the terms set out in the assessment resolution.
(c) Statutes of limitations are suspended during the time that any assessment is held in abeyance without interest.
(d) If an ordinance is adopted under this section, then the assessment procedures followed under Article 9 of Chapter 153A shall conform to the terms of this ordinance with respect to qualifying farms that entered into conservation agreements while such ordinance was in effect.
(e) Nothing in this section is intended to diminish the authority of counties to hold assessments in abeyance under G.S. 153A-201. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-743. County ordinances.

A county adopting an ordinance under this Article may consult with the North Carolina Commissioner of Agriculture or his staff before adoption, and shall record the ordinance with the Commissioner's office after adoption. Thereafter, the county shall submit to the Commissioner at least once a year, a written report including the status, progress and activities of the county's farmland preservation program under this Article. (1985 (Reg. Sess., 1986), c. 1025, s. 1.)

§ 106-744. Purchase of agricultural conservation easements.

(a) A county may, with the voluntary consent of landowners, acquire by purchase agricultural conservation easements over qualifying farmland as

defined by G.S. 106-737 located within a voluntary agricultural district as defined by G.S. 106-738.

(b) For purposes of this section, "agricultural conservation easement" means a negative easement in gross restricting residential, commercial, and industrial development of land for the purpose of maintaining its agricultural production capability. Such easement:

(1) May permit the creation of not more than three lots that meet applicable county zoning and subdivision regulations; and

(2) Shall be perpetual in duration, provided that, at least 20 years after the purchase of an easement, a county may agree to reconvey the easement to the owner of the land for consideration, if the landowner can demonstrate to the satisfaction of the county that commercial agriculture is no longer practicable on the land in question.

(c) There is established a "North Carolina Farmland Preservation Trust Fund" to be administered by the Commissioner of Agriculture. The Trust Fund shall consist of all monies received for the purpose of purchasing agricultural conservation easements or transferred from counties or private sources. The Trust Fund shall be invested as provided in G.S. 147-69.2 and G.S. 147-69.3. The Commissioner shall use Trust Fund monies for the purchase of agricultural conservation easements, including transaction costs, and shall distribute Trust Fund monies to counties and private nonprofit conservation organizations for such purchases, including transaction costs. The Commissioner of Agriculture shall adopt rules and regulations governing the use, distribution, investment, and management of Trust Fund monies.

(d) This section shall apply to agricultural conservation easements falling within its terms. This section shall not be construed to make unenforceable any restriction, easement, covenant, or condition that does not comply with the requirements of this section.

This section shall not be construed to invalidate any farmland preservation program.

This section shall not be construed to diminish the powers of any public entity, agency, or instrumentality to acquire by purchase, gift, devise, inheritance, eminent domain, or otherwise and to use property of any kind for public purposes.

This section shall not be construed to authorize any public entity, agency, or instrumentality to acquire by eminent domain an agricultural conservation easement. (1991, c. 734, s. 1.)

§§ 106-745 through 106-749: Reserved for future codification purposes.

Article 62.

Grape Growers Council.

§ 106-750. North Carolina Grape Growers Council — Creation; powers and duties.

There is created the North Carolina Grape Growers Council of the Department of Agriculture and Consumer Services. The North Carolina Grape Growers Council shall have the following powers and duties:

(1) To identify and implement methods for improving North Carolina's rank as a wine-producing State;

(2) To assure orderly growth and development of North Carolina's grape and wine industry;

(3) To achieve public awareness of the quality of North Carolina grapes and wine;
(4) To coordinate the interaction of North Carolina's grape and wine industry with other segments of the State's economy such as tourism, retail trade, and horticulture;
(5) To conduct methods of quality assurance of North Carolina's grape and wine industry to create a sound foundation for further growth;
(6) To assist in the coordination of the activities of the various State agencies and other organizations contributing to the development of the grape and wine industry;
(7) To receive and disburse funds;
(8) To enter into contracts for the purpose of developing new or improved markets or marketing methods for wine and grape products;
(9) To contract for research services to improve viticultural and enological practices in North Carolina;
(10) To enter into agreements with any local, state, or national organizations or agency engaged in education for the purpose of disseminating information on wine or other viticultural projects;
(11) To enter into contracts with commercial entities for the purpose of developing marketing, advertising, and other promotional programs designed to promote the orderly growth of the North Carolina grape and wine industry;
(12) To acquire any licenses or permits necessary for performance of the duties of the Council; and
(13) To develop a State Viticulture Plan that identifies problems and constraints of the viticultural industry, proposes solutions to those problems and delineates planning mechanisms for the orderly growth of the industry. (1985 (Reg. Sess., 1986), c. 974, s. 1; 1997-261, s. 109.)

§ 106-751. North Carolina Grape Growers Council — Composition; terms; reimbursement.

(a) The North Carolina Grape Growers Council shall consist of 11 members appointed by the Commissioner of Agriculture in the following manner: seven commercial grape growers; three winery operators; and one retailer of North Carolina grape products. For purposes of this Article, a commercial grape grower is one who has at least three acres of grapes or sells ten thousand dollars ($10,000) worth of grapes annually. The Commissioner shall appoint, within 30 days of the effective date of this act, four members for three-year terms, four members for two-year terms, and three members for one-year terms. Thereafter, members shall be appointed for four-year terms and shall serve until their successors are appointed and qualified. Any member of the Council may be reappointed for additional terms. Any appointment to fill a vacancy on the Council shall be for the balance of the unexpired term. Any member of the Council may be removed by the Commissioner for misfeasance, malfeasance, or nonfeasance.

(b) Members of the Council shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 from funds appropriated for the operation of the Council.

(c) All clerical and other services required by the Council may be provided by the Department of Agriculture and Consumer Services.

(d) The Commissioner of Agriculture shall appoint a chairman who shall serve at the pleasure of the Commissioner.

(e) The Council may select a secretary who need not be a member of the Council.

(f) The Council shall meet when necessary as determined by the chairman or upon written request of a majority of the members.

(g) A majority of the Council shall constitute a quorum for the transaction of business. (1985 (Reg. Sess., 1986), c. 974, s. 1; 1997-261, s. 109.)

§§ 106-752 through 106-755: Reserved for future codification purposes.

Article 63.

Aquaculture Development Act.

§ 106-756. Legislative findings and purpose.

The General Assembly finds and declares that it is in the best interest of the citizens of North Carolina to promote and encourage the development of the State's aquacultural resources in order to augment food supplies, expand employment, promote economic activity, increase stocks of native aquatic species, enhance commercial and recreational fishing and protect and better use the land and water resources of the State. (1989, c. 752, s. 147.)

§ 106-757. Short title.

This Article shall be known as the Aquaculture Development Act. (1989, c. 752, s. 147.)

§ 106-758. Definitions.

In addition to the definitions in G.S. 113-129, the following definitions shall apply as used in this Article,

(1) "Aquaculture" means the propagation and rearing of aquatic species in controlled or selected environments, including, but not limited to, ocean ranching;

(2) "Aquaculture facility" means any land, structure or other appurtenance that is used for aquaculture, including, but not limited to, any laboratory, hatchery, rearing pond, raceway, pen, incubator, or other equipment used in aquaculture;

(3) "Aquatic species" means any species of finfish, mollusk, crustacean, or other aquatic invertebrate, amphibian, reptile, or aquatic plant, and including, but not limited to, "fish" and "fishes" as defined in G.S. 113-129(7);

(4) "Commissioner" means the Commissioner of Agriculture;

(5) "Department" means the North Carolina Department of Agriculture and Consumer Services. (1989, c. 752, s. 147; 1993, c. 18, s. 1; 1997-261, s. 71.)

§ 106-759. Lead agency; powers and duties.

(a) For the purposes of this Article, aquaculture is considered to be a form of agriculture and thus the Department of Agriculture and Consumer Services is designated as the lead State agency in matters pertaining to aquaculture.

(b) The Department shall have the following powers and duties:

(1) To provide aquaculturalists with information and assistance in obtaining permits related to aquacultural activities;

(2) To promote investment in aquaculture facilities in order to expand production and processing capacity; and

(3) To work with appropriate State and federal agencies to review, develop and implement policies and procedures to facilitate aquacultural development. (1989, c. 752, s. 147; 1997-261, s. 109.)

§ 106-760. Advisory Board.

(a) There is created within the Department of Agriculture and Consumer Services the Aquaculture Advisory Board, to consist of the following persons:

(1) The Commissioner of Agriculture, or his designee;
(2) The Secretary of Commerce, or his designee;
(3) The Secretary of Environment and Natural Resources, or his designee;
(4) The President of the North Carolina Biotechnology Center, or his designee;
(5) The President of the University of North Carolina, or his designee;
(6) One Senator designated by the President Pro Tempore of the Senate; and
(7) One Representative designated by the Speaker of the House of Representatives.

(b) The Commissioner of Agriculture or his designee shall serve as Chairman of the Board. A majority of the Board shall constitute a quorum for the transaction of business. Clerical and other assistance shall be provided by the Department of Agriculture and Consumer Services. The Commissioner may appoint advisory committees, pursuant to G.S. 143B-10(d), to assist the Board in carrying out its duties.

(c) The Board shall review State and federal policies, laws and regulations affecting aquaculture and recommend changes which may be necessary or useful to carry out the purposes of this Article. The Board shall present its recommendations to the Governor and the General Assembly. The Board shall also assist in the coordination of aquaculture-related activities of the various State agencies and institutions, and shall coordinate research and technology transfer activities to respond to the emerging requirements of aquaculture. (1989, c. 727, s. 223(c); c. 751, s. 9(c); c. 752, s. 147; 1991 (Reg. Sess., 1992), c. 959, s. 85; 1997-261, s. 72; 1997-443, s. 11A.119(a).)

§ 106-761. Aquaculture facility registration and licensing.

(a) Authority. The North Carolina Department of Agriculture and Consumer Services shall regulate the production and sale of commercially raised freshwater fish and freshwater crustacean species. The Board of Agriculture shall promulgate rules for the registration of facilities for the production and sale of freshwater aquaculturally raised species. The Board may prescribe standards under which commercially reared fish may be transported, possessed, bought, and sold. The Department and Board of Agriculture authority shall be limited to commercially reared fish and shall not include authority over the wild fishery resource which is managed under the authority of the North Carolina Wildlife Resources Commission. The authority granted herein to regulate facilities licensed pursuant to this section does not authorize the Department of Agriculture or the Board of Agriculture to promulgate rules that (i) are inconsistent with rules adopted by any other State agency; or (ii) exempt such facilities from the rules adopted by any other State agency.

(b) Species subject to this section. The following species are exempt from special restrictions on introduction of exotic species promulgated by the Wildlife Resources Commission except to prevent disease. All other species are prohibited from propagation and production unless the applicant for the permit first obtains written permission from the Wildlife Resources Commission.

(1) Bluegill	Lepomis macrochirus
(2) Redear Sunfish	Lepomis microlophus
(3) Redbreast Sunfish	Lepomis auritus
(4) Green Sunfish	Lepomis cyanellus
(5) Any hybrids using above species of the genus Lepomis	
(6) Black Crappie	Pomoxis nigromaculatus
(7) White Crappie	Pomoxis annularis
(8) Largemouth Bass	Micropterus salmoides (northern strain)
(9) Smallmouth Bass	Micropterus dolomieui
(10) White Catfish	Ictalurus catus
(11) Channel Catfish	Ictalurus punctatus
(12) Golden Shiner	Notemigonus crysoleucas
(13) Fathead Minnow	Pimephales promelas
(14) Goldfish	Carassius auratus
(15) Rainbow Trout	Oncorhynchus mykiss
(16) Brown Trout	Salmo trutta
(17) Brook Trout	Salvelinus fontinalis
(18) Common Carp	Cyprinus carpio
(19) Crayfish	Procambarus species

(c) Exceptions for Species Not Listed. — The following fish species that are not listed in subsection (b) of this section may be produced and sold as if they were listed in that subsection with the following restrictions:

(1) Hybrid striped bass. — Production, propagation, and holding facilities in the Neuse, Roanoke, or Tar/Pamlico River basins for the hybrid striped bass shall comply with additional escapement prevention measures prescribed by the Wildlife Resources Commission.

(2) Yellow perch. — A letter of approval from the Wildlife Resources Commission is required before the yellow perch, perca flavenscens, may be raised at a facility located west of Interstate Highway 77.

(d) Aquaculture Propagation and Production Facility License. The Board of Agriculture may, by rule, authorize and license the operation of fish hatcheries and production facilities for species of fish listed in subsection (b) of this section. The Board may prescribe standards of operation, qualifications of operators, and the conditions under which fish may be commercially reared, transported, possessed, bought, and sold. Aquaculture Propagation and Production Licenses issued by the Department shall be valid for a period of five years.

(e) Commercial Catchout Facility License.

(1) Commercial catchout facilities must be stocked exclusively with hatchery reared fish obtained from hatcheries approved by the Department to prevent the introduction of diseases. The Board of Agriculture may, by rule, prescribe standards of operation and conditions under which fish from such ponds may be taken, transported, possessed, bought, and sold.

(2) The Commercial Catchout Facility License shall be valid for a period of five years. A pond owner or operator licensed under this subsection shall be authorized to sell fish taken by fishermen from the pond to such fishermen. Fish sold at such facilities shall be limited to those fish covered under this section.

(3) The holder of the Catchout Facility License shall provide receipts to the purchasers of fish. The receipt shall describe the species, number, total weight, and the location of the catchout facility.

(4) No fish taken from a commercial catchout facility may be resold by the purchasing angler for any purpose.

(5) No fishing, special trout, or other license shall be required of anglers fishing in licensed commercial catchout facilities.

(f) Holding Pond/Tank Permit. All facilities holding live food or bait species for sale must obtain a Holding Pond/Tank Permit. Permits shall be valid for a period of two years and shall only authorize possession of fish specified in this section. All fish held live for sale shall be kept in accordance with rules promulgated by the Board of Agriculture. Possession of an Aquaculture Propagation and Production Facility or Commercial Catchout Facility License shall serve in lieu of a Holding Pond/Tank Permit for possession both on and off their facilities premises. No permit shall be required for holding lobsters for sale.

(g) Possession of species other than those listed in subsection (b) of this section or as authorized in writing by the Wildlife Resources Commission shall be a violation which shall result in the revocation of the Aquaculture Propagation and Production Facility or Commercial Catchout Facility License until such time that proper authorization is received from the Wildlife Resources Commission or the unauthorized species is removed from the facility. In the event of possession of unauthorized fish species, the Wildlife Resources Commission may take further regulatory action. The Department and the Wildlife Resources Commission shall have authority to enter the premises of such facilities to inspect for the possession of a species other than those authorized in subsection (b) of this section or authorized by written permission of the Wildlife Resources Commission.

(h) Nothing in this act shall apply to the aquarium or ornamental trade in fish. The Wildlife Resources Commission may by rule identify species for which possession in the State is prohibited. (1993, c. 18, s. 2; 1997-198, s. 1; 1997-261, ss. 73-76.)

§ 106-762. Fish disease management.

(a) The North Carolina Department of Agriculture and Consumer Services shall, with the assistance of the Wildlife Resources Commission, develop and implement a fish disease management plan to prevent the introduction of fish diseases through aquaculture facilities subject to the provisions and duly adopted rules of this section into the State.

(b) Release of fish. It shall be unlawful to willfully release domestically raised fish into the waters of the State, other than in private ponds as defined by G.S. 113-129, without written permission of the Wildlife Resources Commission, or the Division of Marine Fisheries of the Department of Environment and Natural Resources. (1993, c. 18, s. 2; 1997-261, s. 77; 1997-443, s. 11A.119(a).)

§ 106-763. Fish passage and residual stream flow.

(a) Natural watercourses as designated by law or regulation shall not be blocked with a stand, dam, weir, hedge, or other water diversion structure to supply an aquaculture facility that in any way prevents or fails to maintain the free passage of anadromous or indigenous fish.

(b) Residual flow in a natural watercourse below the point of water withdrawal supplying an aquaculture operation shall be sufficient to prevent destruction or serious diminution of downstream fishery habitat and shall be consistent with rules adopted by the Environmental Management Commission. (1993, c. 18, s. 2.)

§ 106-763.1. Propagation and production of American alligators.

(a) License Required. — A person who intends to raise American alligators commercially must first obtain an Aquaculture Propagation and Production

Facility License from the Department. The Board of Agriculture may regulate a facility that raises American alligators to the same extent that it can regulate any other facility licensed under this Article.

(b) Requirements. — A facility that raises American alligators commercially must comply with all of the following requirements:

(1) Before a facility begins operation, it must prepare and implement a confinement plan. After a facility begins operation, it must adhere to the confinement plan. A confinement plan must comply with guidelines developed and adopted by the Wildlife Resources Commission. The Department may inspect a facility to determine if the facility is complying with the confinement plan. As used in this subdivision, "confinement" includes production within a building or similar structure and a perimeter fence.

(2) A facility can possess only hatchlings that have been permanently tagged and have an export permit from their state of origin. The facility must keep records of all hatchlings it receives and must make these records available for inspection by the Wildlife Resources Commission and the Department upon request.

(3) If the facility uses swine, poultry, or other livestock for feed, it must have a disease management plan that has been approved by the State Veterinarian, and it must comply with the plan.

(4) The activities of the facility must comply with the Endangered Species Act and the Convention on International Trade in Endangered Species. The Department is the State agency responsible for the administration of this program for farm-raised alligators.

(c) Sanctions. — The operator of a facility that possesses an untagged or undocumented alligator commits a Class H felony if the operator knows the alligator is untagged or undocumented. Conviction of an operator of a facility under this section revokes the license of the facility for five years beginning on the date of the conviction. An operator convicted under this section may not be the operator of any other facility required to be licensed under this Article for five years beginning on the date of the conviction. (1997-198, s. 2.)

§ 106-764. Violation.

A person who violates this act or a rule of the Board of Agriculture adopted hereunder is guilty of a Class 3 misdemeanor. (1993, c. 18, s. 2; 1994, Ex. Sess., c. 14, s. 56.)

ARTICLE 64.

Genetically Engineered Organisms Act.

§§ 106-765 through 106-777: Expired.

Editor's Note. — This Article expired by its own terms on September 30, 1995.

§§ 106-778 through 106-780: Reserved for future codification purposes.

ARTICLE 65.

Strawberry Assessment Act.

§ 106-781. Title.

This Article shall be known as the "Strawberry Assessment Act." (1989 (Reg. Sess., 1990), c. 1027, s. 1.)

§ 106-782. Findings and purpose.

The General Assembly hereby finds that strawberry production makes an important contribution to the State's economy; and that it is appropriate for the State to provide a means whereby strawberry producers may voluntarily assess themselves in order to provide funds for strawberry research and marketing. (1989 (Reg. Sess., 1990), c. 1027, s. 1.)

§ 106-783. Definitions.

As used in this Article:

(1) "Association" means the North Carolina Strawberry Association, Inc.

(2) "Commercial production" means the production of strawberries for sale.

(3) "Department" means the North Carolina Department of Agriculture and Consumer Services.

(4) "Strawberry plant seller" means a person who sells strawberry plants to growers for commercial production of strawberries. (1989 (Reg. Sess., 1990), c. 1027, s. 1; 1997-261, s. 78; 1997-371, s. 2.)

§ 106-784. Referendum.

(a) At any time after the effective date of this Article, the Association may conduct a referendum among strawberry producers upon the question of whether an assessment shall be levied as provided for herein.

(b) The Association shall determine:

(1) The amount of the proposed assessment;

(2) The period for which the assessment shall be levied, not to exceed three years;

(3) The time and place of the referendum;

(4) Procedures for conducting the referendum and counting of votes; and

(5) Any other matters pertaining to the referendum.

(c) The amount of the proposed assessment and the method of collection shall be set forth on the ballot; provided that no annual assessment shall exceed five percent (5%) of the value of the previous year's strawberry plant sales.

(d) All persons engaged in the commercial production of strawberries, including owners of farms, tenants and sharecroppers shall be eligible to vote in the referendum. Any questions concerning eligibility to vote shall be resolved by the Board of Directors of the Association. (1989 (Reg. Sess., 1990), c. 1027, s. 1.)

§ 106-785. Two-thirds vote required; collection of assessment; penalties; audits.

(a) The assessment shall not be collected unless at least two-thirds of the votes cast in the referendum are in favor of the assessment. If at least

two-thirds of the votes cast in the referendum are in favor of the assessment, then the Department shall notify all strawberry plant sellers of the assessment. The assessment shall be added by the strawberry plant sellers to the price of all strawberry plants sold for commercial planting in North Carolina. The Department shall provide forms to the strawberry plant sellers for reporting the assessment. All strawberry plant sellers shall provide each purchaser of strawberry plants for commercial production with an invoice that sets forth the amount of the assessment on the purchase covered by the invoice. Persons who purchase strawberry plants for commercial production on which the assessment has not been collected by the seller shall report such purchases and pay the assessment to the Department.

(b) Each strawberry plant seller shall remit to the Department no later than the tenth day following the end of each calendar quarter the assessment on strawberry plants sold during that quarter. Any strawberry plant seller who fails to remit the assessment for the previous year's sales by January 10 shall pay a penalty of five percent (5%) of the unpaid assessment plus a penalty of one percent (1%) of the unpaid assessment for each month after January 10 that the assessment remains unpaid.

(c) The Association may conduct inspections or audits of the books of any strawberry plant seller. If the inspection or audit reveals that a strawberry plant seller has willfully failed to remit assessments when due, the seller shall pay the Association the reasonable costs of the inspection or audit.

(d) The Association may bring an action to collect unpaid assessments, penalties, and reasonable costs of any inspection or audit as provided in subsection (c) of this section, against any strawberry plant seller who fails to pay the assessment, penalties, or costs. If successful, the Association shall also recover the cost of such action, including attorneys' fees. (1989 (Reg. Sess., 1990), c. 1027, s. 1; 1997-371, s. 3.)

§ 106-786. Use of funds; refunds.

The Department shall remit all funds collected under this Article to the Association at least monthly.

The Association shall use such funds for research and marketing related to strawberries including such administrative expenses as may be reasonably necessary to carry out this function. A funding committee composed of seven members of the Association appointed by the Commissioner of Agriculture, shall approve all expenditures of such funds. Funding committee members may be reimbursed for necessary expenses as determined by the Association's Board of Directors.

Any person who has purchased strawberry plants upon which the assessment has been paid shall have the right to receive a refund of the assessment by making demand in writing to the Association within 30 days of purchase of the plants. Such demand must be accompanied by proof of purchase satisfactory to the funding committee. (1989 (Reg. Sess., 1990), c. 1027, s. 1.)

§§ 106-787 through 106-789: Reserved for future codification purposes.

ARTICLE 66.

Pork Promotion Assessment Act.

§ 106-790. Title.

This Article shall be known as the "Pork Promotion Assessment Act." (1991, c. 605, s. 1.)

§ 106-791. Purpose.

It is in the public interest for the State to enable producers of porcine animals to assess themselves in order to raise funds to promote the interests of the pork industry. (1991, c. 605, s. 1.)

§ 106-792. Definitions.

The following definitions apply in this Article:

(1) Association. — The North Carolina Pork Producers Association, Inc., a North Carolina nonprofit corporation.

(2) Buyer. — Any person engaged as (i) a commission merchant, (ii) an auction market, or (iii) a livestock market in the business of receiving porcine animals for sale on commission for or on behalf of a pork producer.

(3) Department. — The North Carolina Department of Agriculture and Consumer Services.

(4) Market. — To sell, slaughter for sale, or otherwise dispose of a porcine animal in commerce.

(5) Person. — An individual, a partnership, a firm, or a corporation.

(6) Porcine animal. — Swine raised for seed stock, market hogs, or slaughter.

(7) Pork producer. — A person who (i) is a North Carolina resident, (ii) owns, manages, or has a financial interest in pork production, and (iii) is actively involved in the production of porcine animals. (1991, c. 605, s. 1; 1997-261, s. 79.)

§ 106-793. Referendum.

(a) The Association may conduct among pork producers a referendum upon the question of whether an assessment shall be levied on porcine animals sold in this State.

(b) The Association shall determine:

(1) The amount of the proposed assessment.

(2) The time and place of the referendum.

(3) Procedures for conducting the referendum and counting of votes.

(4) Any other matters pertaining to the referendum.

(c) The amount of the proposed assessment shall be stated on the referendum ballot. The amount may not exceed five cents (5¢) for each porcine animal sold in this State. If the assessment is approved in the referendum, the Association may set the assessment at an amount equal to or less than the amount stated on the ballot. If the Association sets a lower amount than the amount approved by referendum, it may increase the amount annually without a referendum by no more than one cent (1¢) for each porcine animal. The increased rate may not exceed the amount approved by referendum and may not exceed the maximum allowable rate of five cents (5¢) for each porcine animal.

(d) All pork producers may vote in the referendum. Any dispute over eligibility to vote or any other matter relating to the referendum shall be determined by the Association. The Association shall make reasonable efforts to provide pork producers with notice of the referendum and an opportunity to vote. (1991, c. 605, s. 1.)

§ 106-794. Payment and collection of assessment.

(a) The assessment shall not be collected unless more than half of the votes cast in the referendum are in favor of the assessment. If more than half of the

votes cast in the referendum are in favor of the assessment, then the Association shall notify the Department of the amount of the assessment and the effective date of the assessment. The Department shall notify all buyers and pork producers of the assessment.

(b) Each pork producer must pay an assessment on each porcine animal sold to a buyer.

(c) A buyer of a porcine animal shall collect the assessment when buying a porcine animal by deducting the assessment from the price paid for the animal. The buyer shall remit collected assessments to the Department no later than the 10th day of the following month. The Department shall provide forms to buyers for reporting the assessment. If the total assessments collected by a buyer in a month are less than twenty-five dollars ($25.00), the buyer may keep the assessments until the total amount due is at least twenty-five dollars ($25.00) or the end of the quarter, whichever comes first. All buyers shall file at least one report in each calendar quarter, regardless of the amount due.

(d) A buyer of porcine animals shall keep records of the number of porcine animals purchased and the date purchased. All information or records regarding purchases of porcine animals by individual buyers shall be kept confidential by employees or agents of the Department and the Association, and shall not be disclosed except by court order.

(e) The Association may bring an action to recover any unpaid assessments, plus the reasonable costs, including attorney fees, incurred in the action. (1991, c. 605, s. 1.)

§ 106-795. Use of assessments; refunds.

(a) The Department shall remit all funds collected under this Article to the Association at least monthly. The Association shall use the funds to promote the interests of the pork industry. In order to prevent duplication of effort, these funds shall not be used for activities funded under 7 U.S.C. Chapter 79, Pork Promotion, Research, and Consumer Information.

(b) A pork producer may request a refund of an assessment deducted from the sales price of a porcine animal sold by the producer by submitting a written request for a refund to the Association within 30 days after the buyer of the animal collected the assessment. A refund request must be accompanied by proof of payment of the assessment satisfactory to the Association. The Association shall mail a refund to the producer within 30 days of receipt of a properly documented refund request. (1991, c. 605, s. 1.)

§ 106-796. Termination of assessment.

Upon receipt of a petition signed by at least ten percent (10%) of the pork producers in North Carolina known to the Association, the Department shall notify the Association, and the Association shall, within six months, conduct a referendum upon the question of continuing the assessment. If a majority of the votes cast in the referendum are against continuing the assessment, or if the Association fails to conduct a referendum within the six-month period, the assessment expires at the end of the six-month period. If a majority of the votes cast in the referendum are in favor of continuing the assessment, then no subsequent referendum shall be held for at least three years. (1991, c. 605, s. 1.)

§§ 106-797 through 106-799: Reserved for future codification purposes.

Article 67.

Swine Farms.

§ 106-800. Title.

This Article shall be known as the "Swine Farm Siting Act". (1995, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1997-458, s. 4.1.)

Cross References. — As to moratorium on construction or expansion of swine farms, see notes under § 143-215.10A.

Editor's Note. — Session Laws 1995, c. 420, s. 2, as amended by Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 8, provides: "This act applies to the construction or enlargement, on or after October 1, 1995, of swine houses, lagoons, and land areas onto which waste is applied from a lagoon that are components of a swine farm. This act does not apply under each of the following circumstances:

"(1) When the construction or enlargement occurs on or after October 1, 1995, for the purpose of increasing the swine population to that set forth as the projected population in a registration of the swine operation filed with the Department of Environment, Health, and Natural Resources before October 1, 1995.

"(2) When the construction or enlargement occurs on or after October 1, 1995, for the purpose of increasing the swine population to the population that the animal waste management system is designed to accommodate as that system is set forth in a registration of the swine operation filed with the Department of Environment, Health, and Natural Resources before October 1, 1995, or as that system is set forth in an animal waste management plan approved before October 1, 1995.

"(3) When the construction or enlargement occurs on or after October 1, 1995, for the purpose of complying with applicable animal waste management rules and not for the purpose of increasing the swine population."

Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 7(b), provides: "Subsection (a) of this section does not repeal any rule that does not conflict with the amendments to Article 67 of Chapter 106 of the General Statutes made by subsection (a) of this section."

Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 11, provides that the Division of Soil and Water Conservation of the Department of Environment, Health, and Natural Resources, the Cooperative Extension Service of North Carolina State University, and North Carolina Department of Agriculture shall prepare a coordinated and comprehensive plan for nonpoint source pollution prevention and control, and that the comprehensive plan shall be reported to the Senate Select Committee on River Water Quality and Fish Kills and the Environmental Review Commission by September 30, 1996.

Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 12, provides: "The Environmental Review Commission shall evaluate the animal waste permitting, inspection, and enforcement program established under Section 1 of this act including, whether to transfer responsibility for permitting, compliance inspections, and enforcement to the Division of Soil and Water Conservation. The Commission may report its findings and recommendations to the General Assembly on or before the first day of the 1997 Regular Session and shall report its findings and recommendations on or before the first day of the 1998 Regular Session."

Legal Periodicals. — For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

For 1997 legislative survey, see 20 Campbell L. Rev. 450.

§ 106-801. Purpose.

The General Assembly finds that certain limitations on the siting of swine houses and lagoons for swine farms can assist in the development of pork production, which contributes to the economic development of the State, by lessening the interference with the use and enjoyment of adjoining property. (1995, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1997-458, s. 4.1.)

Legal Periodicals. — For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

§ 106-802. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Lagoon" means a confined body of water to hold animal byproducts including bodily waste from animals or a mixture of waste with feed, bedding, litter or other agricultural materials.

(2) Repealed by Session Laws 1995 (Regular Session, 1996), c. 626, s. 7, effective June 21, 1996.

(3) "Occupied residence" means a dwelling actually inhabited by a person on a continuous basis as exemplified by a person living in his or her home.

(3a) "Outdoor recreational facility" means any plot or tract of land on which there is located an outdoor swimming pool, tennis court, or golf course that is open to either the general public or to the members and guests of any organization having 50 or more members.

(4) "Site evaluation" means an investigation to determine if a site meets all federal and State standards as evidenced by the Waste Management Facility Site Evaluation Report on file with the Soil and Water Conservation District office or a comparable report certified by a professional engineer or a comparable report certified by a technical specialist approved by the North Carolina Soil and Water Conservation Commission.

(5) "Swine farm" means a tract of land devoted to raising 250 or more animals of the porcine species.

(6) "Swine house" means a building that shelters porcine animals on a continuous basis. (1995, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 7(a); c. 743, s. 3; 1997-443, s. 11A.119(a); 1997-456, s. 15; 1997-458, s. 4.1; 1997-496, s. 12.)

Editor's Note. — This section was amended by Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 7(a), and by Session Laws 1995 (Reg. Sess., 1996), c. 743, s. 3, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

Legal Periodicals. — For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

§ 106-803. Siting requirements for swine houses, lagoons, and land areas onto which waste is applied at swine farms.

(a) A swine house or a lagoon that is a component of a swine farm shall be located:

(1) At least 1,500 feet from any occupied residence.

(2) At least 2,500 feet from any school; hospital; church; outdoor recreational facility; national park; State Park, as defined in G.S. 113-44.9; historic property acquired by the State pursuant to G.S. 121-9 or listed in the North Carolina Register of Historic Places pursuant to G.S. 121-4.1; or child care center, as defined in G.S. 110-86, that is licensed under Article 7 of Chapter 110 of the General Statutes.

(3) At least 500 feet from any property boundary.

(4) At least 500 feet from any well supplying water to a public water system, as defined in G.S. 130A-313.

(5) At least 500 feet from any other well that supplies water for human consumption. This subdivision does not apply to a well located on the same parcel or tract of land on which the swine house or lagoon is located and that supplies water only for use on that parcel or tract of

land or for use on adjacent parcels or tracts of land all of which are under common ownership or control.

(a1) The outer perimeter of the land area onto which waste is applied from a lagoon that is a component of a swine farm shall be at least 75 feet from any boundary of property on which an occupied residence is located and from any perennial stream or river, other than an irrigation ditch or canal.

(a2) No component of a liquid animal waste management system for which a permit is required under Part 1 or 1A of Article 21 of Chapter 143 of the General Statutes, other than a land application site, shall be constructed on land that is located within the 100-year floodplain.

(b) A swine house or a lagoon that is a component of a swine farm may be located closer to a residence, school, hospital, church, or a property boundary than is allowed under subsection (a) of this section if written permission is given by the owner of the property and recorded with the Register of Deeds. (1995, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1997-458, s. 4.1.)

Editor's Note. — As to application of Session Laws 1995, c. 420, s. 2, as amended by Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 8, to the construction or enlargement on or after October 1, 1995, of swine houses, lagoons, and land areas onto which waste is applied from a lagoon that are components of a swine farm, see the editor's note under § 106-800.

Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 24, provides that the amendment by Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 7, is effective upon ratification, except that the change from 100 to 500 feet made in subsection (a) of this section does not apply to a swine farm for which a site evaluation was conducted prior to October 1, 1996.

Session Laws 1997-458, s. 4.2, provides: "The amendments to subsections (a) and (a1) of G.S. 106-803 made by Section 4.1 of this act and G.S. 106-803(a2), added to G.S. 106-803 by Section 4.1 of this act, apply to any new liquid animal waste management system for which construction commences on or after the date this act becomes law and to any expansion of an existing liquid animal waste management system for which construction commences on or after the date this act becomes law."

Session Laws 1997-458, s. 13.3, contains a severability clause.

Legal Periodicals. — For comment, "The Eight Million Little Pigs — A Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming," see 31 Wake Forest L. Rev. 851 (1996).

§ 106-804. Enforcement.

(a) Any person who owns property directly affected by the siting requirements of G.S. 106-803 pursuant to subsection (b) of this section may bring a civil action against the owner or operator of a swine farm who has violated G.S. 106-803 and may seek any one or more of the following:

(1) Injunctive relief.

(2) An order enforcing the siting requirements under G.S. 106-803.

(3) Damages caused by the violation.

(b) A person is directly affected by the siting requirements of G.S. 106-803 only if the person owns a facility or property located within the siting requirements specified under G.S. 106-803.

(c) If the court determines it is appropriate, the court may award court costs, including reasonable attorneys" fees and expert witnesses" fees, to any party. If a temporary restraining order or preliminary injunction is sought, the court may require the filing of a bond or equivalent security. The court shall determine the amount of the bond or security.

(d) Nothing in this section shall restrict any other right that any person may have under any statute or common law to seek injunctive or other relief. (1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1997-458, s. 4.1.)

§ 106-805. Written notice of swine farms.

Any person who intends to construct a swine farm whose animal waste management system is subject to a permit under Part 1 or 1A of Article 21 of

Chapter 143 of the General Statutes shall, after completing a site evaluation and before the farm site is modified, notify all adjoining property owners; all property owners who own property located across a public road, street, or highway from the swine farm; the county or counties in which the farm site is located; and the local health department or departments having jurisdiction over the farm site of that person's intent to construct the swine farm. This notice shall be by certified mail sent to the address on record at the property tax office in the county in which the land is located. Notice to a county shall be sent to the county manager or, if there is no county manager, to the chair of the board of county commissioners. Notice to a local health department shall be sent to the local health director. The written notice shall include all of the following:

(1) The name and address of the person intending to construct a swine farm.
(2) The type of swine farm and the design capacity of the animal waste management system.
(3) The name and address of the technical specialist preparing the waste management plan.
(4) The address of the local Soil and Water Conservation District office.
(5) Information informing the adjoining property owners and the property owners who own property located across a public road, street, or highway from the swine farm that they may submit written comments to the Division of Water Quality, Department of Environment and Natural Resources. (1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1996, 2nd Ex. Sess., c. 18, s. 27.34(d); 1997-443, s. 11A.119(a); 1997-458, s. 4.1.)

§§ 106-806 through 106-809: Reserved for future codification purposes.

ARTICLE 68.

Southern Dairy Compact.

§ 106-810. Southern Dairy Compact entered into; form of Compact.

The Southern Dairy Compact is enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

ARTICLE I. Statement of Purpose, Findings, and Declaration of Policy

§ 1. Statement of purpose, findings, and declaration of policy.

The purpose of this compact is to recognize the interstate character of the southern dairy industry and the prerogative of the states under the United States Constitution to form an interstate commission for the southern region. The mission of the Commission is to take such steps as are necessary to assure the continued viability of dairy farming in the South, and to assure consumers of an adequate, local supply of pure and wholesome milk.

The participating states find and declare that the dairy industry is an essential agricultural activity of the South. Dairy farms, and associated suppliers, marketers, processors, and retailers, are an integral component of the region's economy. Their ability to provide a stable, local supply of pure, wholesome milk is a matter of great importance to the health and welfare of the region.

The participating states further find that dairy farms are essential, and they are an integral part of the region's rural communities. The farms preserve land

for agricultural purposes and provide needed economic stimuli for rural communities.

By entering into this compact, the participating states affirm that their ability to regulate the price that southern dairy farmers receive for their product is essential to the public interest. Assurance of a fair and equitable price for dairy farmers ensures their ability to provide milk to the market and the vitality of the southern dairy industry, with all the associated benefits.

Recent dramatic price fluctuations, with a pronounced downward trend, threaten the viability and stability of the southern dairy region. Historically, individual state regulatory action had been an effective emergency remedy available to farmers confronting a distressed market. The system of federal orders, implemented by the Agricultural Marketing Agreement Act of 1937, establishes only minimum prices paid to producers for raw milk, without preempting the power of states to regulate milk prices above the minimum levels so established.

In today's regional dairy marketplace, cooperative, rather than individual state action is needed to more effectively address the market disarray. Under our constitutional system, properly authorized states acting cooperatively may exercise more power to regulate interstate commerce than they may assert individually without such authority. For this reason, the participating states invoke their authority to act in common agreement, with the consent of Congress, under the compact clause of the Constitution.

In establishing their constitutional regulatory authority over the region's fluid milk market by this compact, the participating states declare their purpose that this compact neither displace the system of federal orders nor encourage the merging of federal orders. Specific provisions of the compact itself set forth this basic principle.

Designed as a flexible mechanism able to adjust to changes in a regulated marketplace, the compact also contains a contingency provision should the system of federal orders be discontinued. In that event, the interstate commission may regulate the marketplace in lieu of the system of federal orders. This contingent authority does not anticipate such a change, however, and should not be so construed. It is only provided should developments in the market other than establishment of this compact result in discontinuance of the system of federal orders.

ARTICLE II. Definitions and Rules of Construction

§ **2. Definitions.**

For the purposes of this compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context:

(1) "Class I milk" means milk disposed of in fluid form or as a fluid milk product, subject to further definition in accordance with the principles expressed in subsection (b) of Section 3.

(2) "Commission" means the Southern Dairy Compact Commission established by this compact.

(3) "Commission marketing order" means regulations adopted by the Commission pursuant to Sections 9 and 10 of this compact in place of a terminated federal marketing order or state dairy regulation. Such order may apply throughout the region or in any part or parts thereof as defined in the regulations of the Commission. Such order may establish minimum prices for any or all classes of milk.

(4) "Compact" means this interstate compact.

(5) "Compact over-order price" means a minimum price required to be paid to producers for Class I milk established by the Commission in regulations adopted pursuant to Sections 9 and 10 of this compact, which is above the price established in federal marketing orders or by

state farm price regulation in the regulated area. Such price may apply throughout the region or in any part or parts thereof as defined in the regulations of the Commission.

(6) "Milk" means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or any other process. The term is used in its broadest sense and may be further defined by the Commission for regulatory purposes.

(7) "Partially regulated plant" means a milk plant not located in a regulated area but having Class I distribution within such area. Commission regulations may exempt plants having such distribution or receipts in amounts less than the limits defined therein.

(8) "Participating state" means a state which has become a party to this compact by the enactment of concurring legislation.

(9) "Pool plant" means any milk plant located in a regulated area.

(10) "Region" means the territorial limits of the states which are parties to this compact.

(11) "Regulated area" means any area within the region governed by and defined in regulations establishing a compact over-order price or commission marketing order.

(12) "State dairy regulation" means any state regulation of dairy prices and associated assessments, whether by statute, marketing order, or otherwise.

§ 3. Rules of construction.

(a) This compact shall not be construed to displace existing federal milk marketing orders or state dairy regulation in the region but to supplement them. In the event some or all federal orders in the region are discontinued, the compact shall be construed to provide the Commission the option to replace them with one or more commission marketing orders pursuant to this compact.

(b) This compact shall be construed liberally in order to achieve the purposes and intent enunciated in Section 1. It is the intent of this compact to establish a basic structure by which the Commission may achieve those purposes through the application, adaptation, and development of the regulatory techniques historically associated with milk marketing and to afford the Commission broad flexibility to devise regulatory mechanisms to achieve the purposes of this compact. In accordance with this intent, the technical terms which are associated with market order regulation and which have acquired commonly understood general meanings are not defined herein but the Commission may further define the terms used in this compact and develop additional concepts and define additional terms as it may find appropriate to achieve its purposes.

ARTICLE III. Commission Established

§ 4. Commission established.

There is hereby created a commission to administer the compact, composed of delegations from each state in the region. The Commission shall be known as the Southern Dairy Compact Commission. A delegation shall include not less than three nor more than five persons. Each delegation shall include at least one dairy farmer who is engaged in the production of milk at the time of appointment or reappointment, and one consumer representative. Delegation members shall be residents and voters of, and subject to such confirmation process as is provided for in, the appointing state. Delegation members shall serve no more than three consecutive terms with no single term of more than four years, and be subject to removal for cause. In all other respects, delegation members shall serve in accordance with the laws of the state represented. The compensation, if any, of the members of a state delegation shall be determined and paid by each state, but their expenses shall be paid by the Commission.

§ 5. Voting requirements.

All actions taken by the Commission, except for the establishment or termination of an over-order price or commission marketing order, and the adoption, amendment, or rescission of the Commission's bylaws, shall be by majority vote of the delegations present. Each state delegation shall be entitled to one vote in the conduct of the Commission's affairs. Establishment or termination of an over-order price or commission marketing order shall require at least a two-thirds vote of the delegations present. The establishment of a regulated area that covers all or part of a participating state shall require also the affirmative vote of that state's delegation. A majority of the delegations from the participating states shall constitute a quorum for the conduct of the Commission's business.

§ 6. Administration and management.

(a) The Commission shall elect annually from among the members of the participating state delegations a chairperson, a vice-chairperson, and a treasurer. The Commission shall appoint an executive director and fix his or her duties and compensation. The executive director shall serve at the pleasure of the Commission, and, together with the treasurer, shall be bonded in an amount determined by the Commission. The Commission may establish through its bylaws an executive committee composed of one member elected by each delegation.

(b) The Commission shall adopt bylaws for the conduct of its business by a two-thirds vote and shall have the power by the same vote to amend and rescind these bylaws. The Commission shall publish its bylaws in convenient form with the appropriate agency or officer in each of the participating states. The bylaws shall provide for appropriate notice to the delegations of all Commission meetings and hearings and of the business to be transacted at such meetings or hearings. Notice also shall be given to other agencies or officers of participating states as provided by the laws of those states.

(c) The Commission shall file an annual report with the Secretary of Agriculture of the United States, and with each of the participating states by submitting copies to the Governor, both houses of the legislature, and the head of the state department having responsibilities for agriculture.

(d) In addition to the powers and duties elsewhere prescribed in this compact, the Commission may engage in all of the following:

(1) Sue and be sued in any state or federal court.

(2) Have a seal and alter the same at pleasure.

(3) Acquire, hold, and dispose of real and personal property by gift, purchase, lease, license, or other similar manner, for its corporate purposes.

(4) Borrow money and to issue notes, to provide for the rights of the holders thereof, and to pledge the revenue of the Commission as security therefor, subject to the provisions of Section 18 of this compact.

(5) Appoint such officers, agents, and employees as it may deem necessary, prescribe their powers, duties, and qualifications.

(6) Create and abolish such offices, employments, and positions as it deems necessary for the purposes of the compact and provide for the removal, term, tenure, compensation, fringe benefits, pension, and retirement rights of its officers and employees.

(7) Retain personal services on a contract basis.

§ 7. Rule-making power.

In addition to the power to promulgate a compact over-order price or commission marketing orders as provided by this compact, the Commission is further empowered to make and enforce such additional rules and regulations as it deems necessary to implement any provisions of this compact, or to effectuate in any other respect the purposes of this compact.

ARTICLE IV. Powers of the Commission

§ 8. Powers to promote regulatory uniformity, simplicity, and interstate cooperation.

The Commission may:

(1) Investigate or provide for investigations or research projects designed to review the existing laws and regulations of the participating states, to consider their administration and costs, to measure their impact on the production and marketing of milk and their effects on the shipment of milk and milk products within the region.

(2) Study and recommend to the participating states joint or cooperative programs for the administration of the dairy marketing laws and regulations and to prepare estimates of cost savings and benefits of such programs.

(3) Encourage the harmonious relationships between the various elements in the industry for the solution of their material problems. Conduct symposia or conferences designed to improve industry relations, or a better understanding of problems.

(4) Prepare and release periodic reports on activities and results of the Commission's efforts to the participating states.

(5) Review the existing marketing system for milk and milk products and recommend changes in the existing structure for assembly and distribution of milk which may assist, improve, or promote more efficient assembly and distribution of milk.

(6) Investigate costs and charges for producing, hauling, handling, processing, distributing, selling, and for all other services, performed with respect to milk.

(7) Examine current economic forces affecting producers, probable trends in production and consumption, the level of dairy farm prices in relation to costs, the financial conditions of dairy farmers, and the need for an emergency order to relieve critical conditions on dairy farms.

§ 9. Equitable farm prices.

(a) The powers granted in this section and Section 10 shall apply only to the establishment of a compact over-order price, so long as federal milk marketing orders remain in effect in the region. In the event that any or all such orders are terminated, this Article authorizes the Commission to establish one or more commission marketing orders, as herein provided, in the region or parts thereof as defined in the order.

(b) A compact over-order price established pursuant to this section shall apply only to Class I milk. Such compact over-order price shall not exceed one dollar and fifty cents ($1.50) per gallon at Atlanta, Georgia, however, this compact over-order price shall be adjusted upward or downward at other locations in the region to reflect differences in minimum federal order prices. Beginning in 1990, and using that year as a base, the foregoing one dollar and fifty cents ($1.50) per gallon maximum shall be adjusted annually by the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. For purposes of the pooling and equalization of an over-order price, the value of milk used in other use classifications shall be calculated at the appropriate class price established pursuant to the applicable federal order or state dairy regulation and the value of unregulated milk shall be calculated in relation to the nearest prevailing class price in accordance with and subject to such adjustments as the Commission may prescribe in regulations.

(c) A commission marketing order shall apply to all classes and uses of milk.

(d) The Commission may establish a compact over-order price for milk to be paid by pool plants and partially regulated plants. The Commission also may

establish a compact over-order price to be paid by all other handlers receiving milk from producers located in a regulated area. This price shall be established either as a compact over-order price or by one or more commission marketing orders. Whenever such a price has been established by either type of regulation, the legal obligation to pay such price shall be determined solely by the terms and purpose of the regulation without regard to the situs of the transfer of title, possession, or any other factors not related to the purposes of the regulation and this compact. Producer-handlers as defined in an applicable federal market order shall not be subject to a compact over-order price. The Commission shall provide for similar treatment of producer-handlers under commission marketing orders.

(e) In determining the price, the Commission shall consider the balance between production and consumption of milk and milk products in the regulated area, the costs of production including, but not limited to, the price of feed, the cost of labor including the reasonable value of the producer's own labor and management, machinery expense and interest expense, the prevailing price for milk outside the regulated area, the purchasing power of the public, and the price necessary to yield a reasonable return to the producer and distributor.

(f) When establishing a compact over-order price, the Commission shall take such other action as is necessary and feasible to help ensure that the over-order price does not cause or compensate producers so as to generate local production of milk in excess of those quantities necessary to assure consumers of an adequate supply for fluid purposes.

(g) The Commission shall whenever possible enter into agreements with state or federal agencies for exchange of information or services for the purpose of reducing regulatory burden and cost of administering the compact. The Commission may reimburse other agencies for the reasonable cost of providing these services.

§ 10. Optional provisions for pricing order.

Regulations establishing a compact over-order price or a commission marketing order may contain, but shall not be limited to, any of the following:

(1) Provisions classifying milk in accordance with the form in which or purpose for which it is used, or creating a flat pricing program.

(2) With respect to a commission marketing order only, provisions establishing or providing a method for establishing separate minimum prices for each use classification prescribed by the Commission, or a single minimum price for milk purchased from producers or associations of producers.

(3) With respect to an over-order minimum price, provisions establishing or providing a method for establishing such minimum price for Class I milk.

(4) Provisions for establishing either an over-order price or a commission marketing order may make use of any reasonable method for establishing such price or prices including flat pricing and formula pricing. Provision may also be made for location adjustments, zone differentials, and competitive credits with respect to regulated handlers who market outside the regulated area.

(5) Provisions for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered, or for the payment of producers delivering milk to the same handler of uniform prices for all milk delivered by them.

a. With respect to regulations establishing a compact over-order price, the Commission may establish one equalization pool within

the regulated area for the sole purpose of equalizing returns to producers throughout the regulated area.

b. With respect to any commission marketing order, as defined in Section 2, subdivision (9), which replaces one or more terminated federal orders or state dairy regulation, the marketing area of now separate state or federal orders shall not be merged without the affirmative consent of each state, voting through its delegation, which is partly or wholly included within any such new marketing area.

(6) Provisions requiring persons who bring Class I milk into the regulated area to make compensatory payments with respect to all such milk to the extent necessary to equalize the cost of milk purchased by handlers subject to a compact over-order price or commission marketing order. No such provisions shall discriminate against milk producers outside the regulated area. The provisions for compensatory payments may require payment of the difference between the Class I price required to be paid for such milk in the state of production by a federal milk marketing order or state dairy regulation and the Class I price established by the compact over-order price or commission marketing order.

(7) Provisions specially governing the pricing and pooling of milk handled by partially regulated plants.

(8) Provisions requiring that the account of any person regulated under the compact over-order price shall be adjusted for any payments made to or received by such persons with respect to a producer settlement fund of any federal or state milk marketing order or other state dairy regulation within the regulated area.

(9) Provision requiring the payment by handlers of an assessment to cover the costs of the administration and enforcement of such order pursuant to subsection (a) of Section 18 of Article VII.

(10) Provisions for reimbursement to participants of the Women, Infants and Children Special Supplemental Food Program of the United States Child Nutrition Act of 1966.

(11) Other provisions and requirements as the Commission may find are necessary or appropriate to effectuate the purposes of this compact and to provide for the payment of fair and equitable minimum prices to producers.

ARTICLE V. Rule-Making Procedure

§ 11. Rule-making procedure.

Before promulgation of any regulations establishing a compact over-order price or commission marketing order, including any provision with respect to milk supply under subsection (f) of Section 9, or amendment thereof, as provided in Article IV, the Commission shall conduct an informal rule-making proceeding to provide interested persons with an opportunity to present data and views. Such rule-making proceeding shall be governed by Section 4 of the Federal Administrative Procedure Act, as amended (5 U.S.C. § 553). In addition, the Commission shall, to the extent practicable, publish notice of rule-making proceedings in the official register of each participating state. Before the initial adoption of regulations establishing a compact over-order price or a commission marketing order and thereafter before any amendment with regard to prices or assessments, the Commission shall hold a public hearing. The Commission may commence a rule-making proceeding on its own initiative or may in its sole discretion act upon the petition of any person including individual milk producers, any organization of milk producers or handlers, general farm organizations, consumer or public interest groups, and local, state or federal officials.

§ 12. Findings and referendum.

(a) In addition to the concise general statement of basis and purpose required by section 4(b) of the Federal Administrative Procedure Act, as amended (5 U.S.C. § 53 (c)), the Commission shall make findings of fact with respect to:

(1) Whether the public interest will be served by the establishment of minimum milk prices to dairy farmers under Article IV.

(2) What level of prices will assure that producers receive a price sufficient to cover their costs of production and will elicit an adequate supply of milk for the inhabitants of the regulated area and for manufacturing purposes.

(3) Whether the major provisions of the order, other than those fixing minimum milk prices, are in the public interest and are reasonably designed to achieve the purposes of the order.

(4) Whether the terms of the proposed regional order or amendment are approved by producers as provided in Section 13.

§ 13. Producer referendum.

(a) For the purpose of ascertaining whether the issuance or amendment of regulations establishing a compact over-order price or a commission marketing order, including any provision with respect to milk supply under subsection (f) of Section 9, is approved by producers, the Commission shall conduct a referendum among producers. The referendum shall be held in a timely manner, as determined by regulation of the Commission. The terms and conditions of the proposed order or amendment shall be described by the Commission in the ballot used in the conduct of the referendum, but the nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto.

(b) An order or amendment shall be deemed approved by producers if the Commission determines that it is approved by at least two-thirds of the voting producers who, during a representative period determined by the Commission, have been engaged in the production of milk the price of which would be regulated under the proposed order or amendment.

(c) For purposes of any referendum, the Commission shall consider the approval or disapproval by any cooperative association of producers, qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the Capper-Volstead Act, bona fide engaged in marketing milk, or in rendering services for or advancing the interests of producers of such commodity, as the approval or disapproval of the producers who are members or stockholders in, or under contract with, such cooperative association of producers, except as provided in subdivision (1) of this subsection and subject to the provisions of subdivisions (2) through (5) of this subsection.

(1) No cooperative that has been formed to act as a common marketing agency for both cooperatives and individual producers shall be qualified to block vote for either.

(2) Any cooperative that is qualified to block vote shall, before submitting its approval or disapproval in any referendum, give prior written notice to each of its members as to whether and how it intends to cast its vote. The notice shall be given in a timely manner as established, and in the form prescribed, by the Commission.

(3) Any producer may obtain a ballot from the Commission in order to register approval or disapproval of the proposed order.

(4) A producer who is a member of a cooperative which has provided notice of its intent to approve or not to approve a proposed order, and who obtains a ballot and with such ballot expresses his or her approval or disapproval of the proposed order, shall notify the Commission as to the name of the cooperative of which he or she is a member, and the

Commission shall remove such producer's name from the list certified by such cooperative with its corporate vote.

(5) In order to ensure that all milk producers are informed regarding a proposed order, the Commission shall notify all milk producers that an order is being considered and that each producer may register his or her approval or disapproval with the Commission either directly or through his or her cooperative.

§ 14. Termination of over-order price or marketing order.

(a) The Commission shall terminate any regulations establishing an over-order price or commission marketing order issued under this Article whenever it finds that such order or price obstructs or does not tend to effectuate the declared policy of this compact.

(b) The Commission shall terminate any regulations establishing an over-order price or a commission marketing order issued under this Article whenever it finds that such termination is favored by a majority of the producers who, during a representative period determined by the Commission, have been engaged in the production of milk, the price of which is regulated by such order; but such termination shall be effective only if announced on or before such date as may be specified in such marketing agreement or order.

(c) The termination or suspension of any order or provision thereof, shall not be considered an order within the meaning of this Article and shall require no hearing, but shall comply with the requirements for informal rule making prescribed by Section 4 of the Federal Administrative Procedure Act, as amended (5 U.S.C. § 553).

ARTICLE VI. Enforcement

§ 15. Records, reports, access to premises.

(a) The Commission may by rule and regulation prescribe record keeping and reporting requirements for all regulated persons. For purposes of the administration and enforcement of this compact, the Commission may examine the books and records of any regulated person relating to his or her milk business and for that purpose, the Commission's properly designated officers, employees, or agents shall have full access during normal business hours to the premises and records of all regulated persons.

(b) Information furnished to or acquired by the Commission officers, employees, or its agents pursuant to this section shall be confidential and not subject to disclosure except to the extent that the Commission deems disclosure to be necessary in any administrative or judicial proceeding involving the administration or enforcement of this compact, an over-order price, a compact marketing order, or other regulations of the Commission. The Commission may adopt rules further defining the confidentiality of information pursuant to this section. Nothing in this section shall be deemed to prohibit (i) the issuance of general statements based upon the reports of a number of handlers, which do not identify the information furnished by any person, or (ii) the publication by direction of the Commission of the name of any person violating any regulation of the Commission, together with a statement of the particular provisions violated by such person.

(c) No officer, employee, or agent of the Commission shall intentionally disclose information, by inference or otherwise, that is made confidential pursuant to this section. Any person violating the provisions of this section shall, upon conviction, be subject to a fine of not more than one thousand dollars ($1,000) or to imprisonment for not more than one year, or both, and shall be removed from office. The Commission shall refer any allegation of a violation of this section to the appropriate state enforcement authority or United States Attorney.

§ 16. Subpoena, hearings, and judicial review.

(a) The Commission is hereby authorized and empowered by its members and its properly designated officers to administer oaths and issue subpoenas

throughout all signatory states to compel the attendance of witnesses and the giving of testimony and the production of other evidence.

(b) Any handler subject to an order may file a written petition with the Commission stating that any order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. The handler shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Commission. After such hearing, the Commission shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(c) The district courts of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, are hereby vested with jurisdiction to review such ruling, provided a complaint for that purpose is filed within 30 days from the date of the entry of the ruling. Service of process in these proceedings may be had upon the Commission by delivering to it a copy of the complaint. If the court determines that the ruling is not in accordance with law, it shall remand such proceedings to the Commission with directions either (i) to make such ruling as the court shall determine to be in accordance with law, or (ii) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subdivision shall not impede, hinder, or delay the Commission form obtaining relief pursuant to Section 17. Any proceedings brought pursuant to Section 17, except where brought by way of counterclaim in proceedings instituted pursuant to this section, shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this section.

§ 17. Enforcement with respect to handlers.

(a) Any violation by a handler of the provisions of regulation establishing an over-order price or a commission marketing order, or other regulations adopted pursuant to this compact shall:

(1) Constitute a violation of the laws of each of the signatory states. Such violation shall render the violator subject to a civil penalty in an amount as may be prescribed by the laws of each of the participating states, recoverable in any state or federal court of competent jurisdiction. Each day such violation continues shall constitute a separate violation.

(2) Constitute grounds for the revocation of license or permit to engage in the milk business under the applicable laws of the participating states.

(b) With respect to handlers, the Commission shall enforce the provisions of this compact, regulations establishing an over-order price, a commission marketing order or other regulations adopted hereunder by:

(1) Commencing an action for legal or equitable relief brought in the name of the Commission in any state or federal court of competent jurisdiction; or

(2) Referral to the state agency for enforcement by judicial or administrative remedy with the agreement of the appropriate state agency of a participating state.

(c) With respect to handlers, the Commission may bring an action for injunction to enforce the provisions of this compact or the order or regulations adopted thereunder without being compelled to allege or prove that an adequate remedy of law does not exist.

ARTICLE VII. Finance

§ 18. Finance of start-up and regular costs.

(a) To provide for its start-up costs, the Commission may borrow money pursuant to its general power under Section 6, subdivision (d), paragraph 4. In

order to finance the cost of administration and enforcement of this compact, including payback of start-up costs, the Commission may collect an assessment from each handler who purchases milk from producers within the region. If imposed, this assessment shall be collected on a monthly basis for up to one year from the date the Commission convenes, in an amount not to exceed $.015 per hundred weight of milk purchased from producers during the period of the assessment. The initial assessment may apply to the projected purchases of handlers for the two-month period following the date the Commission convenes. In addition, if regulations establishing an over-order price or a compact marketing order are adopted, they may include an assessment for the specific purpose of their administration. These regulations shall provide for establishment of a reserve for the Commission's ongoing operating expenses.

(b) The Commission shall not pledge the credit of any participating state or of the United States. Notes issued by the Commission and all other financial obligations incurred by it, shall be its sole responsibility and no participating state or the United States shall be liable therefor.

§ 19. Audit and accounts.

(a) The Commission shall keep accurate accounts of all receipts and disbursements, which shall be subject to the audit and accounting procedures established under its rules. In addition, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified public accountant and the report of the audit shall be included in and become part of the annual report of the Commission.

(b) The accounts of the Commission shall be open at any reasonable time for inspection by duly constituted officers of the participating states and by any persons authorized by the Commission.

(c) Nothing contained in this Article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any participating state or of the United States.

ARTICLE VIII. Entry into Force; Additional Members and Withdrawal

§ 20. Entry into force; additional members.

The compact shall enter into force effective when enacted into law by any three states of the group of states composed of Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia and when the consent of Congress has been obtained.

§ 21. Withdrawal from compact.

Any participating state may withdraw from this compact by enacting a statute repealing the same, but no such withdrawal shall take effect until one year after notice in writing of the withdrawal is given to the Commission and the governors of all the participating states. No withdrawal shall affect any liability already already incurred by or chargeable to a participating state prior to the time of such withdrawal.

§ 22. Severability.

If any part or provision of this compact is adjudged invalid by any court, such judgment shall be confined in its operation to the part or provision directly involved in the controversy in which such judgment shall have been rendered and shall not affect or impair the validity of the remainder of this compact. In the event Congress consents to this compact subject to conditions, said conditions shall not impair the validity of this compact when said conditions are accepted by three or more compacting states. A compact state may accept the conditions of Congress by implementation of this compact. (1997-494, s. 1.)

Editor's Note. — Session Laws 1999-237, s. 13.4(a) to (f) provides that the sum of $500,000 for the 1999-2000 fiscal year shall be credited to a nonreverting reserve within the Department of Agriculture and Consumer Services for the start-up costs of the Southern Dairy Compact Commission, to be established pursuant to Section 4 of Article III of the Southern Dairy

Compact. No disbursements shall be made from the reserve until Congress ratifies legislation authorizing the operation of the Southern Dairy Compact, and the Compact Commission and the State enter into a contract, subject to approval by the Attorney General and the Commissioner of Agriculture. All sums repaid to the State pursuant to the contract shall be credited to the General Fund. Upon the failure of Congress to ratify legislation authorizing the operation of the Compact by June 30, 2001, all funds in the reserve shall revert to the General Fund.

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during the 1999-2001 biennium."

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 469.

§ 106-811. Appointment of members to the Southern Dairy Compact Commission.

(a) The delegation from the State of North Carolina to the Southern Dairy Compact Commission, as established in Article IV of the Compact, shall be composed of five members appointed as follows:

(1) One member representing consumers of milk, appointed by the Governor.

(2) One member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

(3) One member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate.

(4) Two members appointed by the Commissioner of Agriculture, one of whom shall be a dairy farmer engaged in the production of milk at the time of appointment or reappointment.

(b) Members must be registered to vote in the State.

(c) Members shall serve a term of four years and may be reappointed, but no member shall serve more than three consecutive terms. Members shall serve until their successors are duly appointed. Any appointment to fill an unexpired term shall be for the balance of the unexpired term and shall be made by the appropriate appointing authority. A member may be removed by the appointing authority, in accordance with G.S. 143B-13. The Commissioner of Agriculture shall designate one member of the delegation to serve as chair, at the pleasure of the Commissioner.

(d) Members of the delegation shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5.

(e) A majority of the delegation shall constitute a quorum for the transaction of business.

(f) All clerical and other services required by the delegation shall be provided by the Commissioner of Agriculture. (1997-494, s. 1.)

§§ 106-812 through 106-819: Reserved for future codification purposes.

Article 69.

Horse Industry Promotion Act.

§ 106-820. Title.

This Article may be cited as the Horse Industry Promotion Act. (1998-154, s. 1.)

Editor's Note. — Session Laws 1998-154, s. 3, made this Article effective September 24, 1998.

§ 106-821. Findings.

The General Assembly finds that the horse industry makes an important contribution to the State's economy, and that it is appropriate for the State to provide a means for horse owners to voluntarily assess themselves in order to provide funds to promote the interests of the horse industry. (1998-154, s. 1.)

§ 106-822. Definitions.

As used in this Article:

(1) "Commercial horse feed" means any commercial feed, as defined in G.S. 106-284.33, labeled for equine use.

(2) "Council" means the North Carolina Horse Council.

(3) "Department" means the Department of Agriculture and Consumer Services.

(4) "Equine" means a horse, pony, mule, donkey, or hinny.

(5) "Horse owner" means a person who (i) is a North Carolina resident and (ii) owns or leases an equine. (1998-154, s. 1.)

§ 106-823. Referendum.

(a) The Council may conduct a referendum among horse owners upon the question of whether an assessment shall be levied consistent with this Article.

(b) The Council shall determine all of the following:

(1) The amount of the proposed assessment, not to exceed two dollars ($2.00) per ton of commercial horse feed.

(2) The period for which the assessment shall be levied, not to exceed three years.

(3) The time and place of the referendum.

(4) Procedures for conducting the referendum and counting votes.

(5) Any other matters pertaining to the referendum.

(c) The amount of the proposed assessment and the method of collection shall be set forth on the ballot.

(d) All horse owners are eligible to vote in the referendum. The Council shall send press releases about the referendum to at least 10 daily and 10 weekly or biweekly newspapers having general circulation in a county in the State, and to any trade journals deemed appropriate by the Council. Notice of the referendum also shall be posted in every place the Council identifies as selling commercial horse feed. Any questions concerning eligibility to vote shall be resolved by the board of directors of the Council. (1998-154, s. 1.)

§ 106-824. Majority vote required; collection of assessment.

(a) The assessment shall not be collected unless a majority of the votes cast in the referendum are in favor of the assessment. If a majority of the votes cast in the referendum are in favor of the assessment, the Department shall notify all commercial horse feed manufacturers and distributors of the assessment. The assessment shall apply to all commercial horse feed subject to the provisions of G.S. 106-284.40(b), and the assessment shall be remitted to the Department with the inspection fee imposed by G.S. 106-284.40. The Department shall provide forms for reporting the assessment. Persons who purchase

commercial horse feed on which the assessment has not been paid shall report these purchases and pay the assessment to the Department.

(b) The Council may bring an action to collect unpaid assessments against any feed manufacturer or distributor who fails to pay the assessment. (1998-154, s. 1.)

§ 106-825. Use of funds; refunds.

(a) The Department shall remit all funds collected under this Article to the Council at least quarterly. The Council shall use these funds to promote the interests of the horse industry and may use these funds for those administrative expenses that are reasonably necessary to carry out this function.

(b) Any person who purchases commercial horse feed upon which the assessment has been paid shall have the right to receive a refund of the assessment by making demand in writing to the Council within one year of purchase of the feed. This demand shall be accompanied by proof of purchase satisfactory to the Council. (1998-154, s. 1.)

Chapter 107.

Agricultural Development Districts.

§§ 107-1 through 107-25: Repealed by Session Laws 1971, c. 780, s. 20.

Chapter 108.

Social Services.

§§ 108-1 through 108-123: Repealed and recodified by Session Laws 1981, c. 275, ss. 1 to 3.

Editor's Note. — Session Laws 1981, c. 275, s. 1 repealed Chapter 108. Pursuant to ss. 2 and 3 of the act, Parts 1A, 2 and 3 of Article 3 of Chapter 108 were recodified as Chapters 131C and 131D, and Article 6 of Chapter 108 was recodified as Part 26 of Article 7 of Chapter 143B (now repealed). The act became effective October 1, 1981.

Chapter 108A.

Social Services.

Article 1.

County Administration.

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108A-40. Authorization of State-County Special Assistance for Adults Program.

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108A-48. State Foster Care Benefits Program.
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Article 3.

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Public Assistance and Social Services Appeals and Access to Records.

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Protection of the Abused, Neglected or Exploited Disabled Adult Act.

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ARTICLE 1.

County Administration.

Part 1. County Boards of Social Services.

§ 108A-1. Creation.

Every county shall have a board of social services or a consolidated human services board created pursuant to G.S. 153A-77(b) which shall establish county policies for the programs established by this Chapter in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Health and Human Services. Provided, however, county policies for the program of medical assistance shall be established in conformity with the rules and regulations of the Department of Health and Human Services. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 6; 1981, c. 275, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 5; 1997-443, s. 11A.118(a).)

Cross References. — As to beneficiary's interest in the North Carolina Community Trust for Persons with Severe Disabilities not being deemed an asset for income eligibility determination for publicly operated programs, see § 36A-59.18. As to certain financial assistance and in-kind goods not being considered in determining assistance paid under Chapter 108A and Chapter 111, see § 108A-26. As to the Social Services Commission, see § 143B-153 et seq.

Editor's Note. — Session Laws 1981, c. 275 repealed former Chapter 108, Social Services, and enacted present Chapter 108A in its place. Where appropriate, the historical citations to the sections in the former Chapter have been added to corresponding sections in the current Chapter.

Many of the cases and Opinions of the Attorney General cited under the various sections below were decided under corresponding sections of former Chapter 108.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Employees of Local Departments — Applicability of Eleventh Amendment. — After examining the characterization of the local departments of social service under state law, the relative extent of state control over the departments, the relative extent to which the departments depends on state funding, and the effect of a potential damage award on the state treasury, the departments were found to be an arm of the state and, therefore, the individual defendants, each of whom worked for a department, were state officials for Eleventh Amendment purposes. Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

The Commission misapplied the law by concluding that the Davie County Department of Social Services (DSS) was not an agent of the North Carolina Department of Human Resources (DHR) in its delivery of child protective services. Whitaker v. N.C. Dep't of Human Resources, Social Servs. Comm'n, 121 N.C. App. 602, 468 S.E.2d 404 (1996).

Quoted in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

OPINIONS OF ATTORNEY GENERAL

County Commissioner May Serve on Social Services Board. — There is nothing in this Chapter to suggest any impropriety with the "county commissioner member" also serving as chairman of the social services board. See opinion of Attorney General to C. Preston Cornelius, Senior Resident, Superior Court Judge, 60 N.C.A.G. 50 (1990).

§ 108A-2. Size.

The county board of social services of a county shall consist of three members, except that the board of commissioners of any county may increase such number to five members. The decision to increase the size to five members or to reduce a five-member board to three shall be reported immediately in writing by the chairman of the board of commissioners to the Department of Health and Human Services. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 6; 1997-443, s. 11A.118(a).)

Local Modification. — Mecklenburg: 1981, c. 625.

§ 108A-3. Method of appointment; residential qualifications; fee or compensation for services; consolidated human services board appointments.

(a) Three-Member Board. — The board of commissioners shall appoint one member who may be a county commissioner or a citizen selected by the board; the Social Services Commission shall appoint one member; and the two members so appointed shall select the third member. In the event the two members so appointed are unable to agree upon selection of the third member, the senior regular resident superior court judge of the county shall make the selection.

(b) Five-Member Board. — The procedure set forth in subsection (a) shall be followed, except that both the board of commissioners and the Social Services Commission shall appoint two members each, and the four so appointed shall

select the fifth member by majority vote of the membership. If a majority of the four are unable to agree upon the fifth member, the senior regular superior court judge of the county shall make the selection.

(c) Provided further that each member so appointed under subsection (a) and subsection (b) of this section by the Social Services Commission and by the county board of commissioners or the senior regular resident superior court judge of the county, shall be bona fide residents of the county from which they are appointed to serve, and will receive as their fee or compensation for their services rendered from the Department of Health and Human Services directly or indirectly only the fees and compensation as provided by G.S. 108A-8.

(d) Consolidated Human Services Board. — The board of county commissioners shall be the sole appointing authority for members of a consolidated human services board and shall appoint those members in accordance with G.S. 153A-77(c). (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1971, c. 369; 1973, c. 476, s. 138; 1981, c. 275, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 7; 1997-135, s. 1; 1997-443, s. 11A.118(a).)

CASE NOTES

Stated in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

OPINIONS OF ATTORNEY GENERAL

Subsection (b) does not require that all four members of a five member county board of social services be present when the board selects its fifth member. See opinion of Attorney General to Mr. Stephen M. Schoeberle, Burke County Staff Attorney, 58 N.C.A.G. 48 (1988).

Subsection (b) requires that the other four members of a county board of social services be unanimous in their selection of the fifth member. See opinion of the Attorney General to Mr. Stephen M. Schoeberle, Burke County Staff Attorney, 58 N.C.A.G. 48 (1988).

The legislature intended to permit a county commissioner to serve as a member of the county social services board. See opinion of Attorney General to C. Preston Cornelius, Senior Resident, Superior Court Judge, 60 N.C.A.G. 50 (1990).

§ 108A-4. Term of appointment.

Each member of a county board of social services shall serve for a term of three years. No member may serve more than two consecutive terms. Notwithstanding the previous sentence, the limitation on consecutive terms does not apply if the member of the social services board was a member of the board of county commissioners at any time during the first two consecutive terms, and is a member of the board of county commissioners at the time of reappointment. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1981, c. 275, s. 1; c. 770.)

§ 108A-5. Order of appointment.

(a) Three-Member Board: The term of the member appointed by the Social Services Commission shall expire on June 30, 1981, and every three years thereafter; the term of the member appointed by the board of commissioners shall expire on June 30, 1983, and every three years thereafter; and the term of the third member shall expire on June 30, 1982, and every three years thereafter.

(b) Five-Member Board: Whenever a board of commissioners of any county decides to expand a three-member board to a five-member board of social services, the Social Services Commission shall appoint an additional member for a term expiring at the same time as the term of the existing member appointed by the board of commissioners, and the board of commissioners shall appoint an additional member for a term expiring at the same time as the term of the existing member appointed by the Social Services Commission. The change to a five-member board shall become effective at the time when the additional members shall have been appointed by both the county board of commissioners and the Social Services Commission. Thereafter all appointments shall be for three-year terms.

(c) Change from Five-Member to Three-Member Board: The change shall become effective on the first day of July following the decision to change by the board of commissioners. On that day, the following two seats on the board of social services shall cease to exist:

(1) The seat held by the member appointed by the Social Services Commission whose term would have expired on June 30, 1983, or triennially thereafter; and

(2) The seat held by the member appointed by the board of commissioners whose term would have expired June 30, 1981, or triennially thereafter. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 1986; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 724, s. 1; 1981, c. 275, s. 1.)

§ 108A-6. Vacancies.

Appointments to fill vacancies shall be made in the manner set out in G.S. 108A-3. All such appointments shall be for the remainder of the former member's term of office and shall not constitute a term for the purposes of G.S. 108A-4. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

§ 108A-7. Meetings.

The board of social services of a county shall meet at least once per month, or more often if a meeting is called by the chairman. Such board shall elect a chairman from its members at its July meeting each year, and the chairman shall serve a term of one year or until a new chairman is elected by the board. A consolidated county human services board shall meet in accordance with the provisions of G.S. 153A-77. (1917, c. 170, s. 1; 1919, c. 46, s. 4; C.S., s. 5015; 1937, c. 319, s. 4; 1941, c. 270, s. 3; 1947, c. 92; 1959, c. 320; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1; 1995 (Reg. Sess., 1996), c. 690, s. 8.)

§ 108A-8. Compensation of members.

Members of the county board of social services may receive a per diem in such amount as shall be established by the county board of commissioners. Reimbursement for subsistence and travel shall be in accordance with a policy set by the county board of commissioners. (1917, c. 170, s. 1; 1919, c. 46, s. 4; C.S., s. 5015; 1937, c. 319, s. 4; 1941, c. 270, s. 3; 1947, c. 92; 1959, c. 320; 1961, c. 186; 1969, c. 546, s. 1; 1971, c. 124; 1981, c. 275, s. 1; 1985, c. 418, s. 3.)

§ 108A-9. Duties and responsibilities.

The county board of social services shall have the following duties and responsibilities:

(1) To select the county director of social services according to the merit system rules of the State Personnel Commission;
(2) To advise county and municipal authorities in developing policies and plans to improve the social conditions of the community;
(3) To consult with the director of social services about problems relating to his office, and to assist him in planning budgets for the county department of social services;
(4) To transmit or present the budgets of the county department of social services for public assistance, social services, and administration to the board of county commissioners;
(5) To have such other duties and responsibilities as the General Assembly, the Department of Health and Human Services or the Social Services Commission or the board of county commissioners may assign to it. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 7; 1981, c. 275, s. 1; 1997-443, s. 11A.118(a).)

CASE NOTES

The county department of social services is merely an extension of the county. Meares v. Brunswick County, 615 F. Supp. 14 (E.D.N.C. 1985).

And Has No Sovereign Immunity. — Because the Brunswick County Department of Social Services and the Brunswick County Board of Social Services are extensions of Brunswick County which does not enjoy sovereign immunity, neither do they have sovereign immunity. Meares v. Brunswick County, 615 F. Supp. 14 (E.D.N.C. 1985).

The sole involvement of the county board of social services in personnel matters is to select the county director of social services. And the director derives his authority to appoint personnel directly from the General Assembly, not from the board. Thus the local board does not become the "local appointing authority" pursuant to G.S. 126-37 in the absence of a permanent full-time director. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

Extent of Authority Exercised by County over Director. — It is apparent that the county is at most only equal to the State in the authority it can exert over the director of social services. Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981), decided under former Chapter 108.

In an action by eligibility supervisor of county department of social services alleging that her constitutional rights had been violated when her employment was terminated by the director of social services, the county could not be held liable to the plaintiff since the director was not acting for the county, but rather for the State, and since the county board of social services did not have the authority to dismiss the eligibility supervisor. Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981), decided under former Chapter 108.

Quoted in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

§ 108A-10. Fees.

The county board of social services is authorized to enter into contracts with any governmental or private agency, or with any person, whereby the board of social services agrees to render services to or for such agency or person in exchange for a fee to cover the cost of rendering such service. This authority is to be limited to services voluntarily rendered and voluntarily received, but shall not apply where the charging of a fee for a particular service is specifically prohibited by statute or regulation. The fees to be charged under the authority of this section are to be based upon a plan recommended by the county director of social services and approved by the local board of social services and the board of county commissioners. In no event is the fee charged to exceed the cost to the board of social services. Fee policies may not conflict

with rules and regulations adopted by the Social Services Commission or Department of Health and Human Services regarding fees.

The fees collected under the authority of this section are to be deposited to the account of the social services department so that they may be expended for social services purposes in accordance with the provisions of Article 3 of Chapter 159, the Local Government Budget and Fiscal Control Act. No individual employee is to receive any compensation over and above his regular salary as a result of rendering services for which a fee is charged.

The county board of social services shall annually report to the county commissioners receipts received under this section. Fees collected under this section shall not be used to replace any other funds, either State or local, for the program for which the fees were collected. (1981, c. 275, s. 1; 1997-443, s. 11A.118(a).)

§ 108A-11. Inspection of records by members.

Every member of the county board of social services may inspect and examine any record on file in the office of the director relating in any manner to applications for and provision of public assistance and social services authorized by this Chapter. No member shall disclose or make public any information which he may acquire by examining such records. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5014; 1937, c. 319, s. 3; 1941, c. 270, s. 2; 1945, c. 47; 1953, c. 132; 1955, c. 249; 1957, c. 100, s. 1; 1959, c. 1255, s. 1; 1961, c. 186; 1963, c. 139; c. 247, ss. 1, 2; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

Part 2. County Director of Social Services.

§ 108A-12. Appointment.

(a) The board of social services of every county shall appoint a director of social services in accordance with the merit system rules of the State Personnel Commission. Any director dismissed by such board shall have the right of appeal under the same rules.

(b) Two or more boards of social services may jointly employ a director of social services to serve the appointing boards and such boards may also combine any other functions or activities as authorized by Part 1 of Article 20 of Chapter 160A. The boards shall agree on the portion of the director's salary and the portion of expenses for other joint functions and activities that each participating county shall pay. (1917, c. 170, s. 1; 1919, c. 46, ss. 3, 4; C.S., s. 5016; 1921, c. 128; 1929, c. 291, s. 1; 1931, c. 423; 1937, c. 319, s. 5; 1941, c. 270, s. 4; 1957, c. 100, s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

CASE NOTES

Department of Human Resources Liable for Acts of County Director Negligently Placing Foster Child. — In an action alleging that a foster child was negligently placed in a home by the Durham County Department of Social Services, the Department of Human Resources would be liable for the negligent acts of its agents, the Durham County Director of Social Services and his subordinates, since the Department of Human Resources, through the Social Services Commission, has the right to control the manner in which the county director is to execute his obligation to place children in foster homes. Vaughn v. North Carolina Dep't of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979), decided under former Chapter 108.

The director of the County Department of Social Services is a public officer for purposes of sovereign immunity. Meyer v. Walls, 122 N.C. App. 507, 471 S.E.2d 422 (1996), aff'd in part and rev'd in part, 347 N.C. 97, 489 S.E.2d 880 (1997).

Quoted in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

Cited in Hare v. Butler, 99 N.C. App. 693, 394 S.E.2d 231 (1990).

§ 108A-13. Salary.

The board of social services of every county, with the approval of the board of county commissioners, shall determine the salary of the director in accordance with the classification plan of the State Personnel Commission, and such salary shall be paid by the county from the federal, State and county funds available for this purpose. (1917, c. 170, s. 1; 1919, c. 46, ss. 3, 4; C.S., s. 5016; 1921, c. 128; 1929, c. 291, s. 1; 1931, c. 423; 1937, c. 319, s. 5; 1941, c. 270, s. 4; 1957, c. 100, s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

§ 108A-14. Duties and responsibilities.

(a) The director of social services shall have the following duties and responsibilities:

(1) To serve as executive officer of the board of social services and act as its secretary;

(2) To appoint necessary personnel of the county department of social services in accordance with the merit system rules of the State Personnel Commission;

(3) To administer the programs of public assistance and social services established by this Chapter under pertinent rules and regulations;

(4) To administer funds provided by the board of commissioners for the care of indigent persons in the county under policies approved by the county board of social services;

(5) To act as agent of the Social Services Commission and Department of Health and Human Services in relation to work required by the Social Services Commission and Department of Health and Human Services in the county;

(6) To investigate cases for adoption and to supervise adoptive placements;

(7) To issue employment certificates to children under the regulations of the State Department of Labor;

(8) To supervise adult care homes under the rules and regulations of the Social Services Commission;

(9) To assist and cooperate with the Department of Correction and their representatives;

(10) To act in conformity with the provisions of Article 7, Chapter 35 of the General Statutes with regard to sterilization of mentally ill and mentally retarded persons;

(11) To investigate reports of child abuse and neglect and to take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 3 of Chapter 7B of the General Statutes;

(12) To accept children for placement in foster homes and to supervise placements for so long as such children require foster home care;

(13) To respond by investigation to notification of a proposed adoptive placement pursuant to G.S. 48-3(b) and (c); and

(14) To receive and evaluate reports of abuse, neglect, or exploitation of disabled adults and to take appropriate action as required by the Protection of the Abused, Neglected, or Exploited Disabled Adults Act, Article 6 of this Chapter, to protect these adults.

(b) The director may delegate to one or more members of his staff the authority to act as his representative. The director may limit the delegated authority of his representative to specific tasks or areas of expertise. The director may designate, subject to the approval of the Commissioner of Labor, additional personnel outside his staff to issue youth employment certificates. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5017; 1941, c. 270, s. 5; 1957, c. 100,

s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1971, c. 710, s. 5; 1973, c. 476, ss. 133.3, 138; c. 1262, s. 109; c. 1339, s. 2; 1977, 2nd Sess., c. 1219, s. 8; 1981, c. 275, s. 1; 1983, c. 293; 1985, c. 203, ss. 1, 2; 1991, c. 258, s. 1; 1993, c. 553, s. 31; 1995, c. 214, s. 2; c. 535, s. 4; 1997-443, s. 11A.118(a); 1998-202, s. 13(v).)

Editor's Note. — Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, and applicable to acts committed on or after that date, substituted "Article 3 of Chapter 7B of the General Statutes" for "Article 44 of Chapter 7A" at the end of subdivision (a)(11).

CASE NOTES

The sole involvement of the county board of social services in personnel matters is to select the county director of social services. And the director derives his authority to appoint personnel directly from the General Assembly, not from the board. Thus the local board does not become the "local appointing authority" pursuant to G.S. 126-37 in the absence of a permanent full-time director. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

Director Has Exclusive Power to Hire and Fire Department Personnel. — Subdivision (a)(2) of this section gives the director of a county department of social services the exclusive power to hire and fire the department's personnel; the statute makes no distinction between "acting" and "permanent" directors. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

Chapter 126 establishes and provides for the administration of the state personnel system. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

Authority Exercised by County over Director. — It is apparent that the county is at most only equal to the State in the authority it can exert over the director of social services. Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981), decided under former Chapter 108.

Trainee Has No Property Interest in Continued Employment. — An employee who is subject to the State Personnel Act and who holds a "trainee" appointment as defined by the North Carolina Administrative Code does not have a property interest in her continued employment which is protected by the due process clause of the Fourteenth Amendment. Yow v. Alexander County Dep't of Social Servs., 70 N.C. App. 174, 319 S.E.2d 626, cert. denied, 312 N.C. 625, 323 S.E.2d 927 (1984).

Department of Human Resources Liable for Acts of County Director Negligently Placing Foster Child. — In an action alleging that a foster child was negligently placed in a home by the Durham County Department of Social Services, the Department of Human Resources would be liable for the negligent acts of its agents, the Durham County Director of Social Services and his subordinates, since the Department of Human Resources, through the Social Services Commission has the right to control the manner in which the county director is to execute his obligation to place children in foster homes. Vaughn v. North Carolina Dep't of Human Resources, 296 N.C. 683, 252 S.E.2d 792 (1979), decided under former Chapter 108.

The Commission misapplied the law by concluding that the Davie County Department of Social Services (DSS) was not an agent of the North Carolina Department of Human Resources (DHR) in its delivery of child protective services. Whitaker v. N.C. Dep't of Human Resources, Social Servs. Comm'n, 121 N.C. App. 602, 468 S.E.2d 404 (1996).

Investigation of Child Abuse and Neglect. — Under subdivision (a)(11), the General Assembly made clear its intent to include as work required of a county director of social services the investigation of reports of child abuse and neglect. Gammons v. North Carolina Dep't of Human Resources, 344 N.C. 51, 472 S.E.2d 722 (1996).

§ 108A-15. Social services officials and employees as public guardians.

The director and assistant directors of social services of each county may serve as guardians for adults adjudicated incompetent under the provisions of Chapter 35A, and they shall do so if ordered to serve in that capacity by the

clerk of superior court having jurisdiction of a guardianship proceeding brought under either Article. (1977, c. 725, s. 6; 1981, c. 275, s. 1; 1985, c. 361, s. 3; 1987, c. 550, s. 23.)

Cross References. — As to public guardians, see also § 122C-122.

Part 2A. Consolidated Human Services.

§ 108A-15.1. Consolidated human services board; human services director.

(a) Except as otherwise provided by this section and subject to any limitations that may be imposed by the board of county commissioners under G.S. 153A-77, a consolidated human services board created pursuant to G.S. 153A-77(b) shall have the responsibility and authority to carry out the programs established in this Chapter in conformity with the rules and regulations of the Social Services Commission and under the supervision of the Department of Health and Human Services in the same manner as a county social services board.

(b) In addition to the powers conferred by G.S. 153A-77(d), a consolidated human services board shall have all the powers and duties of a county board of social services as provided by G.S. 108A-9, except that the consolidated human services board may not:

(1) Appoint the human services director.

(2) Transmit or present the budget for social services programs.

(c) In addition to the powers conferred by G.S. 153A-77(e), a human services director shall have all the powers and duties of a director of social services provided by G.S. 108A-14, except that the human services director may:

(1) Serve as the executive officer of the consolidated human services board only to the extent and in the manner authorized by the county manager.

(2) Appoint staff of the consolidated human services agency only upon the approval of the county manager. (1995 (Reg. Sess., 1996), c. 690, s. 9; 1997-443, s. 11A.118(a).)

§§ 108A-15.2 through 108A-15.6: Reserved for future codification purposes.

Part 3. Special County Attorneys for Social Service Matters.

§ 108A-16. Appointment.

With the approval of the board of social services, the board of commissioners of any county may appoint a licensed attorney to serve as a special county attorney for social service matters, or designate the county attorney as special county attorney for social service matters. (1959, c. 1124, s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

§ 108A-17. Compensation.

The special county attorney for social service matters shall receive compensation for the performance of his duties and for his expenses in such amount as the board of commissioners may provide. His compensation shall be a proper

item in the annual budget of the county department of social services. (1959, c. 1124, s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

§ 108A-18. Duties and responsibilities.

(a) The special county attorney shall have the following duties and responsibilities:

(1) To serve as legal advisor to the county director, the county board of social services, and the board of county commissioners on social service matters;

(2) To represent the county, the plaintiff, or the obligee in all proceedings brought under Chapter 52A, the Uniform Reciprocal Enforcement of Support Act and to exercise continuous supervision of compliance with any order entered in any proceeding under that act;

(3) To represent the county board of social services in appeal proceedings and in any litigation relating to appeals;

(4) To assist the district attorney with the preparation and prosecution of criminal cases under Article 40 of Chapter 14, entitled "Protection of the Family";

(5) To assist the district attorney with the preparation and prosecution of proceedings authorized by Chapter 49, entitled "Bastardy";

(6) To perform such other duties as may be assigned to him by the board of county commissioners, the board of social services, or the director of social services.

(b) In performing any of the duties and responsibilities set out in this section, the special county attorney is authorized to call upon any director of social services or the Department of Health and Human Services for any information as he may require to perform his duties, and such director and Department are directed to assist him in performing such duties. (1959, c. 1124, ss. 2, 3; 1969, c. 546, s. 1; 1973, c. 47, s. 2; c. 476, s. 138; 1981, c. 275, s. 1; 1997-443, s. 11A.118(a).)

§§ 108A-19 through 108A-23: Reserved for future codification purposes.

Article 2.

Programs of Public Assistance.

Part 1. In General.

§ 108A-24. Definitions.

As used in Chapter 108A:

(1) "Applicant" is any person who requests assistance or on whose behalf assistance is requested.

(1a) "Biometric" means a digitized image of selected features of an individual encoded and processed in a manner that ensures an extraordinarily high correlation between the digital data and the actual characteristics of an individual.

(1b) "Community service" means work exchanged for temporary public assistance.

(1c) "County block grant" means federal and State money appropriated to implement and maintain a county's Work First Program.

(1d) "County department of social services' means a county department of social services, consolidated human services agency, or other local agency designated to administer services pursuant to this Article.
(1e) "County Plan" is the biennial Work First Program plan prepared by each county pursuant to this Article and submitted to the Department for incorporation into the State Plan.
(2) "Department" is the Department of Health and Human Services, unless the context clearly indicates otherwise.
(3) "Dependent child" is a person under 18 years of age or, in the medical assistance program, a person under 19 years of age.
(3a) "Electing County" means a county that elects to develop and is approved to administer a local Work First Program.
(3b) "Employment" means work that requires either a contribution to FICA or the filing of a State N.C. Form D-400, or the equivalent.
(3c) "Family" means a unit consisting of a minor child or children and one or more of their biological parents, adoptive parents, stepparents, or grandparents living together.
(3d) "Federal TANF funds" means the Temporary Assistance for Needy Families block grant funds provided for in Title IV-A of the Social Security Act.
(3e) "FICA" means the taxes imposed by the Federal Insurance Contribution Act, 26 U.S.C. § 3101, et seq.
(3f) "First Stop Employment Assistance" in the program established to assist recipients of Work First Program assistance with employment through job registration, job search, job preparedness, and community service.
(3g) "Full-time employment" means employment which requires the employee to work a regular schedule of hours per day and days per week established as the standard full-time workweek by the employer, but not less than an average of 30 hours per week.
(4) Repealed by Session Laws 1983, c. 14, s. 3.
(4a) "Mutual Responsibility Agreement" ("MRA") is an agreement between a county and a recipient of Work First Program assistance which describes the conditions for eligibility for the assistance and what the county will provide to assist the recipient in moving from assistance to self-sufficiency. A MRA may provide for recipient parental responsibilities and child development goals and what a county or the State will provide to assist the recipient in achieving those child development goals. Improvement in literacy shall be a part of any MRA, but a recipient shall not be penalized if unable to achieve improvement. A MRA is a prerequisite for any Work First Program assistance under this Article.
(4b) "Parent" means biological parent or adoptive parent.
(5) "Recipient" is a person to whom, or on whose behalf, assistance is granted under this Article.
(6) "Resident," unless otherwise defined by federal regulation, is a person who is living in North Carolina at the time of application with the intent to remain permanently or for an indefinite period; or who is a person who enters North Carolina seeking employment or with a job commitment.
(7) "Secretary" is the Secretary of Health and Human Services, unless the context clearly indicates otherwise.
(8) "Standard Program County" means a county that participates in the Standard Work First Program.
(9) "Standard Work First Program" means the Work First Program development by the Department.

(10) "State Plan" is the biennial Work First Program plan, based upon the aggregate of the Electing County Plans and the Standard Work First Program, prepared by the Department for the State's Work First Program pursuant to this Article, and submitted sequentially to the Budget Director, to the General Assembly, to the Governor, and to the appropriate federal officials for approval.
(11) "Temporary" is a time period, not to exceed 60 cumulative months, which meets the federal requirement of Title IV-A.
(12) "Title IV-A" means the Social Security Act, 42 U.S.C. § 601, et seq., as amended by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, and to other provisions of federal law as may apply to assistance provided in this Article.
(13) "Work" is lawful activity exchanged for cash, goods, uses, or services.
(14) "Work First Diversion Assistance" is a short-term cash payment that is intended to substantially reduce the likelihood of a family requiring Work First Family Assistance.
(15) "Work First Family Assistance" is a program of time-limited periodic payments to assist in maintaining the children of eligible families while the adult family members engage in activities to prepare for entering and to enter the workplace.
(16) "Work First Program" is the Temporary Assistance for Needy Families program established in this Article.
(17) "Work First Program assistance" means the goods or services provided under the Work First Program.
(18) "Work First Services" are services funded from appropriations made pursuant to this Article and designed to facilitate the purposes of the Work First Program. (1981, c. 275, s. 1; 1983, c. 14, s. 3; 1997-443, ss. 11A.118(a), 12.2.)

Cross References. — As to who is a permanently and totally disabled person, see § 108A-42.

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Standing to Appeal Eligibility Decision. — Daughter of deceased Medicaid recipient had no right to appeal from Department of Human Resources decision regarding her father's eligibility, as she was neither an "applicant" nor a "recipient," nor the legal representative of her father's estate. Yates v. North Carolina Dep't of Human Resources, 98 N.C. App. 402, 390 S.E.2d 761 (1990).

OPINIONS OF ATTORNEY GENERAL

Residency Requirement for Receipt of Welfare Benefits Unenforceable. — See opinion of Attorney General to Mr. Robert H. Ward, Assistant Commissioner, Department of Social Services, 40 N.C.A.G. 712 (1970), issued under former Chapter 108.

§ 108A-25. Creation of programs.

(a) The following programs of public assistance are established, and shall be administered by the county department of social services or the Department of Health and Human Services under federal regulations or under rules adopted by the Social Services Commission and under the supervision of the Department of Human Resources:
(1) Repealed by S.L. 1997-443, s. 12.3, effective August 28, 1997.
(2) State-county special assistance for adults;
(3) Food stamp program;

(4) Foster care and adoption assistance payments;
(5) Low income energy assistance program.

(b) The program of medical assistance is established as a program of public assistance and shall be administered by the county departments of social services under rules adopted by the Department of Health and Human Services.

(b1) The Work First Program is established as a program of public assistance and shall be supervised and administered as provided in Part 2 of this Article.

(c) The Department of Health and Human Services may accept all grants-in-aid for programs of public assistance which may be available to the State by the federal government. The provisions of this Article shall be liberally construed in order that the State and its citizens may benefit fully from the federal grants-in-aid. (1937, c. 135, s. 1; c. 288, ss. 3, 31; 1949, c. 1038, s. 2; 1955, c. 1044, s. 1; 1957, c. 100, s. 1; 1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1975, c. 92, s. 4; 1977, 2nd Sess., c. 1219, s. 9; 1979, c. 702, s. 1; 1981, c. 275, s. 1; 1997-443, ss. 11A.118(a), 11A.122, 12.3.)

Legal Periodicals. — For article reviewing the development of protective services for children in this State, see 54 N.C.L. Rev. 743 (1976).

CASE NOTES

State Participation Is Voluntary. — Participation by the State in aid to families with dependent children is not required, but is voluntary; implementation is left to the states. Gilliard v. Craig, 331 F. Supp. 587 (W.D.N.C. 1971), aff'd, 409 U.S. 807, 93 S. Ct. 39, 34 L. Ed. 2d 66 (1972), rehearing denied, 409 U.S. 1119, 93 S. Ct. 892, 34 L. Ed. 2d 704 (1973), decided under former Chapter 108.

Medicaid Has No Resource Spend-Down Provision. — The North Carolina Medicaid statute, like the federal statute, does not have a specific resource spend-down provision in its plan. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

Use of Resource Spend-Down Not Required. — The North Carolina Medicaid plan, established in subsection (b), does not require the use of resource spend-down when evaluating Medicaid eligibility. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

§ 108A-25.1. Recipient identification system.

(a) The Department shall establish and maintain a uniform system in the Department and in all counties of identifying all Work First, food stamp, and medical assistance program recipients, applicants, and payees, except those who are institutionalized adults, children under the age of 18 unless they are minor parents who are applying for or receiving assistance, or other individuals that federal law or regulation mandate be excluded. For purposes of this section, the term "payee" means a responsible adult who receives assistance, whether cash assistance or services, on behalf of a recipient. This system shall provide security and portability throughout the State and between the departments within the State involved in means-tested public assistance programs and shall have the capability of identifying recipients of assistance from all means-tested programs administered or funded through the Department.

(b) The identification system established in this section shall use fingerprint biometrics to ensure greater than ninety-nine percent (99%) accuracy for interdepartmental identification.

(c) The Department shall ensure that the biometric identification system will be compatible with any existing departmental biometric identification system.

(d) The Department shall make biometric identification a condition of eligibility for Work First, food stamp, and medical assistance programs for all recipients, applicants, and payees described in subsection (a) of this section. If any recipient, applicant, or payee is denied Work First or food stamp assistance on the basis of the identification system established in this section, the recipient's, applicant's, or payee's whole case, or group of individuals whose eligibility for Work First or food stamp assistance is dependent on all the other group members' financial and nonfinancial situation, shall be denied Work First or food stamp assistance. (1997-443, s. 12.4; 1998-212, s. 12.26A(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1997-443, s. 12.35, as amended by Session Laws 1998-212, s. 12.26A(b), provides: "Section 12.35. The Department of Health and Human Services shall have the uniform system of recipient identification established in G.S. 108A-25.1 in place and operating no later than October 1, 2000. The Department shall implement the start of the phase-in process no later than October 1, 1999, and shall report on a quarterly basis to the Joint Legislative Public Assistance Commission on its progress towards statewide implementation. Except as otherwise provided in this Part, this Part is effective when it becomes law."

Session Laws 1998-212, s. 12.26A(c) provides: "If the United States Department of Health and Human Services or the United States Department of Agriculture or both reject by written documentation any of the specifics of the biometric identificaton system prescribed in G.S. 108A-25.1, the North Carolina Department of Health and Human Services shall implement any remaining unrejected specifics."

Session Laws 1998-212, s. 12.26A(d) provides: "The Department of Health and Human Services shall report to the Joint Legislative Public Assistance Commission (i) whenever it determines that federal law or regulation mandates that other individuals than the ones specified in G.S. 108A-25.1(a) must be excluded from the biometric identification system prescribed in G.S. 108A-25.1 and (ii) whenever it is notified by written documentation that the United States Department of Health and Human Services or the United States Department of Agriculture or both have rejected any of the specifics of the biometric identification system prescribed in G.S. 108A-25.1."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvements Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, inserted "applicants, and payees, ...behalf of a recipient" in subsection (a); substituted "fingerprint" for "multiple" in subsection (b); and added subsection (d).

OPINIONS OF ATTORNEY GENERAL

Residency Requirement for Receipt of Welfare Benefits Unenforceable. — See opinion of Attorney General to Mr. Robert H. Ward, Assistant Commissioner, Department of Social Services, 40 N.C.A.G. 712 (1970), issued under former Chapter 108.

As to eligibility of children for aid to families with dependent children although parent does not qualify as a payee, see opinion of Attorney General to Colonel Clifton M. Craig, Commissioner, Department of Social Services, 40 N.C.A.G. 652 (1970), issued under former Chapter 108.

§ 108A-25.2. Exemption from limitations for individuals convicted of certain drug-related felonies.

Individuals convicted of Class H or I controlled substance felony offenses in this State shall be eligible to participate in the Work First Program and food stamp program:

(1) Six months after release from custody if no additional controlled substance felony offense is committed during that period and successful completion of or continuous active participation in a required substance abuse treatment program determined appropriate by the area mental health authority; or

(2) If not committed to custody, six months after the date of conviction if no additional controlled substance felony offense is committed during that period and successful completion of or continuous active participation in a required substance abuse treatment program determined appropriate by the area mental health authority.

A county department of social services shall require individuals who are eligible for Work First Program assistance and food stamp benefits pursuant to this section to undergo substance abuse treatment as a condition for receiving Work First Program or food stamp benefits, if funds and programs are available and to the extent allowed by federal law. (1997-443, s. 12.4.)

§ 108A-25.3. Garnishment of wages to recoup fraudulent public assistance program payment.

(a) The following definitions apply in this section:

(1) Disposable income. — The part of the compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise which remains after the deduction of any amounts required by law to be withheld.

(2) Fraudulent payment. — Any public assistance program payment made because of a recipient's false statement or representation or failure to disclose a material fact which occurs willfully and knowingly and with intent to deceive.

(3) Garnishee. — The person, firm, association, or corporation owing compensation for personal services, whether denominated as wages, salary, commission, bonus, or otherwise.

(4) Public assistance program. — Any means-tested benefit program administered or supervised by a county department of social services or the Department of Health and Human Services which is funded in whole or in part by federal, State, or county resources.

(b) In any case in which a recipient or former recipient of a public assistance program, who while a recipient, obtained or benefited from a fraudulent payment, a judge of the district court in the county where the recipient or former recipient resides or is found, or in the county where the payment was made, may enter an order of garnishment to recoup a fraudulent payment after 10 days following the entry of a judgment for a sum certain for fraudulent payments pursuant to a petition filed in the action in accordance with subsection (c) of this section. Not more than twenty percent (20%) of the recipient's or former recipient's monthly disposable income may be garnished to recoup payment in cases of fraudulent payment. The order of garnishment shall be subject to all federal and State laws or regulations that may apply to recoupment of fraudulent payments. Garnishment shall not be a remedy under this section when the recipient or former recipient is required to pay restitution for fraudulent public assistance payments pursuant to a criminal court order.

(c) A county department of social services or the Department of Health and Human Services may petition the court for an order of garnishment to recoup a fraudulent public assistance program payment. Garnishment shall be a remedy to recoup payment only after all administrative remedies are exhausted unsuccessfully. The petition shall be verified and provide the court with facts and circumstances of the fraudulent payment to or on behalf of the

recipient or former recipient, the name and address of the garnishee, the recipient's or former recipient's monthly disposable income (which may be based on information and belief), and the amount sought to be garnished from the recipient's or former recipient's disposable income. The petition shall be served on both the recipient or former recipient and the garnishee in accordance with the provisions for service of process set forth in G.S. 1A-1, Rule 4. The time period for answering or otherwise responding to process issued pursuant to this section shall be in accordance with the time periods set forth in G.S. 1A-1, Rule 12.

(d) Upon a hearing held pursuant to this section, the court may enter an order of garnishment. Provided, the court may not enter an order of garnishment if the court finds that the order jeopardizes the recipient's or former recipient's ability to become or remain financially self-sufficient and will result in the likelihood of an increased or recurring dependency on public assistance or an inability to secure basic necessities including, but not limited to, housing, food, health care, and utility costs. If an order of garnishment is entered, a copy of the same shall be served on both the recipient or the former recipient and the garnishee either personally or by certified or registered mail, return receipt requested. The order shall set forth sufficient findings of facts to support the action by the court and the amount to be garnished for each pay period. The amount garnished may be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the garnishee for each payment under the order. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(e) Upon receipt of the order of garnishment, the garnishee shall transmit without delay to the clerk of superior court the amount ordered by the court to be garnished. These funds shall be disbursed to the county department of social services to recoup fraudulent payments subject to the order of garnishment entered pursuant to this section.

(f) A garnishee who violates the terms of an order of garnishment shall be subject to punishment for contempt.

(g) The Social Services Commission shall adopt rules to implement this section. The rules shall ensure that a petition for an order of garnishment sought pursuant to this section is consistent with all federal and State laws and regulations. (1997-443, s. 11A.122; 1997-497, s. 1.)

Editor's Note. — Session Laws 1997-497, s. 4, makes this section effective December 1, 1997, and applicable to actions filed on or after that date to recover fraudulent payments of public assistance.

This section was enacted as G.S. 108A-25.1, and was recodified as G.S. 108A-25.3 by the Revisor of Statutes.

Session Laws 1997-487, s. 3, effective September 11, 1997, provides the Social Services Commission shall adopt temporary rules and initiate permanent rulemaking to implement Section 1 of this act within 90 days of the date this act is signed into law.

§ 108A-26. Certain financial assistance and in-kind goods not considered in determining assistance paid under Chapters 108A and 111.

Financial assistance and in-kind goods or services received from a governmental agency, or from a civic or charitable organization, shall not be considered in determining the amount of assistance to be paid any person under Chapters 108A and 111 of the General Statutes provided that such financial assistance and in-kind goods and services are incorporated in the rehabilitation plan of such person being assisted by the Division of Vocational Rehabilitation Services or the Division of Services for the Blind of the Department of Health and Human Services, except where such goods and

services are required to be considered by federal law or regulations. (1973, c. 716; 1981, c. 275, s. 1; 1997-443, s. 11A.118(a).)

Part 2. Work First Program.

§ 108A-27. Authorization and description of Work First Program; Work First Program changes; designation of Electing and Standard Program Counties.

(a) The Department shall establish, supervise and monitor the Work First Program. The purpose of the Work First Program is to provide eligible families with short-term assistance to facilitate their movement to self-sufficiency through gainful employment, not the mere reduction of the welfare rolls. The Department shall ensure that the Work First Program focus on this purpose of self-sufficiency. The ultimate goal of the Work First Program is the gradual elimination of generational poverty, and the Department shall ensure that all evaluations of the Work First Program, whether performed at the State or the county level, maintain this purpose and this goal of the Work First Program and effect an ongoing determination of whether the Work First Program is successful in facilitating families to move to self-sufficiency and in gradually eliminating generational poverty.

(b) The Work First Program in all counties shall include program administration, First Stop Employment Registration, and three categories of assistance to participants:

(1) Work First Diversion Assistance;
(2) Work First Family Assistance; and
(3) Work First Services.

All counties shall utilize the registration process of the First Stop Employment Assistance Program. All other provisions of the First Stop Employment Assistance Program shall be optional to the counties.

(c) The Department may change the Work First Program when required to comply with federal law. Any changes in federal law that necessitate a change in the Work First Program shall be effected by temporary rule until the next State Plan is approved by the General Assembly. Any change effective by the Department to comply with federal law shall be reported to the Joint Legislative Public Assistance Commission and included in the State Plan submitted during the next session of the General Assembly following the change.

(d) The Department shall allow counties maximum flexibility in the Work First Program while ensuring that the counties comply with federal and State laws and regulations. Subject to any limitations imposed by law, the Department shall allow counties to request to be designated as either Electing Counties or Standard Program Counties in the Work First Program.

(e) All counties shall notify the Department in writing as to whether they desire to be designated as either Electing or Standard Program. A county shall submit in its notification to the Department documentation demonstrating that three-fifths of its county commissioners support its desired designation. Upon receipt of the notification from the county, the Department shall send to the county confirmation of the county's planning designation. A county that desires to be redesignated shall submit a request in writing to the Department at least six months prior to the effective date of the next State Plan. In its request for redesignation, the county shall submit documentation demonstrating that three-fifths of its county commissioners support the redesignation. Upon receipt of the notification from the county, the Department shall send to

the county confirmation of the county's planning redesignation. A county's redesignation shall become effective on the effective date of the next State Plan following the redesignation. A county's designation or redesignation shall not be effected except as provided in this Article.

(f) The board of county commissioners in an Electing County shall be responsible for development, administration, and implementation of the Work First Program in that county.

(g) The county department of social services in a Standard Program County shall be responsible for administering and implementing the Standard Work First Program in that county.

(h) The Department and Electing Counties, in developing an Electing County Work First Program or the Standard Work First Program, may distinguish among potential groups of recipients on whatever basis necessary to enhance program purposes and to maximize federal revenues, so long as the rights, including the constitutional rights of equal protection and due process, of individuals are protected. The Department and Electing Counties may provide Work First Program assistance to legal immigrants on the same basis as citizens to the extent permitted by federal law. (1981, c. 275, s. 1; 1997-443, s. 12.5; 1998-212, s. 12.27A(a1).)

Editor's Note. — For provision that the Department of Human Resources is to elect the optional Aid to Families with Dependent Children Fraud Control Program pursuant to 45 C.F.R. 235.112, see editor's note under G.S. 105A-2.

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1997-443, s. 12.16 provides in part that the Department of Labor, in conjunction with the Department of Health and Human Services, shall establish a pilot project creating Individual Development Accounts (IDA) to assist working families. These funds shall be made available to serve as matching funds for personal savings of qualified participants in a multiyear demonstration to last not more than five years. Matching funds may be used by qualified participants for home purchase, investment in a business or self-employment venture, or costs of postsecondary education or training for the participant. Only savings from earned income will qualify for State matching funds and tax return reports of earned income shall be used to verify compliance.

Session Laws 1997-443, s. 12.17 provides in part that each county shall dedicate the full return to the county for AFDC and Work First Cash Assistance benefit amount that was determined to be fraudulent or erroneous and recovered by that county pursuant to the AFDC Fraud Control Program to enhance and improve program integrity. Persons charged with or suspected of AFDC or Work First fraud shall not be subjected to coercion, discrimination in targeting persons for civil or criminal prosecution, or civil investigation or action without being properly informed and advised of their rights.

Session Laws 1997-443, s. 12.20, provides in part that counties desiring to be designated as Electing Counties shall submit a request in writing to the Department of Health and Human Services not later than October 31, 1997. The requirement that the Department prepare and submit the State Plan to the General Assembly for approval in accordance with the procedures set forth in G.S. 143-16.1 shall not be applicable for fiscal year 1997-98. An independent evaluator shall evaluate the operation of the Work First Program based on criteria established by the State Auditor in consultation with the Standard program Counties and the Electing Counties. The independent evaluator shall present a report of the findings to the 2000 General Assembly. The Department of Health and Human Services shall study the movement of recipients of Work First Program assistance between counties within the /State, and the reasons for movement, including differences in eligibility criteria, benefit levels, and time limits and shall report on or before February 1, 2000. The Department of Health and Human Services shall monitor and report on the number of Work First Program recipients anticipated to remain without work and lose benefits due to time limits, efforts to intensify effort designed to prevent recipients from losing benefits where they are making reasonable efforts to become and remain employed and the reasons recipients were unable to find work.

Session Laws 1997-443, s. 12.20A, provides in part that the Department of Commerce, the

Employment Security Commission and the Department of Health and Human Services shall proceed to develop an amended Work First State Plan to secure federal Welfare-to-Work grant funds to assist recipients in obtaining employment and shall report to the General Assembly by April 1, 1998.

Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'".

Session Laws 1997-443, s. 35.4, is a severability clause.

Session Laws 1995, c. 368, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 24.16A, and further amended by Session Laws 1998-106, provides that, notwithstanding any law to the contrary, the Department of Health and Human Services shall designate Cabarrus County as a pilot county for the purpose of conducting a demonstration Workfare Program for certain Work First and Food Stamp recipients, that the Department shall seek all necessary federal waivers, and that to the extent that the act or the program conflict with any State law, the program supersedes that law; further provides the tenets of the program and an adjunct program; and provides for funding, and for an evaluation of the program and report to the General Assembly on or before September 1, 1998. The act becomes effective July 1, 1995 and expires on July 1, 2001.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — Session Laws 1998-212, s. 12.27A(a1), effective July 1, 1998, substituted "gainful employment, ...eliminating generational poverty" for "employment" at the end subsection (a).

Legal Periodicals. — Legal Periodicals. - See Legislative Survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Compliance with Federal Standards. — It is true that the State must administer its public assistance program in accordance with federal regulations. However, a state plan need not strictly follow the language of 42 U.S.C. § 602(a)(26)(A) in order to satisfy federal requirements, but may substitute an assignment by operation of law which is "substantially identical" to that described by the federal act. North Carolina's public assistance plan has been duly approved. State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

§ 108A-27.1. Time limitations on assistance.

(a) Under the Standard Work First Program, unless an extension or an exemption is provided pursuant to the provisions of the Part or the State Plan, any cash assistance provided to a person or family in the employment program shall only be provided for a cumulative total of 24 months. After having received cash assistance for 24 months, the person or the family may reapply for cash assistance, but not until after 36 months from the last month the person or the family received cash assistance. This subsection shall not apply to child-only cases.

(b) Electing Counties may set any time limitations on assistance it finds appropriate, so long as the time limitations do not conflict with or exceed any federal time limitations. (1997-443, s. 12.6; 1998-212, s. 12.27A(f).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, inserted "with" following "conflict" in subsection (b).

§ 108A-27.2. General duties of the Department.

The Department shall have the following general duties with respect to the Work First Program:

(1) Ensure that the specifications of the general provisions of the State Plan regarding the procedures required when recipients are sanctioned, prescribed in G.S. 108A-27.9(c), are uniformly developed and implemented across the State;

(1a) Provide technical assistance to counties developing and implementing their County Plans, including providing information concerning applicable federal law and regulations and changes to federal law and regulations that affect the permissible use of federal funds and scope of the Work First Program in a county;

(1b) Reserved for future codification purposes.

(1c) Ensure that two-parent families receive cash assistance for three months after qualifying for assistance without being subject to pay for performance requirements, in order to encourage families to stay together and to overcome barriers to self-sufficiency and gainful employment. Cash assistance or diversion assistance received prior to being subject to pay for performance requirements is limited to one time within a 12-month period.

(2) Describe authorized federal and State work activities. For up to twenty percent (20%) of Work First recipients, authorized State work activities shall include at least part-time enrollment in a postsecondary education program. In Standard Counties, recipients enrolled on at least a part-time basis in a postsecondary education program and maintaining a 2.5 grade point average or its equivalent shall have their two-year time limit suspended for up to three years.

(3) Define requirements for assignment of child support income and compliance with child support activities;

(4) Establish a schedule for counties to submit their County Plans to ensure that all Standard County Plans are adopted by the Standard Program Counties by January 15 of each odd-numbered year and all Electing County Plans are adopted by Electing Counties by February 1 of each odd-numbered year and review and then recommend a State Plan to the General Assembly;

(5) Ensure that the County Plans comply with federal and State laws, rules, and regulations, are consistent with the overall purposes and goals of the Work First Program, and maximize federal receipts for the Work First Program;

(6) Prepare the State Plan in accordance with G.S. 108A-27.9 and federal laws and regulations and submit it to the Budget Director for approval;

(7) Submit the State Plan, as approved by the Budget Director, to the General Assembly for approval;

(8) Report monthly to the Joint Legislative Public Assistance Commission on the monthly progress reports submitted by the counties to the Department;

(9) Develop and implement a system to monitor and evaluate the impact of the Work First Program on children and families, including the impact of the Work First Program on job retention and advancement, child abuse and neglect, caseloads for child protective services and foster care, school attendance, academic and behavioral performance, and other measures of the economic security and health of children and families. The system should be developed to allow monitoring and evaluation of impact based on both aggregated and disaggregated

data. State and county agencies shall cooperate in providing information needed to conduct these evaluations, sharing data and information except where prohibited specifically by federal law or regulation;

(10) Monitor the performance of counties relative to their County Plans and the overall goals of the Work First Program and report every six months to the Director of the Budget and the Joint Legislative Public Assistance Commission and annually to the General Assembly on the counties' attainment of the outcomes and goals;

(11) Provide quarterly progress reports to the county departments of social services, the county boards of commissioners, and the Joint Legislative Public Assistance Commission on the performance of counties in achieving Work First Program expectations;

(12) Report to the Joint Legislative Public Assistance Commission and the members of the Senate Appropriations Committee on Human Resources and the House of Representatives Appropriations Subcommittee on Human Resources the counties which have requested Electing status, provide copies of the proposed Electing County Plans to the Joint Legislative Public Assistance Commission and the members of the Senate Appropriations Committee on Human Resources and the House of Representatives Appropriations Subcommittee on Human Resources and make recommendations to the Joint Legislative Public Assistance Commission, the members of the Senate Appropriations Committee on Human Resources and the House of Representatives Appropriations Subcommittee on Human Resources, and the General Assembly on which of the proposed Electing County Plans ensure compliance with federal and State laws, rules, and regulations and are consistent with the overall purposes and goals for the Work First Program; and

(13) Make recommendations to the General Assembly for approval of counties to become Electing Counties which represent, in aggregate, no more than fifteen and one-half percent (15.5%) of the total Work First caseload at September 1 of each year and, for each county submitting a plan, the reasons individual counties were or were not recommended.

(14) Review the county Work First Program of each electing county and recommend whether the county should continue to be designated an electing county or whether it should be redesignated as a standard county. In conducting its review and making its recommendation, the Department shall:

a. Examine and consider the results of the Department's monitoring and evaluation of the impact of the electing county's Work First Program as required under subdivision (9) of this section;

b. Determine whether the electing county's Work First Program's unique design requires implementation by an electing county or whether the Work First Program could be implemented by a county designated as a standard county;

c. Determine whether the electing county's Work First Program and policies are unique and innovative in meeting the purpose of the Work First Program as stated under G.S. 108A-27, and State and federal laws, rules, and regulations, as compared to other standard and electing county Work First programs.

The Department shall make its recommendation and the reasons therefor to the Joint Legislative Public Assistance Commission not later than three months prior to submitting the State Plan to the Commission for review as required under G.S. 108A-27.9(a). (1997-443, s. 12.6; 1998-212, s. 12.27A(g); 1999-237, s. 7.10(b); 1999-359, ss. 1.2(a), 2(a), (b), 6.)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 12.27A(g1), as amended by Session Laws 1999-237, s. 7.10(c), provides: "The counties approved as Electing Counties in North Carolina's Temporary Assistance for Needy Families State Plan FY 1998-2001 as approved by this section are: Alamance, Caldwell, Caswell, Chatman, Cherokee, Davie, Forsyth, Henderson, Iredell, Lincoln, Macon, McDowell, New Hanover, Polk, Randolph, Rutherford, Sampson, Stokes, Surry, Transylvania, and Wilkes."

Session Laws 1998-212, s. 12.27A(q) provides: "The Department of Health and Human Services shall apply to the United States Department of Agriculture to operate a simplified Food Stamp Program, to make it possible to include the value of food stamp payments as compensation for community service or work experience."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, added subdivision (1), and redesignated former subdivision (1) as subdivision (1a); rewrote subdivision (12); and substituted "September" for "October" in subdivision (13).

Session Laws 1999-237, s. 7.10(b), effective July 1, 1999, substituted "odd-numbered year" for "even-numbered year" twice in subdivision (4).

Session Laws 1999-359, ss. 1.2(a), 2(a), 2(b) and 6, effective August 4, 1999, in subdivision (2), added the last two sentences and made a minor punctuation change; in the first sentence of subdivision (9), substituted "job retention and advancement" for "the economic security and health of children and families," deleted "and" preceding "academic" and inserted "and other ... disaggregated data"; added subdivision (1c); and added subdivision (14).

§ 108A-27.3. Electing Counties — Duties of county boards of commissioners.

(a) The duties of the county boards of commissioners in Electing Counties under the Work First Program are as follows:

(1) Establish county outcome and performance goals based on county economic, educational, and employment factors and adopt criteria for determining the progress of the county in moving persons and families to self-sufficiency;

(2) Establish eligibility criteria for recipients except for those criteria related to sanctioning procedures mandated across the State pursuant to G.S. 108A-27.9(c);

(3) Prescribe the method of calculating benefits for recipients;

(4) Determine and list persons and families eligible for the Work First Program;

(5) If made a part of the county's Work First Program, develop and enter into Mutual Responsibility Agreements with Work First Program recipients and ensure that the services and resources that are needed to assist participants to comply with the obligations under their Mutual Responsibility Agreements are available;

(6) Ensure that participants engage in the minimum hours of work activities required by Title IV-A;

(7) Consider providing community service work for any recipient who cannot find employment;

(8) Make payments of Work First Diversion Assistance and Work First Family Assistance to recipients having MRAs;

(9) Monitor compliance with Mutual Responsibility Agreements and enforce the agreement provisions;

(10) Monitor and evaluate the impact of the Work First Program on economic security and health of children and families, child abuse and neglect, caseloads for child protective services and foster care, school attendance, and academic and behavioral performance, and report the findings to the Department quarterly;

(10a) Ensure that all Work First cases are reviewed no later than three months prior to expiration of time limitations for receiving cash assistance to:

a. Ensure that time limitations on assistance have been computed correctly;

b. Ensure that the family is informed in writing about public assistance benefits, including child care, Medicaid, and food stamps, for which the family is eligible even while cash assistance is no longer available;

c. Provide for an extension of cash assistance benefits if the family qualifies for an extension; and

d. Review family status and assist the family in identifying resources and support the family needs to maintain employment and family stability.

(11) Ensure compliance with applicable State and federal laws, rules, and regulations for the Work First Program;

(12) Develop, adopt, and submit to the Department a biennial County Plan;

(13) Provide monthly progress reports to the Department in a format to be determined by the Department;

(14) Develop and implement an appeals process for the county's Work First Program that substantially complies with G.S. 108A-79 and comply with the procedures related to sanctioning by the Department for all counties in the State pursuant to G.S. 108A-27.2 and prescribed as general provisions in the State Plan pursuant to G.S. 108A-27.9(c)(1).

(b) The county board of commissioners shall not delegate the responsibilities described in subdivisions (a)(1), (a)(11), and (a)(12) of this section but may delegate other duties to public or private entities. Notwithstanding any delegation of duty, the county board of commissioners shall remain accountable for its duties under the Work First Program.

(c) The county board of commissioners shall appoint a committee of individuals to identify the needs of the population to be served and to review and assist in developing the County Plan to respond to the needs. The committee membership shall include, but is not limited to, representatives of the county board of social services, the board of the area mental health authority, the local public health board, the local school systems, the business community, the board of county commissioners and community-based organizations representative of the population to be served.

(d) The county board of commissioners shall review and approve the County Plan for submission to the Department. (1997-443, s. 12.6; 1998-212, s. 12.27A(h); 1999-359, s. 5(a).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, added "except for those criteria ... to G.S. 108A-27.9(c)" in subdivision (a)(2); substituted "Consider providing" for "Provide" in subdivision (a)(7); and added "and comply with ... pursuant to G.S. 108A-27.9(c)(1)" in subdivision (a)(14).

Session Laws 1999-359, s. 5(a), effective August 4, 1999, added subdivision (a)(10a).

§ 108A-27.4. Electing Counties — County Plan.

(a) Each Electing County shall submit to the Department, according to the schedule established by the Department and in compliance with all federal and State laws, rules, and regulations, a biennial County Plan.

(b) An Electing County's County Plan shall have at least the following five parts:

(1) Part I. Conditions Within the County;
(2) Part II. Outcomes and Goals for the County;
(3) Part III. Plans to Achieve and Measure the Outcomes and Goals;
(4) Part IV. Administration; and
(5) Part V. Funding Requirements.

(c) Funding requirements shall, at least, identify the amount of a county block grant for Work First Diversion Assistance, a county block grant for Work First Family Assistance, a county block grant for Work First Services, and the county's maintenance of effort contribution. A county may establish a reserve.

(d) The County Plans in Electing Counties may provide that in cases where benefits are paid only for a child, the case is considered a family case.

(e) Each county shall include in its County Plan the following:

(1) The number of MRAs entered into by the county;
(2) A description of the county's plans for serving families who need child care, transportation, substance abuse services, and employment support based on the needs of the community and the availability of services and funding;
(3) A list of the community service programs equivalent to full-time employment that are being offered to Work First Program recipients who are unable to find full-time employment;
(4) A description of the county's eligibility criteria, benefit calculation, and any other policies adopted by the county relating to eligibility, terms, and conditions for receiving Work First Program assistance, including sanctions, asset and income requirements, time limits and extensions, rewards, exemptions, and exceptions to requirements. If an Electing County Plan proposes to change eligibility requirements, benefits levels, or reduce maintenance of effort, the county shall describe the reasons for these changes and how the county intends to utilize the maintenance of effort savings;
(5) A description of how the county plans to utilize public and private resources to assist in moving persons and families to self-sufficiency; and
(6) Any request to the Department for waivers to rules or any proposals for statutory changes to remove any impediments to implementation of the County's Plan.
(7) The process by which the county will review all Work First caseloads no later than three months prior to expiration of time limitations for receiving cash assistance to:
    a. Ensure that time limitations on assistance have been computed correctly;
    b. Ensure that the family is informed in writing about public assistance benefits, including child care, Medicaid, and food stamps, for which the family is eligible even while cash assistance is no longer available;
    c. Provide for an extension of cash assistance benefits if the family qualifies for an extension; and
    d. Review family status and assist the family in identifying resources and support the family needs to maintain employment and family stability.

(f) Each county shall provide to the general public an opportunity to review and comment upon its County Plan prior to its submission to the Department.

(g) A county may modify its County Plan once each biennium but not at any other time unless the county notifies the Department of the proposed modification and the Department determines that the proposed modification is consistent with State and federal law and the goals for the Work First Program.

(h) Electing counties shall have an emergency assistance program for Work First eligible families, as defined in the electing county plan. Counties may establish income eligibility for emergency assistance at or below two hundred percent (200%) of the federal poverty level. (1997-443, s. 12.6; 1999-359, s. 5(b), (c).)

Effect of Amendments. — Session Laws 1999-359, ss. 5(b) and 5(c), effective August 4, 1999, added subdivision (e)(7) and added subsection (h).

§ 108A-27.5. Electing Counties — Duties of the Department.

In addition to the general duties prescribed in G.S. 108A-27.3, the Department shall have the following duties with respect to establishing, supervising, and monitoring the Work First Program in Electing Counties while allowing Electing Counties maximum flexibility in designing and implementing County Plans:

(1) Coordinate activities of other State agencies providing technical support to counties developing their County Plans;

(2) At the request of the counties, provide assistance to counties in their activities with private sector individuals and organizations relative to County Plans; and

(3) Establish the baseline for the State maintenance of effort. (1997-443, s. 12.6.)

§ 108A-27.6. Standard Program Counties — Duties of county departments of social services and county boards of commissioners.

(a) Except as otherwise provided in this Article, the Standard Work First Program shall be administered by the county departments of social services. The county departments of social services in Standard Program Counties shall:

(1) In consultation with the Department and the county board of commissioners, establish outcome and performance goals for each Standard Program County, based on economic factors and conditions in that county, aimed at reducing child poverty by means of goals that measure the increased numbers of persons employed, the increased numbers of hours worked by and wages earned by recipients, and other measures of child well-being;

(2) Determine eligibility of persons and families for the Work First Program;

(3) Enter into Mutual Responsibility Agreements with participants if required under the State Plan and ensure that the services and resources that are needed to assist participants to comply with their obligations under their Mutual Responsibility Agreements are available;

(4) Comply with State and federal law relating to Work First and Title IV-A;

(5) Develop the County Plans for submission by the counties to the Department;

(6) Ensure that participants engage in the minimum hours of work activities required by the State Plan and Title IV-A;
(7) Ensure that the components of the Work First Program are funded solely from authorized sources and that federal TANF funds are used only for purposes and programs authorized by federal and State law;
(8) Monitor and evaluate the impact of the Work First Program on children and families, including the impact of the Program on the economic security and health of children and families, child abuse and neglect, caseloads for child protective services and foster care, school attendance, and academic and behavioral performance, and report the findings to the Department quarterly; and
(9) Provide monthly progress reports to the Department, in a format to be determined by the Department.
(10) Ensure that all Work First cases are reviewed no later than three months prior to expiration of time limitations for receiving cash assistance to:
a. Ensure that time limitations on assistance have been computed correctly;
b. Ensure that the family is informed about public assistance benefits, including child care, Medicaid, and food stamps, for which the family is eligible even while cash assistance is no longer available;
c. Provide for an extension of cash assistance benefits if the family qualifies for an extension; and
d. Review family status and assist the family in identifying resources and support the family needs to maintain employment and family stability.

(b) In consultation with the Department, a county department of social services may delegate any of its duties under this Article to another public agency or private contractor. Prior to delegating any duty, a county department of social services shall submit its proposed delegation to the Department as the Department may provide. Notwithstanding any delegation of duty, a county department of social services shall remain accountable for its duties under the Work First Program.

(c) The county board of commissioners shall appoint a committee of individuals to identify the needs of the population to be served and to review and assist in developing the County Plan to respond to the needs. The committee membership shall include, but is not limited to, representatives of the county board of social services, the board of the area mental health authority, the local public health board, the local school systems, the business community, the board of county commissioners, and community-based organizations representative of the population to be served.

(d) The county board of commissioners shall review and approve the County Plan for submission to the Department. (1997-443, s. 12.6; 1999-359, s. 5(e).)

Effect of Amendments. — Session Laws 1999-359, s. 5(e), effective August 4, 1999, added subdivision (a)(10).

§ 108A-27.7. Standard Program County Plan.

(a) Each Standard Program County shall submit to the Department for approval a biennial County Plan that describes the Work First Diversion Assistance and Work First Services the county proposes to offer.

(b) Prior to submitting its County Plan to the Department, a county shall provide the public with an opportunity to review and comment upon it.

(c) The County Plan of a Standard Program County shall include a description of how the county will:

(1) Utilize both public and private resources to assist in moving persons and families to self-sufficiency;

(2) Serve families who need child care, transportation, substance abuse services, and employment support based on the needs of the community and the availability of services and funding; and

(3) Address the needs of persons and families in any other areas specified by the Department.

(d) Standard counties shall have an emergency assistance program for Work First eligible families, as defined in the standard county plan. Counties may establish income eligibility for emergency assistance at or below two hundred percent (200%) of the federal poverty level. (1997-443, s. 12.6; 1999-359, s. 5(d).)

Effect of Amendments. — Session Laws 1999-359, s. 5(d), effective August 4, 1999, added subsection (d).

§ 108A-27.8. Standard Program Counties — Duties of Department.

(a) The Department shall establish, develop, supervise, and monitor the Standard Work First Program. In addition to its general duties prescribed in G.S. 108A-27.2, the Department shall have the following duties with respect to the Standard Work First Program and the Standard Program Counties:

(1) Establish the requirements for the content of County Plans and review and approve the County Plans submitted by the Standard Program Counties;

(2) Advise and assist the Social Services Commission in adopting rules necessary to implement the provisions of this Article;

(3) Supervise disbursement of county block grants to the Standard Program Counties for Work First Services;

(4) Make payments of Work First Family Assistance and Work First Diversion Assistance;

(5) Coordinate activities of other State and county agencies in meeting the goals of the Work First Program;

(6) Work with State and county agencies and with private sector organizations and individuals to develop programs and methods to meet the goals of the Work First Program; and

(7) Develop a Mutual Responsibility Agreement for use by Standard Program Counties.

(b) The Secretary, in consultation with the Office of State Budget and Management, may adopt temporary rules when necessary to:

(1) Implement provisions of the State Plan;

(2) Maximize federal revenues to prevent the loss of federal funds;

(3) Enhance the ability of the Department to prevent fraud and abuse in the Work First Program; and

(4) Modify the provisions in the State Plan as necessary to meet changed circumstances after approval of the State Plan.

(c) The Social Services Commission may adopt rules in accordance with G.S. 143B-153 when necessary to implement this Article and subject to delegation by the Secretary of any rule-making authority to implement the provisions of the State Plan. (1997-443, s. 12.6.)

§ 108A-27.9. State Plan.

(a) The Department shall prepare and submit to the Director of the Budget a biennial State Plan that proposes the goals and requirements for the State and the terms of the Work First Program for each fiscal year. Prior to submitting a State Plan to the General Assembly, the Department shall submit the State Plan to the Joint Legislative Public Assistance Commission for its review and then consult with local governments and private sector organizations regarding the design of the State Plan and allow 45 days to receive comments from them.

(b) The State Plan shall consist of generally applicable provisions and two separate sections, one proposing the terms of the Work First Program in Electing Counties, and the other proposing the terms for the Standard Work First Program.

(c) The State Plan shall include the following generally applicable provisions:

(1) Provisions to ensure that recipients who are sanctioned are provided a clear explanation of the sanction and that all recipients, including those under sanction or termination for rules infractions, are fully informed of their right to legal counsel and any other representatives they choose at their own cost;

(1a) Provisions to ensure that no Work First Program recipients, required to participate in work activities, shall be employed or assigned when:

a. Any regular employee is on layoff from the same or substantially equivalent job;

b. An employer terminates any regular employee or otherwise causes an involuntary reduction in the employer's workforce in order to hire Work First recipients; or

c. An employer otherwise causes the displacement of any currently employed worker or positions, including partial displacements such as reductions in hours of nonovertime work, wages, or employment benefits, in order to hire Work First recipients;

(1b) Reserved for future codification purposes.

(1c) Provisions to ensure that two-parent families receive cash assistance for three months after qualifying for assistance without being subject to pay for performance requirements, in order to encourage families to stay together and to overcome barriers to self-sufficiency and gainful employment. Cash assistance or diversion assistance received prior to being subject to pay for performance requirements is limited to one time within a 12-month period.

(2) Provisions to ensure the establishment and maintenance of grievance procedures to resolve complaints by regular employees who allege that the employment or assignment of a Work First Program recipient is in violation of subdivision (1a) of this subsection, and grievance procedures to resolve complaints by Work First Participants made pursuant to subdivision (3) of this subsection;

(3) Provisions to ensure that Work First Program participants, required to participate in work activities, shall be subject to and have the Work First Program employees in similarly situated work activities, including, but not limited to, wage and hour laws, health and safety standards, and nondiscrimination laws, provided that nothing in this subdivision shall be construed to prohibit Work First Program participants from receiving additional State or county services designed to assist Work First Program participants achieve job stability and self-sufficiency;

(4) A description of eligible federal and State work activities. For up to twenty percent (20%) of Work First recipients, authorized State work

activities shall include at least part-time enrollment in a postsecondary education program. In Standard Counties, recipients enrolled on at least a part-time basis in a postsecondary education program and maintaining a 2.5 grade point average or its equivalent shall have their two-year time limit suspended for up to three years.

(5) Requirements for assignment of child support income and compliance with child support activities;

(6) Incentives for high-performing counties, contingency plans for counties unable to meet financial commitments during the term of the State Plan, and sanctions against counties failing to meet performance expectations, including allocation of any federal penalties that may be assessed against the State as a result of a county's failure to perform; and

(7) Anything else required by federal or State law, rule, or regulation to be included in the State Plan.

(d) The section of the State Plan proposing the terms of the Work First Program in Electing Counties shall be based upon the aggregate of the Electing County Plans and shall include the following:

(1) Allocations of federal and State funds for Electing Counties in the Work First Program including block grants to counties and the allocation of funding for administration not to exceed the federally established limitations on the use of federal TANF funds and the limits imposed under this Article;

(2) Maintenance of effort and levels of State and county funding for Electing Counties in the Work First Program;

(3) Federal eligibility requirements and a description of the eligibility requirements and benefit calculation in each Electing County; and

(4) A description of the federal, State, and each Electing County's financial participation in the Work First Program.

The Department may modify the section in the State Plan regarding Electing Counties once a biennium or except as necessary to reflect any modifications made by an Electing County. Any changes to the section of the State Plan regarding Electing Counties shall be reported to the Joint Legislative Public Assistance Commission at the next meeting of the Commission following the changes and to the General Assembly during the next session following the changes.

(e) The section of State Plan describing the Standard Work First Program shall include:

(1) Benefit levels, limitations, and payments and the method for calculating benefit levels and payments;

(2) Eligibility criteria, including asset and income standards;

(3) Any exceptions or exemptions proposed to work requirements;

(4) Provisions for when extensions may be granted to a person or family who reaches the time limit for receipt of benefits;

(5) Provisions for exceptions and exemptions to criteria, time limits, and standards;

(6) Provisions for sanctions for recipient failure to comply with program requirements;

(7) Terms and conditions for repayment of Work First Diversion Assistance by recipients who subsequently receive Work First Family Assistance;

(8) Allocations of federal, State, and county funds for the Standard Work First Program, including county block grants to the counties for Work First Services;

(9) Levels of State and county funding for the Standard Work First Program;

(10) Allocation for funding for administration at the State and local level not to exceed the federally established limitations on use of federal TANF funds for program administration; and

(11) A description of the Department's consultation with local governments and private sector organizations and a summary of any comments received during the 45-day public comment period.

(f) In addition to those items required to be included pursuant to subsection (e) of this section, the State Plan may include proposals to establish the following as part of the Standard Work First Program:

(1) Demonstration projects in one or more counties to assess the value of any proposed changes in State policy or to test ways to improve programs; and

(2) Requirement that recipients shall be required to enter into and comply with Mutual Responsibility Agreements as a condition of receiving benefits. If provided for in the State Plan, the terms and conditions of Mutual Responsibility Agreements shall be consistent with program purposes, federal law, and availability of funds.

(g) The State Plan may provide for automatic Medicaid eligibility for all Work First Program recipients.

(h) The State Plan may provide that in cases where benefits are paid only for a child, the case is considered a family case. (1997-443, s. 12.6; 1997-456, s. 55.10; 1998-212, s. 12.27A(b), (b1); 1999-359, ss. 1.2(b), 2(c).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-359, s. 1(a) provides: "Support services under North Carolina's Temporary Assistance for Needy Families (TANF) State Plan shall be available to families whose family income does not exceed two hundred percent (200%) of the federal poverty level. Other services, including pregnancy prevention, child protection, family preservation, job retention, and tracking and follow-up activities, may be provided without regard to income. Work-related services under TANF may be provided to a noncustodial parent of a minor child whose custodial parent is a TANF recipient, or to a noncustodial parent of a minor child in a child-only case, except that no work-related services shall be provided to the noncustodial parent if the services would limit or reduce Work First assistance to the custodial parent or caretaker and children. In order to be eligible for work-related services under this subsection, the noncustodial parent's family income must be not more than two hundred percent (200%) of the federal poverty level."

Session Laws 1999-359, s. 1(b) provides: "In order to make it more possible for motivated persons to move to higher levels of economic self-sufficiency, counties are encouraged to advise eligible persons who are interested in pursuing postsecondary education or training of the support services that are available during enrollment in these programs. Counties should encourage eligible persons to consider postsecondary education or training programs that are designed to increase earning potential and enhance career advancement opportunities in high-demand and high-growth occupations."

Session Laws 1999-359, s. 7, provides that cash assistance payments under Work First shall be calculated based on the standard of need that was in effect for the 1997-1998 fiscal year. The Department of Health and Human Services shall make the necessary changes to the Temporary Assistance for Needy Families State Plan to comply with this provision.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, deleted "in accordance with the procedures established in G.S. 143-16.1 for federal block grant funds" in subsection (a); added subdivision (c)(1), and redesignated former subdivision (c)(1) as subdivision (c)(1a); in subdivision (c)(2) substituted "subdivision (1a)" for "subdivision (1)," and added the language beginning "and grievance procedures."

Session Laws 1999-359, ss. 1.2(b) and 2(c), effective August 4, 1999, in subdivision (c)(4), added the last two sentences and made a minor punctuation change, and added subdivision (c)(1c).

§ 108A-27.10. Duties of the Director of the Budget/Governor.

(a) The Director of the Budget shall, by May 15 of each even-numbered calendar year, approve and recommend adoption by the General Assembly of the State Plan.

(b) At the beginning of every fiscal year, the Director of the Budget shall report to the General Assembly the number of permanent State employees who have been Work First Program recipients during the previous calendar year.

(c) After the State Plan has become law, the Governor shall sign it and cause it to be submitted to federal officials in accordance with federal law. (1997-443, s. 12.6.)

§ 108A-27.11. Work First Program funding.

(a) County block grants, except funds for Work First Family Assistance, shall be computed based on the percentage of each county's total AFDC (including AFDC-EA) and JOBS expenditures, except expenditures for cash assistance, to statewide actual expenditures for those programs in fiscal year 1995-96. The resulting percentage shall be applied to the State's total certified budget enacted by the General Assembly for each fiscal year, except for State funds budgeted for State and county demonstration projects authorized by the General Assembly and for Work First Family Assistance payments.

(b) The following shall apply to funding for Standard Program Counties:

(1) The Department shall make payments of Work First Family Assistance and Work First Diversion Assistance subject to the availability of federal, State, and county funds.

(2) The Department shall reimburse counties for county expenditures under the Work First Program subject to the availability of federal, State, and county funds.

(c) Each Electing County's allocation for Work First Family Assistance shall be computed based on the percentage of each Electing County's total expenditures for cash assistance to statewide actual expenditures for cash assistance in 1995-96. The resulting percentage shall be applied to the federal TANF block grant funds appropriated for cash assistance by the General Assembly each fiscal year. The Department shall transmit the federal funds contained in the county block grants to Electing Counties as soon as practicable after they become available to the State and in accordance with federal cash management laws and regulations. The Department shall transmit one-fourth of the State funds contained in county block grants to Electing Counties at the beginning of each quarter. Once paid, the county block grant funds shall not revert. (1997-443, s. 12.6; 1998-212, s. 12.27A(i); 1999-359, s. 3.)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, substituted "certified budget enacted by the General Assembly for each fiscal year" for "budgeted funds" in the second sentence of subsection (a); and substituted "federal TANF block ... each fiscal year" for "total budgeted funds for Work First Family Assistance" in the second sentence of subsection (c).

Session Laws 1999-359, s. 3, effective August 4, 1999, substituted "for State funds budgeted for State and county demonstration projects authorized by the General Assembly and for Work First Family Assistance payments" for "funds budgeted for Work First Family Assistnace, for Work First Program expenditures at the county level" in the last sentence of subsection (a).

§ 108A-27.12. Maintenance of effort.

(a) The Department shall define in the State Plan the services that can be provided with TANF federal funds and with State and county maintenance of effort funds. The Department shall work with counties to allow flexibility in the spending of county, State, and federal funds so as to maximize the use of resources while assuring that federal maintenance of effort requirements are met.

(b) Counties that fail to meet maintenance of effort requirements and that fail to meet the performance indicators for reducing maintenance of effort shall submit a corrective action plan to the Department and shall be subject to G.S. 108A-27.14. The Department may reduce block grant allocations to counties that fail to meet maintenance of effort requirements and performance indicators or may use some of the county's block grant allocation to secure needed services for clients in that county. If a county fails to comply with maintenance of effort requirements, the Director of the Budget may also withhold State funds appropriated to the county pursuant to G.S. 108A-93.

(c) The Department shall maintain the State's maintenance of effort at one hundred percent (100%) of the State certified budget enacted by the General Assembly for programs under this Part during fiscal year 1996-97. At no time shall the Department reduce or reallocate State funds previously obligated or appropriated for Work First or child welfare services.

(d) Each standard county shall maintain funding in Work First, child welfare, and related activities as defined by the Department at one hundred percent (100%) of the county funds budgeted in State Fiscal Year 1996-97 for AFDC Administration, JOBS employment and training, and AFDC Emergency Assistance (cash and services). A county may request to reduce its block grant and maintenance of effort if that county can demonstrate that it is meeting all the needs of its clients, as defined by the Department's performance indicators, without spending all of the block grant funds. The needs of clients include child protection, employment services, and related supportive services such as child care. The Department may reallocate any State or federal funds released from a county that reduced its maintenance of effort or from counties not spending their block grants. Funds reallocated to counties will require county match.

(e) During the first year a county operates as an Electing County, the county's maintenance of effort shall be no less than ninety percent (90%) of the amount the county budgeted for programs under this Part during fiscal year 1996-97. If during the first year of operation as Electing the Electing County achieves one hundred percent (100%) of its goals as set forth in its Electing County Plan, then the Electing County may reduce its maintenance of effort to eighty percent (80%) of the amount the county budgeted for programs under this Part during fiscal year 1996-97 for the second year of the Electing County's operation and for all years thereafter that the county maintains Electing Status.

(f) The Department may realign funds if the realignment will assure that maintenance of effort requirements are met while maximizing federal revenues.

(g) The Department of Health and Human Services shall report quarterly on the extent to which the State and counties are meeting federal maintenance of effort requirements under Temporary Assistance of Needy Families and on any realignment of funds. The Department and the counties shall work together to maximize full achievement of the State and county maintenance of effort. The Department shall make its report to members of the House of Representatives Appropriations Subcommittee on Health and Human Services, the Senate Appropriations Committee on Human Resources, and the Joint Legislative Public Assistance Committee, and to the Fiscal Research Division. (1997-443, s. 12.6; 1998-212, s. 12.27A(j); 1999-359, s. 4(a), (c).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-359, s. 4(b) provides that notwithstanding G. S. 108A-27.12(e), during the 1999-2000 fiscal year, Electing Counties maintenance of effort shall be no less than 90% of the amount the county budgeted for programs under this Part during fiscal year 1996-97. If during the 1999-2000 fiscal year the Electing County achieves 100% of its goals as set forth in its Electing County Plan, then the Electing County may reduce its maintenance of effort to 80% of the amount the county budgeted for programs under this Part during fiscal year 1996-97 for the next year of the Electing County's operation and for all years thereafter that the county maintains Electing Status. Section 4(b) does not apply to any electing county that achieved 100% of its goals as set forth in its Electing County Plan during the 1998-99 fiscal year.

Session Laws 1999-359, s. 4(c) was codified as subsection (g) of this section at the direction of the Revisor of Statutes.

Session Laws 1999-359, s. 4(d) provides that the Department shall continue to work with counties, area mental health authorities, and other public and private entities or partnerships that provide services to Temporary Assistance for Needy Families recipients paid for with state and local funds to identify those services and activities that meet federal maintenance of effort requirements. The Department shall report the status of identifying services and activities in its quarterly report on meeting federal maintenance of effort requirements as required under s. 4(c) (codified as subsection (g) of G.S. 108A-27.12).

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, in subsection (c), substituted "State certified budget enacted by the General Assembly" for "amount the State budgeted," and added the last sentence; and substituted "1996-97 fiscal year" for "preceding fiscal year" in subsection (d).

Session Laws 1999-359, ss. 4(a) and 4(c), effective August 4, 1999, rewrote subsections (a), (b) and (d); in subsection (c), deleted "or county" preceding "funds previously obligated" and deleted "County Block Grants" following "Work First"; and added subsections (f) and (g).

§ 108A-27.13. Performance standards.

(a) The Department, in consultation with the county department of social services and county board of commissioners, shall establish acceptable levels of performance for Standard Program Counties in meeting Work First expectations, measured by outcome and performance goals contained in the State Plan. The Department shall establish monitoring mechanisms and reporting requirements to assess progress toward the goals. The well-being of children and economic factors and conditions within the counties, including the increased numbers of persons employed and increased numbers of hours worked by and wages earned by recipients, shall be considered by the Department.

(b) Electing County performance shall be judged upon the county's ability to attain the outcomes and goals established in that county's County Plan.

(c) All adult recipients of Work First Program assistance are expected to achieve full-time employment, subject to applicable exceptions. Adult recipients of Work First Program assistance shall comply with the provisions and requirements in their MRAs. (1997-443, s. 12.6.)

§ 108A-27.14. Corrective action.

(a) When any county fails to meet acceptable levels of performance, the Department may take one or more of the following actions to assist the county in meeting its Work First goals:

(1) Notify the county of the deficiencies and add additional monitoring and reporting requirements.

(2) Require the county to develop and submit for approval by the Department a corrective action plan.

(b) If any Standard Program County fails to meet acceptable levels of performance for two consecutive years, or fails to comply with a corrective action plan developed pursuant to this section, the Department may assume

control of the county's Work First Program, appoint an administrator to administer the county's Work First Program, and exercise the powers assumed to administer the Work First Program either directly or through contract with private or public agencies. County funding shall continue at levels established by the State Plan when the State has assumed control of a county Work First Program. At no time after the State has assumed control of a Work First Program shall a county withdraw funds previously obligated or appropriated to the Work First Program.

(c) If an Electing County fails to achieve its Work First Program goals for two consecutive years, or fails to comply with a corrective action plan developed pursuant to this section, and as a result the federal government imposes a penalty upon the State, then the county shall lose its Electing County status. (1997-443, s. 12.6.)

§ 108A-27.15. Assistance not an entitlement; appeals.

(a) Any assistance programs established under this Part, whether administered by the Department or the counties, are not entitlements, and nothing in this Part shall create any property right.

(b) The Standard Work First Program is a program of temporary public assistance for the purpose of an appeal under G.S. 108A-79. (1997-443, s. 12.6.)

§ 108A-27.16: Repealed by Session Laws 1999-237, s. 6(h), effective July 1, 1999.

Editor's Note. — Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

§§ 108A-28, 108A-28.1: Repealed by Session Laws 1997-443, s. 12.14.

§ 108A-29. First Stop Employment Assistance; priority for employment services.

(a) There is established in the Employment Security Commission a program to be called First Stop Employment Assistance. The Chair of the Employment Security Commission shall administer the program with the participation and cooperation of the Department of Commerce, county boards of commissioners, the Department of Health and Human Services, the Department of Labor, the Department of Crime Control and Public Safety, and the community college system. The responsibilities of each agency shall be specified in a Memorandum of Understanding between the Employment Security Commission and the Department of Health and Human Services, in consultation with the Department of Commerce, the Department of Labor, and the community college system. The Employment Security Commission shall be the presumptive primary deliverer of job placement services for the Work First Program.

(b) Individuals seeking to apply or reapply for Work First Program assistance and who are not exempt from work requirements shall register with the First Stop Employment Assistance Program. The point of registration shall be at an office of the Employment Security Commission in the county in which the individual resides or at another location designated in a Memorandum of Understanding between the Employment Security Commission and the local department of social services.

(c) Individuals who are not otherwise exempt shall present verification of registration at the time of applying for Work First Program assistance. Unless

exempt, the individual shall not be approved for Work First Program assistance until verification is received. Child-only cases are exempt from this requirement.

(d) Once an individual has registered as required in subsection (c) of this section and upon verification of the registration by the agency or contractor providing the Work First Program assistance, the individual's eligibility for Work First Program assistance may be evaluated and the application completed. Continued receipt of Work First Program benefits is contingent upon successful participation in the First Stop Employment Program, and lack of cooperation and participation in the First Stop Employment Program may result in the termination of benefits to the individual.

(e) The county board of commissioners shall determine which agencies or nonprofit or private contractors will participate with the Employment Security Commission and the local department of social services in developing the rules to implement the First Stop Employment Program.

(f) At the county's option, the Employment Security Commission, in consultation with and with the assistance of the agencies specified in the Memorandum of Understanding described in subsection (b) of this section, shall provide to Work First Program registrants the continuum of services available through its Employment Security Commission. Each County Plan may provide that the county department of social services enter into a cooperative agreement with the Employment Security Commission to operate the Job Search component on behalf of Work First Program registrants. The cooperative agreement shall include a provision for payment to the Employment Security Commission by the county department of social services for the cost of providing those services, not otherwise available to all clients of the Employment Security Commission, described in this subsection as the same are reflected as a component of the County Plan payable from fund allocations in the county block grant. The county department of social services may also enter into a cooperative agreement with the community college system or any other entity to operate the Job Preparedness component. This cooperative agreement shall include a provision for payment to that entity by the county department of social services for the cost of providing those services, not otherwise available to all clients of the Employment Security Commission, described in this subsection as the same are reflected as a component of the County Plan payable from fund allocations in the county block grant.

(g) The Employment Security Commission shall be the primary job placement entity of the Work First Program. The Employment Security Commission shall further assist registrants through job search, job placement, or referral to community service, if contracted to do so.

(h) An individual placed in the Job Search component of the First Stop Employment Program shall look for work and shall accept any suitable employment. If contracted, the Employment Security Commission shall refer individuals to current job openings and shall make job development contacts for individuals. Individuals so referred shall be required to keep a record of their job search activities on a job search record form provided by the Commission, and the Employment Security Commission will monitor these activities. A "job search record" means a written list of dates, times, places, addresses, telephone numbers, names, and circumstances of job interviews. The Job Search component shall include at least one weekly contact with the Employment Security Commission. The Employment Security Commission shall adopt rules to accomplish this subsection.

(i) The Employment Security Commission shall notify all employers in the State of the "Exclusive No-Fault" Referral Service available through the Employment Security Commission to employers who hire personnel through Job Service referrals.

(j) All individuals referred to jobs through the Employment Security Commission shall be instructed in the procedures for applying for the Federal Earned Income Credit (FEIC). All individuals referred to jobs through the Employment Security Commission who qualify for the FEIC shall apply for the FEIC by filing a W-5 form with their employers.

(k) The FEIC shall not be counted as income when eligibility is determined for Work First Program assistance, Medicaid, food stamps, subsidies, public housing, or Supplemental Security Income.

(*l*) The Employment Security Commission shall work with the Department of Labor to develop a relationship with these private employment agencies to utilize their services and make referrals of individuals registered with the Employment Security Commission.

(m) An individual who has not found a job within 12 weeks of being placed in the Job Search component of the Program may also be placed in the Community Service component at the county's option.

(n) If after evaluation of an individual the Employment Security Commission believes it necessary, the Employment Security Commission or the county department of social services also may refer an individual to the Job Preparedness component of the First Stop Employment Program. The local community college should include General Education Development, Adult Basic Education, or Human Resources Development programs that are already in existence as a part of the Job Preparedness component. Additionally, the Commission or the county department of social services may refer an individual to a literacy council. Through a Memorandum of Understanding between the Employment Security Commission, the local department of social services, and other contracted entities, a system shall be established to monitor an individual's progress through close communications with the agencies assisting the individual. The Employment Security Commission or Job Preparedness provider shall adopt rules to accomplish this subsection.

(o) The Job Preparedness component of the Program shall last a maximum of 12 weeks unless the recipient is registered and is satisfactorily progressing in a program that requires additional time to complete. Every reasonable effort shall be made to place the recipient in part-time employment or part-time community service if the time required exceeds the 12-week maximum. The county department of social services may contract with service providers to provide the services described in this section and shall monitor the provision of the services by the service providers. Registrants may participate in more than one component at a time.

(p) The Employment Security Commission shall expand its Labor Market Information System. The expansion shall at least include: statistical information on unemployment rates and other labor trends by county; and publications dealing with licensing requirements, economic development, and career projections, and information technology systems which can be used to track participants through the employment and training process.

(q) Each county Employment Security Commission local or branch office shall organize a Job Service Employer Committee. The Chairman of the Employment Security Commission shall appoint the Job Service Employer Committee members, each of whom shall serve two-year terms, from persons nominated by the local Job Service Employer Committee. The Employment Security Commission shall organize a State Job Service Employer Committee consisting of eight members who shall serve two-year terms. The Chairman of the Employment Security Commission shall appoint the State Job Service Employer Committee members after consultation with the Governor. The Employment Security Commission shall adopt rules and regulations concerning the meeting schedule and the conduct of meetings of each Job Service Employer Committee. Each Job Service Employer Committee in counties

participating in the First Stop Employment Program shall oversee the operation of the First Stop Employment Program in that county and shall report to the local Employment Security Commission quarterly on its recommendations to improve the First Stop Employment Program. The Employment Security Commission shall develop the reporting method and time frame and shall coordinate a full report to be presented to the Joint Legislative Public Assistance Commission by the end of each calendar year.

(r) Each county's Job Service Employer Committee or Workforce Development Board shall continue the study of the working poor, titled "NC WORKS", in their respective counties and shall include the following in the study:

(1) Determination of the extent to which current labor market participation enables individuals and families to earn the amount of disposable income necessary to meet their basic needs;

(2) Determination of how many North Carolinians work and earn wages below one hundred fifty percent (150%) of the Federal Poverty Guideline and study trends in the size and demographic profiles of this underemployed group within the respective county;

(3) Examination of job market factors that contribute to any changes in the composition and numbers of the working poor including, but not limited to, shifts from manufacturing to service, from full-time to part-time work, from permanent to temporary or their contingent employment;

(4) Consideration and determination of the respective responsibilities of the public and private sectors in ensuring that working families and individuals have disposable income adequate to meet their basic needs;

(5) Evaluation of the effectiveness of the unemployment insurance system in meeting the needs of low-wage workers when they become unemployed;

(6) Examination of the efficacy of a State-earned income tax credit that would enable working families to meet the requirements of the basic needs budget;

(7) Examination of the wages, benefits, and protections available to part-time and temporary workers, leased employees, independent contractors, and other contingent workers as compared to regular full-time workers;

(8) Solicitation, receipt, and acceptance of grants or other funds from any person or entity and enter into agreements with respect to these grants or other funds regarding the undertaking of studies or plans necessary to carry out the purposes of the committee; and

(9) A request of any necessary data from either public or private entities that relate to the needs of the committee or board.

Each committee or board shall prepare and submit a report on the finding for the county which it represents by May 1 of each year to the Joint Legislative Public Assistance Commission, the Senate Appropriations Committee on Human Resources, the House of Representatives Appropriations Subcommittee on Human Resources, the Senate Appropriations Committee on Natural and Economic Resources, and the House of Representatives Appropriations Subcommittee on Natural and Economic Resources.

(s) Members of families with dependent children and with aggregate family income at or below the level required for eligibility for Work First Family Assistance, regardless of whether or not they have applied for such assistance, shall be given priority in obtaining employment services including training and community service provided by or through State agencies or counties or with funds which are allocated to the State of North Carolina directly or indirectly through prime sponsors or otherwise for the purpose of employment

of unemployed persons. (1961, c. 998; 1963, c. 1061; 1965, c. 939, s. 2; 1969, c. 546, s. 1; 1971, c. 283; 1973, c. 476, s. 138; 1977, c. 362; 1981, c. 275, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 19; 1989 (Reg. Sess., 1990), c. 966, s. 1; 1997-443, s. 12.7(a); 1998-212, s. 12.27A(l), (m); 1999-340, s. 9.)

Editor's Note. — Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, rewrote the section.

Session Laws 1999-340, s. 9, effective July 22, 1999, rewrote subsection (q).

Legal Periodicals. — For note on illegitimacy in North Carolina, see 46 N.C.L. Rev. 813 (1968).

For note on the "man in the house" or "substitute parent" rule in determining eligibility for aid to dependent children, see 47 N.C.L. Rev. 228 (1968).

OPINIONS OF ATTORNEY GENERAL

As to eligibility of children for aid to families with dependent children although parent does not qualify as a payee, see opinion of Attorney General to Colonel Clifton M. Craig, Commissioner, Department of Social Services, 40 N.C.A.G. 652 (1970), issued under former Chapter 108.

§ 108A-29.1. Substance abuse treatment required; drug testing for Work First Program recipients.

(a) Each applicant or current recipient of Work First Program benefits, determined by a Qualified Substance Abuse Professional (QSAP) or by a physician certified by the American Society of Addiction Medicine (ASAM) to be addicted to alcohol or drugs and to be in need of professional substance abuse treatment services shall be required, as part of the person's MRA and as a condition to receiving Work First Program benefits, to participate satisfactorily in an individualized plan of treat in an appropriate treatment program. As a mandatory program component of participation in an addiction treatment program, each applicant or current recipient shall be required to submit to an approved, reliable, and professionally administered regimen of testing for presence of alcohol or drugs, without advance notice, during and after participation, in accordance with the addiction treatment program's individualized plan of treatment, follow-up, and continuing care services for the applicant or current recipient.

(b) An applicant or current recipient who fails to comply with any requirement imposed pursuant to this section shall not be eligible for benefits or shall be subject to the termination of benefits, but shall be considered to be receiving benefits for purposes of determining eligibility for medical assistance.

(c) The children of any applicant or current recipient shall remain eligible for benefits, and these benefits shall be paid to a protective payee pursuant to G.S. 108A-38.

(d) An applicant or current recipient shall not be regarded as failing to comply with the requirements of this section if an appropriate drug or alcohol treatment program is unavailable.

(e) Area mental health authorities organized pursuant to Article 4 of Chapter 122C of the General Statutes shall be responsible for administering the provisions of this section.

(f) The requirements of this section may be waived or modified as necessary in the case of individual applicants or recipients to the degree necessary to comply with Medicaid eligibility provisions. (1997-443, s. 12.8.)

§ 108A-30: Repealed by Session Laws 1997-443, s. 12.14.

§ 108A-31. Application for assistance.

Any person who believes that the person is eligible to receive Work First Program assistance may apply for assistance to the county department of social services in the county in which the person resides, or, in the case of residents of Electing Counties, to the public or private entity designated by the board of county commissioners. Counties shall record inquiries for and accept applications from all persons requesting to apply for Work First Program assistance. Counties shall process applications in a reasonable and timely manner. (1937, c. 288, ss. 15, 45; 1939, c. 395, s. 1; 1941, c. 232; 1945, c. 615, s. 1; 1947, c. 91, s. 3; 1953, c. 675, s. 12; 1959, c. 179, ss. 1, 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 742; 1979, c. 702, s. 4; 1981, c. 275, s. 1; 1997-443, s. 12.8A.)

§§ 108A-32 through 108A-35: Repealed by Session Laws 1997-443, s. 12.14.

§ 108A-36. Assistance not assignable; checks payable to decedents.

The assistance granted by this Article shall not be transferable or assignable at law or in equity; and none of the money paid or payable as assistance shall be subject to execution, levy, attachment, garnishment, or other legal processes, or to the operation of any bankruptcy or insolvency law.

In the event of the death of a public assistance recipient during or after the first day of the month for which assistance was previously authorized by the county social services board, or county director if waived, any public assistance check or checks payable to such recipient not endorsed prior to such recipient's death shall be delivered to the clerk of superior court and by him administered under the provisions of G.S. 28A-25-6. (1937, c. 288, ss. 17, 47; 1945, c. 615, s. 1; 1953, c. 213; 1969, c. 546, s. 1; 1971, c. 446, ss. 1, 2; 1977, c. 655, ss. 1, 2; 1981, c. 275, s. 1.)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

CASE NOTES

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 108A-37. Personal representative for mismanaged public assistance.

(a) Whenever a county director of social services shall determine that a recipient of assistance is unwilling or unable to manage such assistance to the extent that deprivation or hazard to himself or others results, the director shall file a petition before a district court or the clerk of superior court in the county

alleging such facts and requesting the appointment of a personal representative to be responsible for receiving such assistance and to use it for the benefit of the recipient.

(b) Upon receipt of such petition, the court shall promptly hold a hearing, provided the recipient shall receive five days' notice in writing of the time and place of such hearing. If the court, sitting without a jury, shall find at the hearing that the facts alleged in the petition are true, it may appoint some responsible person as personal representative. The personal representative shall serve without compensation and be responsible to the court for the faithful performance of his duties. He shall serve until the director of social services or the recipient shows to the court that the personal representative is no longer required or is unsuitable. All costs of court relating to proceedings under this section shall be waived.

(c) Any recipient for whom a personal representative is appointed may appeal such appointment to superior court for a hearing de novo without a jury.

(d) All findings of fact made under the proceedings authorized by this section shall not be competent as evidence in any case or proceeding which concerns any subject matter other than that of appointing a personal representative. (1959, c. 1239, ss. 1, 3; 1961, c. 186; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

CASE NOTES

Grant to Be Used to Benefit Child. — This section requires that the caretaker use the Aid to Families with Dependent Children (AFDC) grant for the benefit of the dependent child, and provides for the appointment of a protective payee or personal representative. Morrell v. Flaherty, 338 N.C. 230, 449 S.E.2d 175 (1994), cert. denied, 515 U.S. 1122, 115 S. Ct. 2278, 132 L. Ed. 2d 282 (1995).

§ 108A-38. Protective and vendor payments.

When necessary to comply with any present or future federal law or regulation in order to obtain federal participation in public assistance payments, the payments may be made direct to vendors to reimburse them for goods and services provided the applicants or recipients, and may be made to protective payees who shall act for the applicant or recipient for receiving and managing assistance. Payments to vendors and protective payees shall be made to the extent provided in, and in accordance with, rules of the Social Services Commission or the Department, which rules shall be subject to applicable federal laws and regulations. (1963, c. 380; 1969, c. 546, s. 1; c. 747; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 20; 1981, c. 275, s. 1; 1997-443, s. 12.9.)

Editor's Note. — Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

CASE NOTES

Quoted in Morrell v. Flaherty, 338 N.C. 230, 449 S.E.2d 175 (1994), cert. denied, 515 U.S. 1122, 115 S. Ct. 2278, 132 L. Ed. 2d 282 (1995).

§ 108A-39. Fraudulent misrepresentation.

(a) Any person whether provider or recipient, or person representing himself as such, who willfully and knowingly and with intent to deceive makes a false statement or representation or who fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact obtains, for himself or another person, attempts to obtain for himself or another person, or continues to receive or enables another person to continue to receive public assistance in the amount of not more than four hundred dollars ($400.00) is guilty of a Class 1 misdemeanor.

(b) Any person, whether provider or recipient, or person representing himself as such who willfully and knowingly with the intent to deceive makes a false statement or representation or fails to disclose a material fact and as a result of making a false statement or representation or failing to disclose a material fact, obtains for himself or another person, attempts to obtain for himself or another person, or continues to receive or enables another person to continue to receive public assistance in an amount of more than four hundred dollars ($400.00) is guilty of a Class I felony.

(c) As used in this section the word "person" means person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1937, c. 288, ss. 27, 57; 1963, cc. 1013, 1024, 1062; 1969, c. 546, s. 1; 1977, c. 604, s. 1; 1979, c. 510, s. 2; c. 907; 1981, c. 275, s. 1; 1993, c. 539, s. 813; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Purpose. — This section was passed to define and punish a particular, specific crime. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981), decided under former Chapter 108.

All of the elements of § 14-100 are not required to sustain a charge under this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981), decided under former Chapter 108.

The agency making the payments does not have to be deceived. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981), decided under former Chapter 108.

Who May Be Guilty. — An employee of the agency providing the funds, or the provider of the funds, can be guilty of violating this section. State v. Bass, 53 N.C. App. 40, 280 S.E.2d 7 (1981), decided under former Chapter 108.

§ 108A-39.1: Repealed by Session Laws 1997-443, s. 12.14.

§ 108A-39.2: Repealed by Session Laws 1989 (Regular Session, 1990), c. 966, s. 3.

Part 3. State-County Special Assistance for Adults.

§ 108A-40. Authorization of State-County Special Assistance for Adults Program.

The Department is authorized to establish and supervise a State-County Special Assistance for Adults Program. This program is to be administered by county departments of social services under rules and regulations of the Social Services Commission. (1981, c. 275, s. 1.)

§ 108A-41. Eligibility.

(a) Assistance shall be granted under this Part to all persons in adult care homes for care found to be essential in accordance with the rules and

regulations adopted by the Social Services Commission and prescribed by G.S. 108A-42(b).

(b) Assistance shall be granted to any person who:

(1) Is 65 years of age and older, or is between the ages of 18 and 65 and is permanently and totally disabled; and

(2) Has insufficient income or other resources to provide a reasonable subsistence compatible with decency and health as determined by the rules and regulations of the Social Services Commission; and

(3) Is one of the following:

a. A resident of North Carolina for at least 90 days immediately prior to receiving this assistance;

b. A person coming to North Carolina to join a close relative who has resided in North Carolina for at least 180 consecutive days immediately prior to the person's application. The close relative shall furnish verification of his or her residency to the local department of social services at the time the applicant applies for special assistance. As used in this sub-subdivision, a close relative is the person's parent, grandparent, brother, sister, spouse, or child; or

c. A person discharged from a State facility who was a patient in the facility as a result of an interstate mental health compact. As used in this sub-subdivision the term State facility is a facility listed under G.S. 122C-181.

(c) When determining whether a person has insufficient resources to provide a reasonable subsistence compatible with decency and health, there shall be excluded from consideration the person's primary place of residence and the land on which it is situated, and in addition there shall be excluded real property contiguous with the person's primary place of residence in which the property tax value is less than twelve thousand dollars ($12,000).

(d) The county shall also have the option of granting assistance to Certain Disabled persons as defined in the rules and regulations adopted by the Social Services Commission. Nothing in this Part should be interpreted so as to preclude any individual county from operating any program of financial assistance using only county funds. (1949, s. 1038, s. 2; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 717, s. 1; 1977, 2nd Sess., c. 1252, s. 1; 1979, c. 702, s. 8; 1981, c. 275, s. 1; c. 849, s. 1; 1983, c. 14, s. 2; 1995, c. 535, s. 5; 1997-210, s. 1.)

Editor's Note. — Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

OPINIONS OF ATTORNEY GENERAL

Residency Requirement for Receipt of Welfare Benefits Unenforceable. — See opinion of Attorney General to Mr. Robert H. Ward, Assistant Commissioner, Department of Social Services, 40 N.C.A.G. 712 (1970), issued under former Chapter 108.

§ 108A-42. Determination of disability.

(a) For purposes of G.S. 108A-41(b)(1), a person is permanently and totally disabled if:

(1) This person was receiving aid to the disabled assistance in December 1973, and continues to be disabled under the definition of disability, having a physical or mental impairment which substantially precludes him from obtaining gainful employment and this impairment

appears reasonably certain to continue without substantial improvement throughout his lifetime; or

(2) This person applied for assistance on or after January 1, 1974, and is disabled under the Social Security standards.

(b) For purposes of G.S. 108A-41(d), a "Certain Disabled" person is a person in a private living arrangement who is age 18 but less than age 65, having a physical or mental impairment which substantially precludes him from obtaining gainful employment, which impairment appears reasonably certain to continue without substantial improvement throughout his lifetime.

(c) Disability shall be reviewed by medical consultants employed by the Department. The final decision on the disability shall be made by these medical consultants under rules and regulations adopted by the Social Services Commission. (1979, c. 702, s. 9; 1981, c. 275, s. 1; 1983, c. 14, s. 1.)

CASE NOTES

Federal Decisions Are Persuasive But Not Binding. — Federal decisions interpreting the disability definitions for Old Age, Survivors and Disability Benefits (Title II) and SSI benefits (Title XVI) are not binding on this state's courts, but are deemed to be persuasive authority. Lackey v. North Carolina Dep't of Human Resources, 306 N.C. 231, 293 S.E.2d 171 (1982), decided under former § 108-26.

§ 108A-43. Application procedure.

(a) Applications under this Part shall be made to the county director of social services who, with the approval of the county board of social services and in conformity with the rules and regulations of the Social Services Commission, shall determine whether assistance shall be granted and the amount of such assistance; but the county board of social services may delegate to the county director the authority to approve or reject all applications for assistance under this Part, in which event the county director shall not be required to report his actions to the board.

(b) The amount of assistance which any eligible person may receive shall be determined with regard to the resources and necessary expenditures of the applicant, in accordance with the appropriate rules and regulations of the Social Services Commission. (1949, c. 1038, s. 2; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 717, s. 4; 1981, c. 275, s. 1.)

§ 108A-44. State funds to counties.

(a) Appropriations made under this Part by the General Assembly to the Department, together with grants of the federal government (when such grants are made available to the State) shall be used exclusively for assistance to needy persons eligible under this Part.

(b) Allotments shall be made annually by the Department to the counties participating in the program established by this Part.

(c) No allotment shall be used, either directly or indirectly, to replace county appropriations or expenditures. (1949, c. 1038, s. 2; 1955, c. 310, s. 3; 1961, c. 186; 1969, c. 546, s. 1; 1973, c. 717, s. 5; 1975, c. 92, s. 2; 1981, c. 275, s. 1.)

§ 108A-45. Participation.

The State-County Special Assistance for Adults Program established by this Part shall be administered by all the county departments of social services under rules and regulations adopted by the Social Services Commission and under the supervision of the Department. Provided that, assistance for certain

disabled persons shall be provided solely at the option of the county. (1949, c. 1038, s. 2; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 717, s. 6; 1975, c. 92, s. 3; 1977, 2nd Sess., c. 1252, s. 2; 1981, c. 275, s. 1.)

§ 108A-46. Transfer of property for purposes of qualifying for State-county special assistance for adults; periods of ineligibility.

(a) Any person, otherwise eligible, who, either while receiving State-county special assistance or within one year prior to the date of applying for assistance, unless some other time period is mandated by controlling federal law, sells, gives, assigns or transfers countable real or personal property or an interest therein, either by himself or through his legal representative, for the purpose of retaining or establishing eligibility for State-county special assistance, shall be ineligible to receive assistance thereafter as set forth in subsection (c) of this section.

Countable real and personal property shall be real property, excluding a homesite, intangible personal property, nonessential motor and recreational vehicles, nonincome producing business equipment, boats and motors. The provisions of this act shall not apply to the sale, gift, assignment or transfer of real or personal property if and to the extent that the person applying for State-county special assistance would have been eligible for such assistance notwithstanding ownership of such property or an interest therein.

(b) Any sale, gift, assignment or transfer of real or personal property or an interest therein, as provided in subsection (a) of this section, shall be presumed to have been made for the purpose of retaining or establishing eligibility for State-county special assistance unless the person, or his legal representative, who sells, gives, assigns or transfers the property or interest, receives valuable consideration at least equal to the fair market value, less encumbrances, of the property or interest.

(c) Any person who, by himself or through his legal representative, sells, gives, assigns or transfers real or personal property or an interest therein for the purpose of retaining or establishing eligibility for State-county special assistance, as provided in subsection (a) of this section, shall be ineligible to receive assistance thereafter until an amount equal to the uncompensated value of the property or interest has been expended by or on behalf of such person for maintenance and support, including medical expenses, paid or incurred, or shall be ineligible in accordance with the following schedule, whichever is sooner:

(1) For uncompensated value of at least one thousand dollars ($1,000) but not more than six thousand dollars ($6,000), a one-year period of ineligibility from date of sale, gift, assignment or transfer;

(2) For uncompensated value of more than six thousand dollars ($6,000) but not more than twelve thousand dollars ($12,000), a two-year period of ineligibility from date of sale, gift, assignment or transfer;

(3) For uncompensated value of more than twelve thousand dollars ($12,000), a two-year period of ineligibility from date of sale, gift, assignment or transfer, plus one additional month of ineligibility for each five hundred dollar ($500.00) increment or portion thereof by which the uncompensated value exceeds twelve thousand dollars ($12,000), but in no event to exceed three years.

(d) The sale, gift, assignment or transfer for a consideration less than fair market value, less encumbrances, or any tangible personal property which was acquired with the proceeds of sale, assignment or transfer of real or intangible personal property described in subsection (a) of this section or in exchange for such real or intangible personal property shall be presumed to have been for

the purpose of evading the provisions of this section if the acquisition and sale, gift, assignment or transfer of the tangible personal property is by or on behalf of a person receiving State-county special assistance or within one year of making application for such assistance and the consequences of the sale, gift, assignment or transfer of such tangible personal property shall be determined under the provisions of subsections (c), (f) and (g) of this section.

(e) The presumption created by subsections (b) and (d) may be overcome if the person receiving or applying for State-county special assistance, or his legal representative, establishes by the greater weight of the evidence that the sale, gift, assignment or transfer was exclusively for some purpose other than retaining or establishing eligibility for such assistance.

(f) For the purpose of establishing uncompensated value under subsection (c), the value of property or an interest therein shall be the fair market value of the property or interest at the time of the sale, gift, assignment or transfer, less the amount of compensation received for the property or interest, if any. There shall be a rebuttable presumption that the fair market value of real property is the most recent property tax value of the property, as ascertained according to Subchapter II of Chapter 105 of the General Statutes. Fair market value for purpose of this subsection shall be such value, determined as above set out, less any legally enforceable encumbrances to which the property is subject.

(g) In the event that there is more than one sale, gift, assignment or transfer of property or an interest therein by a person receiving State-county special assistance or within one year of the date of an application for such assistance, unless some other time period is mandated by controlling federal law, the uncompensated value for the purposes of subsection (c) shall be the aggregate uncompensated value of all sales, gifts, assignments and transfers. The date which is the midpoint between the date of the first and the last sale, gift, assignment or transfer shall be the date from which the period of ineligibility shall be determined under subsection (c). (1979, c. 585, s. 1; 1981, c. 275, s. 1; c. 758, s. 1.)

§ 108A-47. Limitations on payments.

No payment of assistance under this Part shall be made for the care of any person in an adult care home that is owned or operated in whole or in part by any of the following:

(1) A member of the Social Services Commission, of any county board of social services, or of any board of county commissioners;

(2) An official or employee of the Department, unless the official or employee has been appointed temporary manager of the facility pursuant to G.S. 131E-237, or of any county department of social services;

(3) A spouse of a person designated in subdivisions (1) and (2). (1979, c. 702, s. 10; 1981, c. 275, s. 1; 1995, c. 298, s. 1; c. 535, s. 6.)

Editor's Note. — Session Laws 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

Part 4. Foster Care and Adoption Assistance Payments.

§ 108A-48. State Foster Care Benefits Program.

(a) The Department is authorized to establish a State Foster Care Benefits Program with appropriations by the General Assembly for the purpose of providing assistance to children who are placed in foster care facilities by county departments of social services in accordance with the rules and regulations of the Social Services Commission. Such appropriations, together with county contributions for this purpose, shall be expended to provide for the costs of keeping children in foster care facilities.

(b) No benefits provided by this section shall be granted to any individual who has passed his eighteenth birthday unless he is less than 21 years of age and is a full-time student or has been accepted for enrollment as a full-time student for the next school term pursuing a high school diploma or its equivalent; a course of study at the college level; or a course of vocational or technical training designed to fit him for gainful employment. (1981, c. 275, s. 1.)

§ 108A-49. Foster care and adoption assistance payments.

(a) Benefits in the form of foster care assistance shall be granted in accordance with the rules of the Social Services Commission to any dependent child who would have been eligible to receive Aid to Families with Dependent Children (as that program was in effect on June 1, 1995), but for his or her removal from the home of a specified relative for placement in a foster care facility; provided, that the child's placement and care is the responsibility of a county department of social services. A county department of social services shall pay, at a minimum, the monthly graduated foster care assistance payments for eligible children as set by the General Assembly. A county department of social services may make foster care assistance payments in excess of the monthly graduated rates set by the General Assembly.

(b) Adoption assistance payments for certain adoptive children shall be granted in accordance with the rules of the Social Services Commission to adoptive parents who adopt a child eligible to receive foster care maintenance payments or supplemental security income benefits; provided, that the child cannot be returned to his or her parents; and provided, that the child has special needs which create a financial barrier to adoption. A county department of social services shall pay, at a minimum, the monthly graduated adoption assistance payments for eligible children as set by the General Assembly. A county department of social services may make adoption assistance payments in excess of the monthly graduated rates set by the General Assembly.

(c) The Department is authorized to use available federal payments to states under Title IV-E of the Social Security Act for foster care and adoption assistance payments. (1981, c. 275, s. 1; 1997-443, s. 12.10; 1999-190, s. 3.)

Editor's Note. — Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

Effect of Amendments. — Session Laws 1999-190, s. 3, effective June 18, 1999, added the last two sentences in subsections (a) and (b).

§ 108A-50. State benefits for certain adoptive children.

(a) The Department is authorized to establish a program of State benefits for certain adoptive children from appropriations made by the General Assembly and from grants available from the federal government to the State. This program shall be used exclusively for the purpose of meeting the needs of adoptive children who are physically or mentally handicapped, older, or otherwise hard to place for adoption.

(b) The purpose of this program is to encourage, within the limits of available funds, the adoption of certain hard-to-place children in order to make it possible for children living in, or likely to be placed in foster homes or institutions, to benefit from the stability and security of permanent homes where such children can receive continuous care, guidance, protection and love to reduce the number of such children who might be placed or remain in foster homes or institutions until they become adults.

(c) Eligibility for an adoptive child to receive assistance shall be determined by the Department under the rules and regulations of the Social Services Commission.

(d) Financial assistance under this program shall not be provided when the needed services are available free of cost to the adoptive child; or are covered by an insurance policy of the adoptive parents; or are available to the child under the Adoption Assistance Program specified in G.S. 108A-49. (1975, c. 953, s. 3; 1981, c. 275, s. 1.)

Part 5. Food Stamp Program.

§ 108A-51. Authorization for Food Stamp Program.

The Department is authorized to establish a statewide food stamp program as authorized by the Congress of the United States. The Department of Health and Human Services is designated as the State agency responsible for the supervision of such programs. The boards of county commissioners through the county departments of social services are held responsible for the administration and operation of the programs. (1981, c. 275, s. 1; 1997-443, s. 11A.118(a).)

§ 108A-52. Determination of eligibility.

Any person who believes that he or another person is eligible to receive food stamps may apply for such assistance to the county department of social services in the county in which the applicant resides. The application shall be made in such form and shall contain such information as the Social Services Commission may require. Upon receipt of an application for food stamps, the county department of social services shall make a prompt evaluation or investigation of the facts alleged in the application in order to determine the applicant's eligibility for such assistance and to obtain such other information as the Department may require. Upon the completion of such investigation, the county department of social services shall, within a reasonable period of time, determine eligibility. (1981, c. 275, s. 1.)

§ 108A-53. Fraudulent misrepresentation.

(a) Any person, whether provider or recipient or person representing himself as such, who knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant

thereto, transfers with intent to defraud any food stamps or authorization cards to which that person is not entitled in the amount of four hundred dollars ($400.00) or less shall be guilty of a Class 1 misdemeanor. Whoever knowingly obtains or attempts to obtain, or aids or abets any person to obtain by means of making a willfully false statement or representation or by impersonation or by failing to disclose material facts or in any manner not authorized by this Part or the regulations issued pursuant thereto, transfers with intent to defraud any food stamps or authorization cards to which he is not entitled in an amount more than four hundred dollars ($400.00) shall be guilty of a Class I felony.

(b) Whoever presents, or causes to be presented, food stamps or authorization cards for payment or redemption, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this Part or the regulations issued pursuant to this Part shall be guilty of a Class 1 misdemeanor.

(c) Whoever receives any food stamps for any consumable item knowing that such food stamps were procured fraudulently under subsections (a) and/or (b) of this section shall be guilty of a Class 1 misdemeanor.

(d) Whoever receives any food stamps for any consumable item whose exchange is prohibited by the United States Department of Agriculture shall be guilty of a Class 1 misdemeanor. (1981, c. 275, s. 1; 1991, c. 523, s. 5; 1993, c. 539, ss. 814, 1299; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 507, s. 19.5(n); 1996, 2nd Ex. Sess., c. 18, s. 24.31(a).)

CASE NOTES

Successive Acts of Misrepresentation. — Amounts that defendant received after making false statements could be combined to reach the felony threshold of "more than four hundred dollars ($400.00) (now $2,000)," where defendant's successive acts of misrepresentation were in essence a continuing act to reach her desired result: obtain food stamps in an amount for which she would not have been otherwise qualified. State v. Williams, 101 N.C. App. 412, 399 S.E.2d 348 (1991).

Cited in State v. Wells, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

§ 108A-53.1. Illegal possession or use of food stamps.

(a) Any person who knowingly buys, sells, distributes, or possesses with the intent to sell, or distribute food stamp coupons, authorization cards, or access devices in any manner contrary to that authorized by this Part or the regulations issued pursuant thereto shall be guilty of a Class H felony.

(b) Any person who knowingly uses, transfers, acquires, alters, or possesses food stamp coupons, authorization cards, or access devices in any manner contrary to that authorized by this Part or the regulations issued pursuant thereto, other than as set forth in subsection (a) of this section, shall be guilty of a Class 1 misdemeanor if the value of such food stamp coupons, authorization cards, or access devices is less than one hundred dollars ($100.00), or a Class A1 misdemeanor if the value of such food stamp coupons, authorization cards, or access devices is equal to at least one hundred dollars ($100.00) but less than five hundred dollars ($500.00), or a Class I felony if the value of such food stamp coupons, authorization cards, or access devices is equal to at least five hundred dollars ($500.00) but less than one thousand dollars ($1,000), or a Class H felony if the value of such food stamp coupons, authorization cards, or access devices equals or exceeds one thousand dollars ($1,000). (1997-497, s. 2.)

Part 6. Medical Assistance Program.

§ 108A-54. Authorization of Medical Assistance Program.

The Department is authorized and empowered to establish a Medical Assistance Program from federal, State and county appropriations and to adopt rules and regulations under which payments are to be made in accordance with the provisions of this Part. The nonfederal share may be divided between the State and the counties, in a manner consistent with the provisions of the federal Social Security Act, except that the share required from the counties may not exceed the share required from the state. If a portion of the nonfederal share is required from the counties, the boards of county commissioners of the several counties shall levy, impose and collect the taxes required for the special purpose of medical assistance as provided in this Part, in an amount sufficient to cover each county's share of such assistance. (1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 24; 1981, c. 275, s. 1.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Compliance with Statutes and Regulations in Determining Eligibility Required. — A state agency designated by the legislature as being responsible for determining eligibility for medical assistance must comply with state and federal statutes and regulations in making such determinations. Lowe v. North Carolina Dep't of Human Resources, 72 N.C. App. 44, 323 S.E.2d 454 (1984).

Medicaid Has No Resource Spend-Down Provision. — The North Carolina Medicaid statute, like the federal statute, does not have a specific resource spend-down provision in its plan. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

Use of Resource Spend-Down Not Required. — The North Carolina Medicaid plan does not require the use of resource spend-down when evaluating Medicaid eligibility. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

Calculation of Medicaid Reserve. — The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 42 U.S.C. § 1396a(a)-(10)(C)(i)(III), mandates that North Carolina use the "$6,000/6% rule" for calculating what property should be excluded from a person's Medicaid reserve, under which rule property may be excluded from an applicant's or recipient's reserve of property if it has equity value of less than $6,000 and earns an annual income equal to or greater than 6% of its value, but will be included if it has equity value greater than $6,000 or earns an annual income of less than 6% of its value, because it is a part of a methodology for determining Supplemental Security Income eligibility. Morris ex rel. Simpson v. Morrow, 783 F.2d 454 (4th Cir. 1986).

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Applied in Bowens v. North Carolina Dep't of Human Resources, 710 F.2d 1015 (4th Cir. 1983).

Cited in Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986); Henderson v. North Carolina Dep't of Human Resources, 91 N.C. App. 527, 372 S.E.2d 887 (1988); Correll v. Division of Social Servs., 103 N.C. App. 562, 406 S.E.2d 633 (1991).

§ 108A-55. Payments.

(a) The Department may authorize, within appropriations made for this purpose, payments of all or part of the cost of medical and other remedial care

for any eligible person when it is essential to the health and welfare of such person that such care be provided, and when the total resources of such person are not sufficient to provide the necessary care. When determining whether a person has sufficient resources to provide necessary medical care, there shall be excluded from consideration the person's primary place of residence and the land on which it is situated, and in addition there shall be excluded real property contiguous with the person's primary place of residence in which the property tax value is less than twelve thousand dollars ($12,000).

(b) Payments shall be made only to intermediate care facilities, hospitals and nursing homes licensed and approved under the laws of the State of North Carolina or under the laws of another state, or to pharmacies, physicians, dentists, optometrists or other providers of health-related services authorized by the Department. Payments may also be made to such fiscal intermediaries and to the capitation or prepaid health service contractors as may be authorized by the Department. Arrangements under which payments are made to capitation or prepaid health services contracts are not subject to the provisions of Chapter 58 of the General Statutes or of Article 3 of Chapter 143 of the General Statutes.

(c) The Department shall reimburse providers of services, equipment, or supplies under the Medical Assistance Program in the following amounts:

(1) The amount approved by the Health Care Financing Administration of the United States Department of Health and Human Services, if that Administration approves an exact reimbursement amount;

(2) The amount determined by application of a method approved by the Health Care Financing Administration of the United States Department of Health and Human Services, if that Administration approves the method by which a reimbursement amount is determined, and not the exact amount.

The Department shall establish the methods by which reimbursement amounts are determined in accordance with Chapter 150B of the General Statutes. A change in a reimbursement amount becomes effective as of the date for which the change is approved by the Health Care Financing Administration of the United States Department of Health and Human Services. The Department shall report to the Fiscal Research Division of the Legislative Services Office and to the Senate Appropriations Committee on Human Resources and the House of Representatives Appropriations Subcommittee on Human Resources or the Joint Legislative Commission on Health Care Oversight on any change in a reimbursement amount at the same time as it sends out public notice of this change prior to presentation to the Health Care Financing Administration.

(d) No payments shall be made for the care of any person in a nursing home or intermediate care home which is owned or operated in whole or in part by a member of the Social Services Commission, of any county board of social services, or of any board of county commissioners, or by an official or employee of the Department or of any county department of social services or by a spouse of any such person. (1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1971, c. 435; 1973, c. 476, s. 138; c. 644; 1975, c. 123, ss. 1, 2; 1977, 2nd Sess., c. 1219, c. 25; 1979, c. 702, s. 7; 1981, c. 275, s. 1; c. 849, s. 2; 1991, c. 388, s. 1; 1993, c. 529, s. 7.3; 1998-212, s. 12.12B(c).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, added the last sentence in subsection (c).

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1116 (1981).

CASE NOTES

Medicaid Has No Resource Spend-Down Provision. — The North Carolina Medicaid statute, like the federal statute, does not have a specific resource spend-down provision in its plan. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

Use of Resource Spend-Down Not Required. — The North Carolina Medicaid plan does not require the use of resource spend-down when evaluating Medicaid eligibility. Elliot ex rel. Casstevens v. Department of Human Resources, 115 N.C. App. 613, 446 S.E.2d 809, aff'd, 341 N.C. 191, 459 S.E.2d 273 (1995).

This section does not require that Medicaid applicants own their primary place of residence in order to exclude property they own contiguous to their residence from their assets for purposes of determining their eligibility for Medicaid benefits. Correll v. Division of Social Servs., 332 N.C. 141, 418 S.E.2d 232 (1992).

Medicaid applicants are not required to own their primary places of residence before being entitled to the benefit of the contiguous property exclusion. Correll v. Division of Social Servs., 332 N.C. 141, 418 S.E.2d 232 (1992).

Medically Unnecessary Abortions. — By no stretch of the imagination can medically unnecessary abortions be considered as "essential to the health and welfare" of the recipients. Stam v. State, 302 N.C. 357, 275 S.E.2d 439 (1981), decided under former Chapter 108.

The action of the General Assembly in placing severe restrictions on the funding of medically necessary abortions for indigent women is valid and does not violate Article I, Section 1; Article 1, Section 19; or Article XI, Section 4 of the Constitution of North Carolina. Rosie J. v. North Carolina Dep't of Human Resources, 347 N.C. 247, 491 S.E.2d 535 (1997).

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Applied in Kempson v. North Carolina Dep't of Human Resources, 100 N.C. App. 482, 397 S.E.2d 314 (1990).

§ 108A-56. Acceptance of federal grants.

All of the provisions of the federal Social Security Act providing grants to the states for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such act so that the intent to comply with it shall be made effectual. Nothing in this Part or the regulations made under its authority shall be construed to deprive a recipient of assistance of the right to choose the licensed provider of the care or service made available under this Part within the provisions of the federal Social Security Act. (1965, c. 1173, s. 1; 1969, c. 546, s. 1; 1981, c. 275, s. 1.)

CASE NOTES

Compliance with Statutes and Regulations in Determining Eligibility Required. — A state agency designated by the legislature as being responsible for determining eligibility for medical assistance must comply with state and federal statutes and regulations in making such determinations. Lowe v. North Carolina Dep't of Human Resources, 72 N.C. App. 44, 323 S.E.2d 454 (1984).

North Carolina agencies making disability benefit determinations are required to comply with federal Medicaid statutes and regulations. Henderson v. North Carolina Dep't of Human Resources, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

Quoted in Lackey v. North Carolina Dep't of Human Resources, 306 N.C. 231, 293 S.E.2d 171 (1982).

Cited in Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986); Payne ex rel. Rabil v. State, Dep't of Human Resources, 126 N.C. App. 672, 486 S.E.2d 469 (1997).

§ 108A-57. Subrogation rights; withholding of information a misdemeanor.

(a) Notwithstanding any other provisions of the law, to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance, or of the beneficiary's personal representative, heirs, or the administrator or executor of the estate, against any person. The county attorney, or an attorney retained by the county or the State or both, or an attorney retained by the beneficiary of the assistance if this attorney has actual notice of payments made under this Part shall enforce this section. Any attorney retained by the beneficiary of the assistance shall, out of the proceeds obtained on behalf of the beneficiary by settlement with, judgment against, or otherwise from a third party by reason of injury or death, distribute to the Department the amount of assistance paid by the Department on behalf of or to the beneficiary, as prorated with the claims of all others having medical subrogation rights or medical liens against the amount received or recovered, but the amount paid to the Department shall not exceed one-third of the gross amount obtained or recovered.

The United States and the State of North Carolina shall be entitled to shares in each net recovery under this section. Their shares shall be promptly paid under this section and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid to the recipient.

(b) It is a Class 1 misdemeanor for any person seeking or having obtained assistance under this Part for himself or another to willfully fail to disclose to the county department of social services or its attorney the identity of any person or organization against whom the recipient of assistance has a right of recovery, contractual or otherwise. (1973, c. 476, s. 138; c. 1031, s. 1; 1979, 2nd Sess., c. 1312, ss. 1, 2; 1981, c. 275, s. 1; 1987 (Reg. Sess., 1988), c. 1022; 1993, c. 539, s. 815; 1994, Ex. Sess., c. 24, s. 14(c); 1996, 2nd Ex. Sess., c. 18, s. 24.2(a).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 24.2, provides that the Legislative Research Commission may study issues relating to the Medicaid subrogation statute, and may report the results to the 1997 General Assembly.

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

CASE NOTES

Who May Bring Action. — Where a cause of action is created by statute and the statute also provides who is to bring the action, the person or persons so designated, and, ordinarily, only such persons, may sue. Malloy v. Durham County Dep't of Social Servs., 58 N.C. App. 61, 293 S.E.2d 285 (1982), decided under former § 108-61.2.

Subdivision of County May Not Be Subrogated to Its Rights. — A county department of social services may not recover by subrogation under this section, since that right inheres only in the county involved, not such county department. Malloy v. Durham County Dep't of Social Servs., 58 N.C. App. 61, 293 S.E.2d 285 (1982), decided under former § 108-61.2.

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Evidence of a Collateral Benefit. — In

tort actions, evidence of a collateral benefit is improper when the plaintiff will not receive a double recovery. Because Medicaid provides for a right of subrogation in the State to recover sums paid to plaintiffs, this principle is applicable thereto. Cates v. Wilson, 321 N.C. 1, 361 S.E.2d 734 (1987).

Subrogation Rights. — The plain language of this section does not provide that the state is subrogated to all rights of recovery to the extent of all money a medical assistance beneficiary receives, only that the state is subrogated to all rights of recovery of the beneficiary of medical assistance to the extent of payments under the entitled Medical Assistance Program. North Carolina Dep't of Human Resources v. Weaver, 121 N.C. App. 517, 466 S.E.2d 717, cert. denied, 342 N.C. 896, 467 S.E.2d 905 (1996).

Attorney's Fees. — This section does not govern a private attorney's fee arrangement with his client. The section regulates the amount of the attorney's fee only as it relates to the amount of the "medicaid lien" payable to plaintiff. North Carolina Dep't of Human Resources v. Weaver, 121 N.C. App. 517, 466 S.E.2d 717, cert. denied, 342 N.C. 896, 467 S.E.2d 905 (1996).

§ 108A-57.1. Rules governing transfer of medical assistance benefits between counties.

Any recipient of medical assistance who moves from one county to another county of this State shall continue to receive medical assistance if eligible. The county director of social services of the county from which the recipient has moved shall transfer all necessary records relating to the recipient to the county director of social services of the county to which the recipient has moved. The county from which the recipient has moved shall pay the county portion of the nonfederal share of medical assistance payments paid for services provided to the recipient during the month following the recipient's move. Thereafter, the county to which the recipient has moved shall pay the county portion of the nonfederal share of medical assistance payments paid for the services provided to the recipient. (1998-212, s. 12.6.)

Editor's Note. — Session Laws 1998-212, s. 30.6, made this section effective July 1, 1998.

§ 108A-58. Transfer of property for purposes of qualifying for medical assistance; periods of ineligibility.

(a) Any person, otherwise eligible, who, either while receiving medical assistance benefits or within one year prior to the date of applying for medical assistance benefits, unless some other time period is mandated by controlling federal law, sells, gives, assigns or transfers countable real or personal property or an interest in real or personal property for the purpose of retaining or establishing eligibility for medical assistance benefits, shall be ineligible to receive medical assistance benefits as set forth in subsection (c) of this section.

Countable real and personal property includes real property, excluding a homesite, intangible personal property, nonessential motor and recreational vehicles, nonincome producing business equipment, boats and motors. The provisions of this act shall not apply to the sale, gift, assignment or transfer of real or personal property if and to the extent that the person applying for medical assistance would have been eligible for such assistance notwithstanding ownership of such property or an interest therein.

(b) Any sale, gift, assignment or transfer of real or personal property or an interest in real or personal property, as provided in subsection (a) of this section, shall be presumed to have been made for the purpose of retaining or establishing eligibility for medical assistance benefits unless the person, or the person's legal representative, who sells, gives, assigns or transfers the property or interest, receives valuable consideration at least equal to the fair market value, less encumbrances, of the property or interest.

(c) Any person who sells, gives, assigns or transfers real or personal property or an interest in real or personal property for the purpose of retaining or establishing eligibility for medical assistance benefits, as provided in subsection (a) of this section, shall, after the time of transfer, be ineligible to receive these benefits until an amount equal to the uncompensated value of the property or interest has been expended by or on behalf of the person for the person's maintenance and support, including medical expenses, paid or incurred, or shall be ineligible in accordance with the following schedule, whichever is sooner;

(1) For uncompensated value of at least one thousand dollars ($1,000) but not more than six thousand dollars ($6,000), a one-year period of ineligibility from date of sale, gift, assignment or transfer;

(2) For uncompensated value of more than six thousand dollars ($6,000) but not more than twelve thousand dollars ($12,000), a two-year period of ineligibility from date of sale, gift, assignment or transfer;

(3) For uncompensated value of more than twelve thousand dollars ($12,000), a two-year period of ineligibility from date of sale, gift, assignment or transfer, plus one additional month of ineligibility for each five hundred dollar ($500.00) increment or portion thereof by which the uncompensated value exceeds twelve thousand dollars ($12,000), but in no event to exceed three years.

(d) The sale, gift, assignment or transfer for a consideration less than fair market value, less encumbrances, of any tangible personal property which was acquired with the proceeds of sale, assignment or transfer of real or intangible personal property described in subsection (a) of this section or in exchange for such real or intangible personal property shall be presumed to have been for the purpose of evading the provisions of this section if the acquisition and sale, gift, assignment or transfer of the tangible personal property is by or on behalf of a person receiving medical assistance or within one year of making application for such assistance and the consequences of the sale, gift, assignment of transfer of such tangible personal property shall be determined under the provisions of subsections (c), (f) and (g) of this section.

(e) The presumptions created by subsections (b) and (d) may be overcome if the person receiving or applying for medical assistance, or the person's legal representative, establishes by the greater weight of the evidence that the sale, gift, assignment or transfer was exclusively for some purpose other than retaining or establishing eligibility for medical assistance benefits.

(f) For the purpose of establishing uncompensated value under subsection (c), the value of property or an interest therein shall be the fair market value of the property or interest at the time of the sale, gift, assignment or transfer, less the amount of compensation, if any, received for the property or interest. There shall be a rebuttable presumption that the fair market value of real property is the most recent property tax value of the property, as ascertained according to Subchapter II of Chapter 105 of the General Statutes. Fair market value for purpose of this subsection shall be such value, determined as above set out, less any legally enforceable encumbrances to which the property is subject.

(g) In the event that there is more than one sale, gift, assignment or transfer of property or an interest therein by a person receiving medical assistance or within one year of the date of an application for medical assistance, unless some other time period is mandated by controlling federal law, the uncompensated value, for the purposes of subsection (c), shall be the aggregate uncompensated value of all sales, gifts, assignments and transfers. The date which is the midpoint between the date of the first and last sale, gift, assignment or transfer shall be the date from which the period of ineligibility shall be determined under subsection (c).

(h) This section shall not apply to applicants for or recipients of Work First Family Assistance or to persons entitled to medical assistance by virtue of their eligibility for Work First Family Assistance.

(i) This section shall apply only to transfers made before July 1, 1988. (1977, c. 59, s. 1; 1981, c. 275, s. 1; c. 758, s. 2; 1989, c. 120; 1997-443, s. 12.11.)

CASE NOTES

Calculation of Medicaid Reserve. — The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), 42 U.S.C. § 1396a(a)-(10)(C)(i)(III), mandates that North Carolina use the "$6,000/6% rule" for calculating what property should be excluded from a person's Medicaid reserve, under which rule property may be excluded from an applicant's or recipient's reserve of property if it has equity value of less than $6,000 and earns an annual income equal to or greater than 6% of its value, but will be included if it has equity value greater than $6,000 or earns an annual income of less than 6% of its value, because it is a part of a methodology for determining Supplemental Security Income eligibility. Morris ex rel. Simpson v. Morrow, 783 F.2d 454 (4th Cir. 1986).

Cited in Correll v. Division of Social Servs., 103 N.C. App. 562, 406 S.E.2d 633 (1991).

§ 108A-59. Acceptance of medical assistance constitutes assignment to the State of right to third party benefits; recovery procedure.

(a) Notwithstanding any other provisions of the law, by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled.

It shall be the responsibility of the county attorney of the county from which the medical assistance benefits are received or an attorney retained by that county and/or the State to enforce this subsection, and said attorney shall be compensated for his services in accordance with the attorneys' fee arrangements approved by the Department of Health and Human Services.

(b) The responsible State agency will establish a third party resources collection unit that is adequate to assure maximum collection of third party resources.

(c) Notwithstanding any other law to the contrary, in all actions brought pursuant to subsection (a) of this section to obtain reimbursement for payments for medical services, liability shall be determined on the basis of the same laws and standards, including bases for liability and applicable defenses, as would be applicable if the action were brought by the individual on whose behalf the medical services were rendered. (1977, c. 664; 1979, 2nd Sess., c. 1312, ss. 3-5; 1981, c. 275, s. 1; 1995, c. 508, s. 2; 1997-443, s. 11A.118(a).)

CASE NOTES

Medicaid Benefits Protected. — Subsection (a) of this section does not remove Medicaid benefits from the protection of the collateral source rule. Availability of public assistance should not operate to reduce a tortfeasor's legal liability. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986), modified, 321 N.C. 1, 361 S.E.2d 734 (1987).

Payment by tort-feasor of injured party's claim without notice of subrogee's interest is a complete defense to a subrogee's claim against the tort-feasor. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Cited in Payne ex rel. Rabil v. State, Dep't of Human Resources, 126 N.C. App. 672, 486 S.E.2d 469 (1997).

§ 108A-60. Protection of patient property.

(a) It shall be unlawful for any person:

(1) To willfully commingle or cause or solicit the commingling of the personal funds or moneys of a recipient resident of a provider health care facility with the funds or moneys of such facility; or

(2) To willfully embezzle, convert, or appropriate or cause or solicit the embezzlement, conversion or appropriation of recipient personal funds or property to his own use or to the use of any provider or other person or entity.

(b) A violation of subdivision (a)(1) of this section shall be a Class 1 misdemeanor. A violation of subdivision (a)(2) of this section shall be a Class H felony.

(c) For purposes of this section:

(1) "Health care facility" shall include skilled nursing facilities, intermediate care facilities, rest homes, or any other residential health care facility; and

(2) "Person" includes any natural person, association, consortium, corporation, body politic, partnership, or other group, entity or organization; and

(3) "Recipient" shall include current resident recipients, deceased recipients and recipients who no longer reside at such facility. (1979, c. 510, s. 1; 1981, c. 275, s. 1; 1993, c. 539, ss. 816, 1300; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 108A-61: Repealed by Session Laws 1989, c. 701.

§ 108A-61.1. Financial responsibility of a parent for a child under age 21 in a medical institution.

Notwithstanding any other provisions of the law, for the purpose of determining eligibility for medical assistance under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., the income and financial resources of the natural or adoptive parents of a person who is under the age of 21 and who requires Medicaid covered services in a medical institution shall not be counted if the patient's physician certifies, and the Division of Medical Assistance or its agents approve, that continuous care and treatment are expected to exceed 12 months. For purposes of this subsection, "medical institution" means licensed acute care inpatient medical facilities providing medical, surgical, and psychiatric or substance abuse treatment, or facilities providing skilled or intermediate care, including intermediate care for the mentally retarded. (1993, c. 386, s. 1.)

§ 108A-62. Therapeutic leave for medical assistance patients.

Patients at an intermediate care facility or skilled nursing facility may take up to 60 days of therapeutic leave in any one calendar year without the facility losing reimbursement under the medical assistance program, provided, however, no more than 15 consecutive days may be taken without approval of the Department of Health and Human Services, Division of Medical Assistance. Under no circumstances shall the number of Medicaid-covered therapeutic leave days exceed 60 days per patient per calendar year. (1979, c. 925; 1981, c. 275, s. 1; 1985 (Reg. Sess., 1986), c. 1014, s. 120; 1991, c. 126, s. 1; 1997-443, s. 11A.118(a).)

§ 108A-63. Medical assistance provider fraud.

(a) It shall be unlawful for any provider of medical assistance under this Part to knowingly and willfully make or cause to be made any false statement or representation of a material fact:

(1) In any application for payment under this Part, or for use in determining entitlement to such payment; or

(2) With respect to the conditions or operation of a provider or facility in order that such provider or facility may qualify or remain qualified to provide assistance under this Part.

(b) It shall be unlawful for any provider of medical assistance to knowingly and willfully conceal or fail to disclose any fact or event affecting:

(1) His initial or continued entitlement to payment under this Part; or

(2) The amount of payment to which such person is or may be entitled.

(c) Any person who violates a provision of this section shall be guilty of a Class I felony.

(d) "Provider" shall include any person who provides goods or services under this Part and any other person acting as an employee, representative or agent of such person. (1979, c. 510, s. 1; 1981, c. 275, s. 1.)

CASE NOTES

Pharmacist who actually furnished and provided medical assistance to Medicaid patients is a "provider" under the statute, unless some other provision of law gives the word a different meaning from the one commonly understood. None does. State v. Beatty, 64 N.C. App. 511, 308 S.E.2d 65, cert. denied, 309 N.C. 823, 310 S.E.2d 354 (1983).

Definition of "Provider" in Federal Medicaid Regulations. — Under Title XIX of the Social Security Act 42 U.S.C. § 1396, et seq., drugs prescribed for and dispensed to eligible patients are part of the medical care, and services covered by Medicaid and regulations governing all aspects of Medicaid were adopted. These regulations may be found in the Code of Federal Regulations. One of them defines a Medicaid "provider" as "any individual or entity furnishing Medicaid services under a provider agreement with the [state] Medicaid agency." 42 C.F.R. § 430.1 (1982). Another refers to a "provider" as "an individual or entity which furnishes items or services for which payment is claimed under Medicaid." 42 C.F.R. § 455.300(a) (1982). These regulations are as much a part of the law as they would be if they had been read three times and adopted by the General Assembly and explicitly set forth in the General Statutes. State v. Beatty, 64 N.C. App. 511, 308 S.E.2d 65, cert. denied, 309 N.C. 823, 310 S.E.2d 354 (1983).

Cited in State v. Smith, 87 N.C. App. 474, 361 S.E.2d 422 (1987).

§ 108A-64. Medical assistance recipient fraud.

(a) It shall be unlawful for any person to knowingly and willfully and with intent to defraud make or cause to be made a false statement or representation of a material fact in an application for assistance under this Part, or intended for use in determining entitlement to such assistance.

(b) It shall be unlawful for any applicant, recipient or person acting on behalf of such applicant or recipient to knowingly and willfully and with intent to defraud, conceal or fail to disclose any condition, fact or event affecting such applicant's or recipient's initial or continued entitlement to receive assistance under this Part.

(b1) It is unlawful for any person knowingly, willingly, and with intent to defraud, to obtain or attempt to obtain, or to assist, aid, or abet another person, either directly or indirectly, to obtain money, services, or any other thing of value to which the person is not entitled as a recipient under this Part, or otherwise to deliberately misuse a Medicaid identification card. This misuse includes the sale, alteration, or lending of the Medicaid identification card to others for services and the use of the card by someone other than the recipient

to receive or attempt to receive Medicaid program coverage for services rendered to that individual.

Proof of intent to defraud does not require proof of intent to defraud any particular person.

(c)(1) A person who violates a provision of this section shall be guilty of a Class I felony if the value of the assistance wrongfully obtained is more than four hundred dollars ($400.00).

(2) A person who violates a provision of this section shall be guilty of a Class 1 misdemeanor if the value of the assistance wrongfully obtained is four hundred dollars ($400.00) or less.

(d) For purposes of this section the word "person" includes any natural person, association, consortium, corporation, body politic, partnership, or other group, entity or organization. (1981, c. 275, s. 1; 1993, c. 539, s. 817; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 317, s. 1.)

§ 108A-65. Conflict of interest.

(a) It shall be unlawful for any person who is or has been an officer or employee of State or county government, and as such is or has been responsible for the expenditure of substantial amounts of federal, State or county money under the State medical assistance plan, or any person who is the partner of the present or former officer or employee, to engage in any of the following activities relating to the State medical assistance program:

(1) Knowingly to act as agent or attorney for, or otherwise knowingly to represent, any person other than the United States, the State or a county, in any formal or informal appearance before, or with the intent to influence, make any oral or written communication on behalf of any other person other than the United States, the State or a county to:

a. Any department, agency, court, board, commission, legislature or committee of the United States, the State or a county, or any officer or employee thereof,

b. In connection with any of the following matters in which the United States, the State, or a county is a party or has a direct and substantial interest, such as any judicial or other proceeding, legislation, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties,

c. In which he participated personally and substantially as an officer or an employee through decision, approval, recommendation, the rendering of advice, investigation or otherwise.

(2) Within two years after his employment has ceased, knowingly to act as agent or attorney for, or otherwise knowingly to represent, any other person other than the United States, the State or a county, in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication on behalf of any other person other than the United States, the State or a county to:

a. Any department, agency, court, board, commission, legislature or committee of the United States, the State, or a county, or any officer or employee thereof,

b. In connection with any of the following matters in which the United States, the State, or a county is a party or has a direct and substantial interest, such as, any judicial or other proceeding, legislation, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusa-

tion, arrest, or other particular matter involving a specific party or parties,

c. Which was actually pending under his official responsibility as an officer or employee within a period of one year prior to the termination of responsibility.

(3) Within two years after his employment has ceased, knowingly to aid, counsel, advise, consult or by personal presence represent any other person other than the United States, the State or a county in any formal or informal appearance before:

a. Any department, agency, court, board, commission, legislature or committee of the United States, the State, or the county, or any officer or employee thereof,

b. In connection with any of the following matters in which the United States, the State, or a county is a party or has a direct and substantial interest, such as, any judicial or other proceeding, legislation, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties,

c. Which was actually pending under his official responsibility as an officer or employee within the period of one year prior to the termination of such responsibility.

(4) To participate personally and substantially as an officer or employee, through decision, approval, disapproval, recommendation, rendering of advice, investigation or otherwise, in a judicial or other proceeding legislation, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as an officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest.

(b) Violation of this statute is a Class 1 misdemeanor.

(c) The Department of Health and Human Services shall annually identify and designate by rule or regulation those positions which are filled by State or county officers or employees who are responsible for the expenditure of substantial amounts of moneys under the State medical assistance plan. (1981, c. 679, s. 1; 1993, c. 539, s. 818; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.118(a).)

§ 108A-66: Repealed by Session Laws 1989, c. 702.

§ 108A-67. Medicare/Qualified Disabled Working Individuals.

Qualified disabled working individuals are eligible for the payment of the Medicare Part A premium. An individual is qualified for this payment:

(1) If the Social Security Administration determines the individual to be a "Disabled Working Individual";

(2) If the individual's income is less than two hundred percent (200%) of the current federal poverty level, as revised annually; and

(3) If the individual is less than 65 years of age. (1991, c. 127, s. 1.)

§ 108A-68. Drug Use Review Program; rules.

Notwithstanding the provisions of Chapter 90 of the General Statutes or of any other provision of law, the Division of Medical Assistance, Department of

Health and Human Services, shall adopt rules implementing the drug use review provisions of the Omnibus Budget Reconciliation Act of 1990, as amended. (1991 (Reg. Sess., 1992), c. 900, s. 128; 1997-443, s. 11A.118(a).)

§ 108A-69. Employer obligations.

(a) As used in this section and in G.S. 108A-70:

(1) "Health benefit plan" means an accident and health insurance policy or certificate; a nonprofit hospital or medical service corporation contract; a health maintenance organization subscriber contract; a plan provided by a multiple employer welfare arrangement; the Teachers' and State Employees' Comprehensive Major Medical Plan under Chapter 135 of the General Statutes; or a plan provided by another benefit arrangement. "Health benefit plan" does not mean a Medicare supplement policy as defined in G.S. 58-54-1(5).

(2) "Health insurer" means any health insurance company subject to Articles 1 through 63 of Chapter 58 of the General Statutes, including a multiple employee welfare arrangement, and any corporation subject to Articles 65 and 67 of Chapter 58 of the General Statutes; a group health plan, as defined in Section 607(1) of the Employee Retirement Income Security Act of 1974; and the Teachers' and State Employees' Comprehensive Major Medical Plan under Chapter 135 of the General Statutes.

(b) If a parent is required by a court or administrative order to provide health benefit plan coverage for a child, and the parent is eligible for family health benefit plan coverage through an employer, the employer:

(1) Must allow the parent to enroll, under family coverage, the child if the child would be otherwise eligible for coverage without regard to any enrollment season restrictions.

(2) Must enroll the child under family coverage upon application of the child's other parent or upon receipt of notice from the Department of Health and Human Services in connection with its administration of the Medical Assistance or Child Support Enforcement Program if the parent is enrolled but fails to make application to obtain coverage for the child.

(3) May not disenroll or eliminate coverage of the child unless:

a. The employer is provided satisfactory written evidence that:

1. The court or administrative order is no longer in effect; or

2. The child is or will be enrolled in comparable health benefit plan coverage that will take effect not later than the effective date of disenrollment; or

b. The employer has eliminated family health benefit plan coverage for all of its employees.

(4) Must withhold from the employee's compensation the employee's share, if any, of premiums for health benefit plan coverage, not to exceed the maximum amount permitted to be withheld under section 303(b) of the federal Consumer Credit Protection Act, as amended; and must pay this amount to the health insurer; subject to regulations, if any, adopted by the Secretary of the U.S. Department of Health and Human Services. (1993 (Reg. Sess., 1994), c. 644, s. 3; 1995, c. 193, s. 44; 1997-433, s. 3.2; 1997-443, s. 11A.118(a); 1998-17, s. 1; 1999-293, s. 8.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Effect of Amendments. — Session Laws

1999-293, s. 8, effective October 1, 1999, in this section as amended by Session Laws 1998-17, s. 1, inserted "the Teachers' ... Statutes" in subdivision (a)(1), in subdivision (a)(2), deleted "and means" preceding "a group health plan," and added "and the Teachers' ... General Statutes" to the end; and deleted "doing business in this State" following "employer" in the introductory paragraph of subsection (b).

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994) N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), 50-13.9 and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 108A-70. Recoupment of amounts spent on medical care.

(a) The Department may garnish the wages, salary, or other employment income of, and the Secretary of Revenue shall withhold amounts from State tax refunds to, any person who:

(1) Is required by court or administrative order to provide health benefit plan coverage for the cost of health care services to a child eligible for medical assistance under Medicaid; and

(2) Has received payment from a third party for the costs of such services; but

(3) Has not used such payments to reimburse, as appropriate, either the other parent or guardian of the child or the provider of the services;

to the extent necessary to reimburse the Department for expenditures for such costs under this Part; provided, however, claims for current and past due child support shall take priority over any such claims for the costs of such services.

(b) To the extent that payment for covered services has been made under G.S. 108A-55 for health care items or services furnished to an individual, in any case where a third party has a legal liability to make payments, the Department of Health and Human Services is considered to have acquired the rights of the individual to payment by any other party for those health care items or services. (1993 (Reg. Sess., 1994), c. 644, s. 3; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 399.

OPINIONS OF ATTORNEY GENERAL

Medical Child Support Enforcement Provisions. — The medical child support enforcement provisions of House Bill 1563, 1993 (Reg. Sess., 1994) N.C. Session Laws c. 644, are inapplicable to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan and the governmental entities whose employees and retirees, along with their dependents, are eligible for coverage under the Plan or its HMO option. Medical child support orders nonetheless may be enforced directly against State employees and retirees who fail to enroll, or maintain coverage for, their eligible dependent children under the State Health Plan in accordance with the provisions of §§ 50-13.4(f), 50-13.9 and 50-13.11. See opinion of Attorney General to Patricia Crawford, Associate General Counsel, University of North Carolina at Chapel Hill, — N.C.A.G. — (August 10, 1995).

§ 108A-70.5. Medicaid Estate Recovery Plan.

(a) There is established in the Department of Health and Human Services, the Medicaid Estate Recovery Plan, as required by the Omnibus Budget Reconciliation Act of 1993, to recover from the estates of recipients of medical assistance an equitable amount of the State and federal shares of the cost paid the recipient. The Department shall administer the program in accordance with applicable federal law and regulations, including those under Title XIX of the Social Security Act, 42 U.S.C. § 1396(p).

(b) As used in this section:

(1) "Medical assistance" means medical care services paid for by the North Carolina Medicaid Program on behalf of the recipient:

a. If the recipient is receiving these medical care services as an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, and cannot reasonably be expected to be discharged to return home; or

b. If the recipient is 55 years of age or older and is receiving these medical care services, including related hospital care and prescription drugs, for nursing facility services or home- and community-based services.

(2) "Estate" means all the real and personal property considered assets of the estate available for the discharge of debt pursuant to G.S. 28A-15-1.

(c) The amount the Department recovers from the estate of any recipient shall not exceed the amount of medical assistance made on behalf of the recipient and shall be recoverable only for medical care services prescribed in subsection (b) of this section. The Department is a fifth-class creditor, as prescribed in G.S. 28A-19-6, for purposes of determining the order of claims against an estate; provided, however, that judgments in favor of other fifth-class creditors docketed and in force before the Department seeks recovery for medical assistance shall be paid prior to recovery by the Department.

(d) The Department of Health and Human Services shall adopt rules pursuant to Chapter 150B of the General Statutes to implement the Plan, including rules to waive whole or partial recovery when this recovery would be inequitable because it would work an undue hardship or because it would not be administratively cost-effective and rules to ensure that all recipients are notified that their estates are subject to recovery at the time they become eligible to receive medical assistance.

(e) Regarding trusts that contain the assets of an individual who is disabled as defined in Title 19 of Section 1014(a)(3) of the Social Security Act, as amended, if the trust is established and managed by a nonprofit association, to the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the nonprofit association, the trust pays to the Department from these remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the North Carolina Medicaid Program. (1993 (Reg. Sess., 1994), c. 769, s. 25.47(a); 1997-443, s. 11A.118(a).)

§§ 108A-70.6 through 108A-70.10: Reserved for future codification purposes.

Part 7. Medical Assistance Provider False Claims Act.

§ 108A-70.10. Short title.

This Part may be cited as The Medical Assistance Provider False Claims Act. (1997-338, s. 1.)

§ 108A-70.11. Definitions.

Definitions. — As used in this Part:

(1) "Attorney General" means the Attorney General or any Deputy, Assistant, or Associate Attorney General.

(2) "Claim" means an application for payment or approval or for use in determining entitlement to payment presented to the Medical Assistance Program in any form, including written, electronic, or magnetic, which identifies a service, good, or accommodation as reimbursable under the Medical Assistance Program.

(3) "Damages" means the difference between what the Medical Assistance Program paid a provider and the amount it would have paid the provider in the absence of a violation of this section and may be established by statistical sampling methods.

(4) "Knowingly" means that a provider, with respect to the information:

a. Has actual knowledge of the information;

b. Acts in deliberate ignorance of the truth or falsity of the information; or

c. Acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.

(5) "Medical Assistance Program" means the North Carolina Division of Medical Assistance and its fiscal agent. (1997-338, s. 1.)

§ 108A-70.12. Liability for certain acts; damages; effect of repayment.

(a) Liability for Certain Acts. — It shall be unlawful for any provider of medical assistance under the Medical Assistance Program to:

(1) Knowingly present, or cause to be presented to the Medical Assistance Program a false or fraudulent claim for payment or approval; or

(2) Knowingly make, use, or cause to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the Medical Assistance Program.

Each claim presented or caused to be presented in violation of this section is a separate violation.

(b) Damages. —

(1) Except as provided in subdivision (2) of this subsection, a court shall assess against any provider of medical assistance under the Medical Assistance Program who violates this section a civil penalty of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) plus three times the amount of damages which the Medicaid Assistance Program sustained because of the act of the provider.

(2) A court may assess a penalty of not less than two times the amount of damages which the Medical Assistance Program sustains because of the act of the provider if a court finds that:

a. The provider committing a violation of this section furnished officials of the State responsible for investigating false claims violations with all information known to the provider about the violation within 30 days after the date the provider first obtained the information;

b. The provider fully cooperated with any State investigation of the violation; and

c. At the time the provider furnished the State with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the viola-

tion, and the provider did not have actual knowledge of the existence of an investigation into the violation.

(3) In addition to the damages and penalty assessed by the court pursuant to subdivision (1) or (2) of this subsection, a provider violating this section shall also be liable for the costs of a civil action brought to recover any penalty or damages, interest on the damages at the maximum legal rate in effect on the date the payment was made to the provider for the period from the date upon which payment was made to the provider to the date upon which repayment is made by the provider to the Medical Assistance Program, and the costs of the investigation.

(4) As applied to providers that are subject to certification review by the Division of Facility Services, a violation of Medicaid provider certification standards in providing a service, good, or accommodation shall not be considered an independent basis for liability under this Act. However, liability may be imposed if a false or fraudulent claim is presented as set forth in subsection (a) of this section in connection with that service, good, or accommodation.

(c) Effect of Repayment. — Intent to repay or repayment of any amounts obtained by a provider as a result of any acts described in subsection (a) of this section shall not be a defense to or grounds for dismissal of an action brought pursuant to this section. However, a court may consider any repayment in mitigation of the amount of any penalties assessed. (1997-338, s. 1.)

§ 108A-70.13. False claims procedure.

(a) The Attorney General shall have the authority to investigate, institute proceedings, compromise and settle any investigation or action, and perform all duties in connection with any civil action to enforce G.S. 108A-70.12.

(b) A civil action under G.S. 108A-70.12 may not be brought more than six years after the date the violation of G.S. 108A-70.12 is committed, or more than three years after the date when facts material to the right of action are known or reasonably should have been known by the official of the State of North Carolina charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under G.S. 108A-70.12, the State shall be required to prove all essential elements of the cause of action, including damages, by the greater weight of the evidence.

(d) Notwithstanding any other provision of law or rule, a final judgment rendered in favor of the State in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under G.S. 108A-70.12.

(e) No criminal or administrative action need be brought against any provider as a condition for establishing civil liability under G.S. 108A-70.12. The civil liability under G.S. 108A-70.12 is in addition to any other criminal, civil, and administrative liabilities or penalties that may be prescribed by law. However, treble and double damages and civil penalties provided by G.S. 108A-70.12 shall not be assessed against a provider if treble or double damages or civil penalties have been previously assessed against the provider for the same claims under the federal False Claims Act, 31 U.S.C. § 3729, et seq., or the federal Civil Monetary Penalty Law, 42 U.S.C. § 1320a-7a. In the event that any provider is found liable under the provisions of this Act and is subsequently found liable for the same claim under the federal False Claims

Act, or the appropriate sections of the federal Civil Monetary Penalty Law, the State and the Medical Assistance Program shall pay to the federal government on behalf of the provider any amounts, other than restitution, recovered or otherwise obtained by the State under this Act, not to exceed the amount of the federal damages and penalties.

(f) The amount of damages and number of violations of G.S. 108A-70.12 shall be established by the trial judge or, in the event of a jury trial, by jury verdict. The amount of penalties, treble or double damages, interest, cost of the investigation, and cost of the civil action shall be determined by the trial judge as prescribed in G.S. 108A-70.12(b).

(g) Venue for any action brought pursuant to G.S. 108A-70.12 shall be in either Wake County or in any county in which claim originated, or in which any statement or record was made, or acts done, or services, goods, or accommodations rendered in connection with any act constituting part of the violation of G.S. 108A-70.12. (1997-338, s. 1.)

§ 108A-70.14. Civil investigative demand.

(a) If the Attorney General has reasonable cause to believe that a person has information or is in possession, custody, or control of any document or other tangible object relevant to an investigation or that would lead to the discovery of relevant information in an investigation of a violation of G.S. 108A-70.12, the Attorney General may serve upon the person, before bringing an action under G.S. 108A-70.12 or other false claims law, a civil investigative demand to appear and be examined under oath, to answer written interrogatories under oath, and to produce any documents or objects for their inspection and copying.

(b) The civil investigative demand shall:

(1) Be served upon the person in the manner required for service of process in civil actions and may be served by the Attorney General or investigator assigned to the North Carolina Department of Justice;

(2) Describe the nature of the conduct constituting the violation under investigation;

(3) Describe the class or classes of any documents or objects to be produced with sufficient definiteness to permit them to be fairly identified;

(4) Contain a copy of any written interrogatories to be answered;

(5) Prescribe a reasonable date and time at which the person shall appear to testify, answer any written interrogatories, or produce any document or object;

(6) Advise the person that objections to or reasons for not complying with the demand may be filed with the Attorney General on or before that date and time;

(7) Specify a place for the taking of testimony;

(8) Designate a person to whom answers to written interrogatories shall be submitted and to whom any document or object shall be produced; and

(9) Contain a copy of subsections (b) and (c) of this section.

(c) The date within which to answer any written interrogatories and within which any document or object must be produced shall be more than 30 days after the civil investigative demand has been served upon the person. The date within which a person must appear to testify shall be more than 15 days after the demand has been served upon a person who resides out-of-state or more than 10 days after the demand has been served upon a person who resides in-state.

(d) The person before whom the oral examination is to be taken shall put the person to be examined on oath and shall personally, or by someone acting

under the person's direction and in the person's presence, record the testimony of the person to be examined. The Attorney General may exclude from the place where the examination is held all persons except the person giving the testimony, the attorney or other representative of the person giving the testimony, the Attorney General conducting the examination, the investigator assisting the Attorney General, the stenographer, and any other person agreed upon by the Attorney General and the person giving the testimony. When the testimony is transcribed, the person shall have a reasonable opportunity to examine and read the transcript, unless an examination and reading are waived by the person. Any changes in form or substance which the person desires to make shall be entered and identified upon the transcript by the person. The transcript shall then be signed by the person, unless the person in writing waives the signing, is ill, cannot be found, or refuses to sign.

(e) Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under sworn certificate by the person to whom the demand is directed, or in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person. If a person objects to any interrogatory, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(f) The production of documents and objects in response to a civil investigative demand served under this section shall be made under a sworn certificate by the person to whom the demand is directed, or in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to the production and authorized to act on behalf of the person. The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available. Upon written agreement between the person served with the civil investigative demand and the Attorney General, the person may substitute copies for originals of all or any part of the documents requested.

(g) No person shall be excused from testifying, answering interrogatories, or producing documents or objects in response to a civil investigative demand on the ground that the testimony, answers, documents, or objects required of the person may tend to incriminate the person. However, no testimony, answers, documents, or objects compelled pursuant to G.S. 108A-70.14 may be used against the person in a criminal action, except a prosecution for perjury or for contempt arising from a failure to comply with an order of the court.

(h) Any person appearing for oral testimony under a civil investigative demand issued pursuant to this section shall be entitled to the same fees and allowances paid to witnesses in the General Court of Justice of the State of North Carolina.

(i) If a person objects to or otherwise fails to comply with a civil investigative demand served upon the person under subsection (a) of this section, the Attorney General may file an action in superior court for an order to enforce the demand. Venue for the action to enforce the demand shall be in either Wake County or the county in which the person resides. Notice of a hearing on the action to enforce the demand and a copy of the action shall be served upon the person in the same manner as prescribed in the Rules for Civil Procedure. If the court finds that the demand is proper, that there is reasonable cause to

believe that there may have been a violation of G.S. 108A-70.12, and that the information sought or document or object demanded is relevant to the violation, the court shall order the person to comply with the demand, subject to modifications the court may prescribe.

(j) If the person fails to comply with an order entered pursuant to subsection (i) of this section, the court may:

(1) Adjudge the person to be in contempt of court;

(2) Grant injunctive relief against the person to whom the demand is issued to restrain the conduct which is the subject of the investigation; or

(3) Grant any other relief as the court may deem proper.

(k) Any transcript of oral testimony, answers to written interrogatories, and documents and objects produced pursuant to this section may be used in connection with any civil action brought under G.S. 108A-70.12.

(*l*) The North Carolina Rules of Civil Procedure shall apply to this section to the extent that the rules are not inconsistent with the provisions of this section. (1997-338, s. 1.)

§ 108A-70.15. Employee remedies.

(a) In the absence of fraud or malice, no person who furnishes information to officials of the State responsible for investigating false claims violations shall be liable for damages in a civil action for any oral or written statement made or any other action that is necessary to supply information required pursuant to this Part.

(b) Any employee of a provider who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by the employee's employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under G.S. 108A-70.12, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under G.S. 108A-70.12, shall be entitled to all relief necessary to make the employee whole. Relief shall include reinstatement with the same seniority status as the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys" fees. An employee may bring an action in the appropriate court for the relief provided in this section. (1997-338, s. 1.)

§ 108A-70.16. Uniformity of interpretation.

This Part shall be so interpreted and construed as to be consistent with the federal False Claims Act, 31 U.S.C. § 3729, et seq., and any subsequent amendments to that act. (1997-338, s. 1.)

§ 108A-70.17: Reserved for future codification purposes.

Part 8. Health Insurance Program for Children.

§ 108A-70.18. Definitions.

Unless the context clearly requires otherwise, the term:

(1) "Comprehensive health coverage" means creditable health coverage as defined under Title XXI.

(2) "Family income" has the same meaning as used in determining eligibility for the Medical Assistance Program.
(3) "FPL" or "federal poverty level" means the federal poverty guidelines established by the United States Department of Health and Human Services, as revised each April 1.
(4) "Medical Assistance Program" means the State Medical Assistance Program established under Part 6 of Article 2 of Chapter 108A of the General Statutes.
(5) "Program" means The Health Insurance Program for Children established in this Part.
(6) "State Plan" means the State Child Health Plan for the State Children's Health Insurance Program established under Title XXI.
(7) "Title XXI" means Title XXI of the Social Security Act, as added by Pub. L. 105-33, 111 Stat. 552, codified in scattered sections of 42 U.S.C. (1997).
(8) "Uninsured" means the applicant for Program benefits was not covered under any private or employer-sponsored comprehensive health insurance plan for the six-month period immediately preceding the date of application for Program benefits. Effective April 1, 1999, "uninsured" means the applicant is and was not covered under any private or employer-sponsored comprehensive health insurance plan for 60 days immediately preceding the date of application. The waiting periods required under this subdivision shall be waived if the child has been enrolled in Medicaid and has lost Medicaid eligibility, has lost health care benefits due to cessation of a nonprofit organization program that provides health care benefits to low-income children, or has lost employer-sponsored comprehensive health care coverage due to termination of employment, cessation by the employer of employer-sponsored health coverage, or cessation of the employer's business. (1998-1, s. 1; 1998-166, s. 6.)

Editor's Note. — Session Laws 1998-1, s. 11, made this Part effective May 7, 1998.

Session Laws 1998-1, s. 1, effective May 7, 1998, enacted this section. Subsequently, Session Laws 1998-166, s. 6, effective July 1, 1998 amended this section. Subdivision (8), prior to the amendment by Session Laws 1998-166 read as follows: "'Uninsured' means the applicant for Program benefits was not covered under any private or employer-sponsored comprehensive health insurance plan for the six-month period immediately preceding the date the Program becomes effective. Effective six months from date the Program becomes effective, 'uninsured' means the applicant is and was not covered under any private or employer-sponsored comprehensive health insurance plan for 60 days immediately preceding the date of application. The waiting periods required under this subdivision shall be waived if the child has lost Medicaid eligibility due to a change in family income or has lost employer-sponsored comprehensive health care coverage due to termination of employment, cessation by the employer of employer-sponsored health coverage, or cessation of the employer's business."

Session Laws 1998-166, s. 11 contains a severability clause.

Session Laws 1998-1, s. 7, provides: "In order to ensure that health insurance coverage provided to children from public funds is not duplicative of coverage provided to the same children pursuant to court orders for medical support or health insurance, the Department of Health and Human Services shall develop a plan for collecting and retrieving data to enable the Department to readily identify children covered by support orders and also covered under private health insurance, or eligible for coverage under the State Medicaid Program or the Health Insurance Program for Children established in this act. No later than October 1, 1998, the Department shall report on the development of this plan to the Joint Legislative Health Care Oversight Committee."

Session Laws 1998-1, s. 8, as amended by Session Laws 1999-4, s. 1, provides: "The Executive Administrator and Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan shall conduct a survey of any claims paid by the Plan's self-insured indemnity program during each of the last three plan years. Any results of the survey shall be used by the Plan in conducting a study of the array of medical services delivered in school-based settings and whether or not such

services should be eliminated, curtailed, or expanded. No later than March 31, 1999, the Plan shall make its findings and recommendations pursuant to this study known to the Committee on Employee Hospital and Medical Benefits, the Joint Legislative Health Care Oversight Committee, and the 1999 Session of the General Assembly."

Session Laws 1998-1, s. 10, effective July 1, 1998, provides in part "that fifteen million six hundred seventeen thousand eight hundred twenty-two dollars ($15,617,822) is appropriated to the Department of Health and Human Services for the 1998-99 fiscal year to be used for the Health Insurance Program for Children. The Office of State Budget and Management shall include the amount of State funds necessary for Program implementation for the budgeted fiscal year but not more than the amount necessary to draw down the maximum amount of federal funds available to the State for the Health Insurance Program for Children under Title XXI of the Social Security Act, as added by Pub. L. 105-33, 111 Stat. 552.

"(b) Of the funds appropriated under subsection (a) of this section, the Department of Health and Human Services may use up to two million dollars ($2,000,000) for the 1998-99 fiscal year to cover unmatched start-up costs for the Health Insurance Program for Children established under this act.

"(c) No State funds appropriated under this act may be expended for any purpose other than as provided under this act for the implementation of the Health Insurance Program for Children established under this act and approved by the United States Secretary of Health and Human Services under Title XXI of the Social Security Act, as added by Pub. L. 105-33, 111 Stat. 552.

"(d) Funds appropriated under this section and not expended or obligated in the 1998-99 fiscal year shall revert to the General Fund on June 30, 1999."

Session Laws 1998-166, s. 8 provides that except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year.

Session Laws 1998-1, s. 9 provides that the Department of Health and Human Services shall select a name for the Health Insurance Program for Children established under this act not later than September 1, 1998, and the Department shall establish procedures for public input into the selection of the name and prior to final selection of the Program name, the Department shall report to the Joint Legislative Health Care Oversight Committee the results of the public input solicited by the Department and the name selected by the Department.

Session Laws 1998-1, s. 11 provides in part that health insurance coverage provided to children under the Health Insurance Program for Children established under this act shall become effective no earlier than October 1, 1998. Since the Health Insurance Program for Children established in this act is dependent upon federal funds, it is the intent of the General Assembly that the Health Insurance Program for Children will continue and benefits will be paid for so long as federal funds are available and State funds are specifically appropriated for this purpose.

Effect of Amendments. — The 1998 amendment, effective September 30, 1998, rewrote subdivision (8).

§ 108A-70.19. Short title; purpose; no entitlement.

This Part may be cited as "The Health Insurance Program for Children Act of 1998." The purpose of this Part is to provide comprehensive health insurance coverage to uninsured low-income children who are residents of this State. Coverage shall be provided from federal funds received, State funds appropriated, and other nonappropriated funds made available for this purpose. Nothing in this Part shall be construed as obligating the General Assembly to appropriate funds for the Program or as entitling any person to coverage under the Program. (1998-1, s. 1.)

§ 108A-70.20. Program established.

The Health Insurance Program for Children is established. The Program shall be administered by the Department of Health and Human Services in accordance with this Part and as required under Title XXI and related federal rules and regulations. Administration of Program benefits and claims processing shall be as provided under Part 5 of Article 3 of Chapter 135 of the General Statutes. (1998-1, s. 1.)

§ 108A-70.21. Program eligibility; benefits; enrollment fee and other cost-sharing; coverage from private plans; purchase of extended coverage.

(a) Eligibility. — The Department may enroll eligible children based on availability of funds. Following are eligibility and other requirements for participation in the Program:

(1) Children must:
   a. Be under the age of 19;
   b. Be ineligible for Medicaid, Medicare, or other federal government-sponsored health insurance;
   c. Be uninsured;
   d. Be in a family that meets the following family income requirements:
      1. Infants under the age of one year whose family income is from one hundred eighty-five percent (185%) through two hundred percent (200%) of the federal poverty level;
      2. Children age one year through five years whose family income is above one hundred thirty-three percent (133%) through two hundred percent (200%) of the federal poverty level; and
      3. Children age six years through eighteen years whose family income is above one hundred percent (100%) through two hundred percent (200%) of the federal poverty level;
   e. Be a resident of this State and eligible under federal law; and
   f. Have paid the Program enrollment fee required under this Part.

(2) Proof of family income and residency and declaration of uninsured status shall be provided by the applicant at the time of application for Program coverage. The family member who is legally responsible for the children enrolled in the Program has a duty to report any change in the enrollee's status within 60 days of the change of status.

(3) If a responsible parent is under a court order to provide or maintain health insurance for a child and has failed to comply with the court order, then the child is deemed uninsured for purposes of determining eligibility for Program benefits if at the time of application the custodial parent shows proof of agreement to notify and cooperate with the child support enforcement agency in enforcing the order.

If health insurance other than under the Program is provided to the child after enrollment and prior to the expiration of the eligibility period for which the child is enrolled in the Program, then the child is deemed to be insured and ineligible for continued coverage under the Program. The custodial parent has a duty to notify the Department within 10 days of receipt of the other health insurance, and the Department, upon receipt of notice, shall disenroll the child from the Program. As used in this paragraph, the term "responsible parent" means a person who is under a court order to pay child support.

(4) Except as otherwise provided in this section, enrollment shall be continuous for one year. At the end of each year, applicants may reapply for Program benefits.

(b) Benefits. — Except as otherwise provided for eligibility, fees, deductibles, copayments, and other cost-sharing charges, health benefits coverage provided to children eligible under the Program shall be equivalent to coverage provided for dependents under the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan, including optional prepaid plans. Prescription drug providers shall accept as payment in full, for outpatient prescriptions filled, ninety percent (90%) of the average wholesale price for the prescription drug or the amounts published by the Health Care Financing

Administration plus a fee established by the provider not to exceed the amount authorized under subdivision (d)(3) of this section. All other health care providers providing services to Program enrollees shall accept as payment in full for services rendered the maximum allowable charges under the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan for services less any copayments assessed to enrollees under this Part. No child enrolled in the Plan's self-insured indemnity program shall be required by the Plan to change health care providers as a result of being enrolled in the Program.

In addition to the benefits provided under the Plan, the following services and supplies are covered under the Health Insurance Program for Children established under this Part:

(1) Dental: Oral examinations, teeth cleaning, and scaling twice during a 12-month period, full mouth X rays once every 60 months, supplemental bitewing X rays showing the back of the teeth once during a 12-month period, fluoride applications twice during a 12-month period, sealants, simple extractions, therapeutic pulpotomies, prefabricated stainless steel crowns, and routine fillings of amalgam or other tooth-colored filling material to restore diseased teeth. No benefits are to be provided for services under this subsection that are not performed by or upon the direction of a dentist, doctor, or other professional provider approved by the Plan nor for services and materials that do not meet the standards accepted by the American Dental Association.

(2) Vision: Scheduled routine eye examinations once every 12 months, eyeglass lenses or contact lenses once every 12 months, routine replacement of eyeglass frames once every 24 months, and optical supplies and solutions when needed. Optical services, supplies, and solutions must be obtained from licensed or certified opthamologists, optometrists, or optical dispensing laboratories. Eyeglass lenses are limited to single vision, bifocal, trifocal, or other complex lenses necessary for a Plan enrollee's visual welfare. Coverage for oversized lenses and frames, designer frames, photosensitive lenses, tinted contact lenses, blended lenses, progressive multifocal lenses, coated lenses, and laminated lenses is limited to the coverage for single vision, bifocal, trifocal, or other complex lenses provided by this subsection. Eyeglass frames are limited to those made of zylonite, metal, or a combination of zylonite and metal. All visual aids covered by this subsection require prior approval of the Plan. Upon prior approval by the Plan, refractions may be covered more often than once every 12 months.

(3) Hearing: Auditory diagnostic testing services and hearing aids and accessories when provided by a licensed or certified audiologist, otolaryngologist, or other hearing aid specialist approved by the Plan. Prior approval of the Plan is required for hearing aids, accessories, earmolds, repairs, loaners, and rental aids.

(c) Annual Enrollment Fee. — There shall be no enrollment fee for Program coverage for enrollees whose family income is at or below one hundred fifty percent (150%) of the federal poverty level. The enrollment fee for Program coverage for enrollees whose family income is above one hundred fifty percent (150%) of the federal poverty level shall be fifty dollars ($50.00) per year per child with a maximum annual enrollment fee of one hundred dollars ($100.00) for two or more children. The enrollment fee shall be collected by the county department of social services and retained to cover the cost of determining eligibility for services under the Program. County departments of social services shall establish procedures for the collection of enrollment fees.

(d) Cost-Sharing. — There shall be no deductibles, copayments, or other cost-sharing charges for families covered under the Program whose family income is at or below one hundred fifty percent (150%) of the federal poverty level. Families covered under the Program whose family income is above one hundred fifty percent (150%) of the federal poverty level shall be responsible for copayments to providers as follows:

(1) Five dollars ($5.00) per child for each visit to a provider, except that there shall be no copayment required for well-baby, well-child, or age-appropriate immunization services;
(2) Five dollars ($5.00) per child for each outpatient hospital visit;
(3) A six-dollar ($6.00) fee for each outpatient prescription drug purchased;
(4) Twenty dollars ($20.00) for each emergency room visit unless:
    a. The child is admitted to the hospital, or
    b. No other reasonable care was available as determined by the Claims Processing Contractor of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan.

Copayments required under this subsection for prescription drugs apply only to prescription drugs prescribed on an outpatient basis.

(e) Cost-Sharing Limitations. — The total annual aggregate cost-sharing, including fees, with respect to all children in a family receiving Program benefits under this Part shall not exceed five percent (5%) of the family's income for the year involved. To assist the Department in monitoring and ensuring that the limitations of this subsection are not exceeded, the Executive Administrator and Board of Trustees of the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan shall provide data to the Department showing cost-sharing paid by Program enrollees.

(f) Coverage From Private Plans. — The Department shall, from funds available for the Program, pay the cost for dependent coverage provided under a private insurance plan for persons eligible for coverage under the Program if all of the following conditions are met:

(1) The person eligible for Program coverage requests to obtain dependent coverage from a private insurer in lieu of coverage under the Program and shows proof that coverage under the private plan selected meets the requirements of this subsection;
(2) The dependent coverage under the private plan is actuarially equivalent to the coverage provided under the Program and the private plan does not engage in the exclusive enrollment of children with favorable health care risks;
(3) The cost of dependent coverage under the private plan is the same as or less than the cost of coverage under the Program; and
(4) The total annual aggregate cost-sharing, including fees, paid by the enrollee under the private plan for all dependents covered by the plan, do not exceed five percent (5%) of the enrollee's family income for the year involved.

The Department may reimburse an enrollee for private coverage under this subsection upon a showing of proof that the dependent coverage is in effect for the period for which the enrollee is eligible for the Program.

(g) Purchase of Extended Coverage. — An enrollee in the Program who loses eligibility due to an increase in family income above two hundred percent (200%) of the federal poverty level and up to and including two hundred twenty-five percent (225%) of the federal poverty level may purchase at full premium cost continued coverage under the Program for a period not to exceed one year beginning on the date the enrollee becomes ineligible under the income requirements for the Program. The same benefits, copayments, and other conditions of enrollment under the Program shall apply to extended coverage purchased under this subsection.

(h) No State Funds for Voluntary Participation. — No State or federal funds shall be used to cover, subsidize, or otherwise offset the cost of coverage obtained under subsection (g) of this section. (1998-1, s. 1; 1999-237, s. 11.9.)

Editor's Note. — Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — Session Laws 1999-237, s. 11.9, effective July 1, 1999, in subdivision (b)(1), substituted "twice" for "once" following "fluoride applications" and inserted "sealants, simple extractions, therapeutic pulpotomies, prefabricated stainless steel crowns."

§ 108A-70.22. Allocation of federal and State funds for Program; consultation with Joint Legislative Health Care Oversight Committee.

The Department of Health and Human Services, after having consulted with and received advice from the Joint Legislative Health Care Oversight Committee established under G.S. 120-70.110, shall from total funds available to the Department for Program implementation, allocate and adjust, as needed, funds to pay the North Carolina Teachers' and State Employees' Major Medical Plan in accordance with G.S. 108A-70.23 and Part 5 of Article 3 of Chapter 135 of the General Statutes, and funds to pay for eligible services provided for children with special needs in accordance with G.S. 108A-70.23. (1998-1, s. 1.)

§ 108A-70.23. Services for children with special needs established; definition; eligibility; services; limitation; recommendations; no entitlement.

(a) [Special Needs Services Authorized.—] The Department shall, from federal funds received and State funds appropriated for the Program, pay for services for children with special needs as authorized under this section. As used in this section, the term "children with special needs" or "special needs child" means children who have been diagnosed as having one or more of the following conditions which in the opinion of the diagnosing physician (i) is likely to continue indefinitely, (ii) interferes with daily routine, and (iii) require extensive medical intervention and extensive family management:

(1) Birth defect, including genetic, congenital, or acquired disorders;
(2) Developmental disability as defined under G.S. 122C-3;
(3) Mental or behavioral disorder; or
(4) Chronic and complex illnesses.

(b) Eligibility for Services. — In order to be eligible for services under this section a special needs child must be enrolled in the Program.

(c) Services Provided. — The services authorized to be provided to children eligible under this section are as follows:

(1) The same level of services as provided for special needs children under the Medical Assistance Program as authorized in the Current Operations Appropriations Act except that no services for long-term care shall be provided under this section, and except that services for respite care shall be provided only under emergency circumstances; and
(2) Only those services eligible under this section that are not covered or otherwise provided under Part 5 of Article 3 of Chapter 135 of the General Statutes.

(d) Limitation. — Funds may be expended for services under this section only if the special needs child is enrolled in the Program, the services provided

under this section are not provided under Part 5 of Article 3 of Chapter 135 of the General Statutes, and the child meets the definition of a special needs child under this section.

(e) Case Management Services. — The Department shall develop procedures for the provision of case management services by the Department to eligible special needs children. Case management services shall be developed to ensure to the maximum extent possible that services are provided in the most efficient and effective manner considering the special needs of the child. The cost of providing case management services for children with special needs shall be paid from funds available for services under this section.

(f) Recommendations by Commission on Children With Special Health Care Needs. — In implementing this section the Department shall consider the recommendations of the Commission on Children With Special Health Care Needs established under Article 71 of Chapter 143 of the General Statutes. The Department, in consultation with the Commission on Children With Special Health Care Needs shall develop procedures for providing respite care services under emergency circumstances.

(g) No Entitlement. — Nothing in this section shall be construed as entitling any person to services under this section. (1998-1, s. 1.)

Editor's Note. — The bracketed subsection (a) catchline was inserted at the direction of the Revisor of Statutes.

§ 108A-70.24. Claims processing; payments.

(a) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan shall be responsible for the administration and processing of claims for benefits under the Program, as provided under Part 5 of Article 3 of Chapter 135 of the General Statutes.

(b) The Department shall, from State and federal appropriations, and from any other funds made available for this purpose, make premium payments to the North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan as determined by the Plan for its administration, claims processing, and other services authorized to provide coverage for acute medical care to children eligible for benefits under this Part.

(c) The North Carolina Teachers' and State Employees' Comprehensive Major Medical Plan shall also be responsible for the administration and processing of claims for benefits provided under G.S. 108A-70.23 and not covered by Part 5 of Article 3 of Chapter 135 of the General Statutes. Such claims payments shall be made against accounts maintained by the Department. (1998-1, s. 1.)

§ 108A-70.25. State Plan for Health Insurance Program for Children.

The Department shall develop and submit a State Plan to implement "The Health Insurance Program for Children" authorized under this Part to the federal government as application for federal funds under Title XXI. The State Plan submitted under this Part shall be developed by the Department only as authorized by and in accordance with this Part. No provision in the State Plan submitted under this Part may expand or otherwise alter the scope or purpose of the Program from that authorized under this Part. The Department shall include in the State Plan submitted only those items required by this Part and required by the federal government to qualify for federal funds under Title XXI and necessary to secure the State's federal fund allotment for the applicable

fiscal period. Except as otherwise provided in this section, the Department shall not amend the State Plan nor submit any amendments thereto to the federal government for review or approval without the specific approval of the General Assembly. In the event federal law requires that an amendment be made to the State Plan and further requires that the amendment be submitted or implemented within a time period when the General Assembly is not and will not be in session to approve the amendment, then the Department may submit the amendment to the federal government for review and approval without the approval of the General Assembly. Prior to submitting an amendment to the federal government without General Assembly approval as authorized in this section, the Department shall report the proposed amendment to the Joint Legislative Health Care Oversight Committee and to members of the Joint Appropriations Subcommittee on Health and Human Services. The report shall include an explanation of the amendment, the necessity therefor, and the federal time limits required for implementation of the amendment. (1998-1, s. 1.)

§ 108A-70.26. Application process; outreach efforts; appeals.

(a) Application. — The Department shall use an application form for the Program that is concise, relatively easy for the applicant to comprehend and complete, and only as lengthy as necessary for identifying applicants, determining eligibility for the Program or Medicaid, and providing information to applicants on requirements for application submission and proof of eligibility. Application forms shall be obtainable from public health departments and county departments of social services. Applications shall be processed by the county department of social services and may be submitted by mail. The Department may adopt rules for the submission and processing of applications and for securing the proof of eligibility for benefits under this Part.

The application form for the Program shall have printed on it or attached to it a notice stating substantially: "The Health Insurance Program for Children is a federally and State funded program that may be discontinued if federal funds are not provided for its continuation."

(b) Outreach Efforts. — The Department shall adopt procedures to ensure that the Program is adequately publicized statewide and to comply with federal outreach requirements. The Department shall make information about the Program available through the Internet and shall explore the feasibility of securing a 24-hour toll-free telephone number to facilitate access to Program information. In order to avoid duplication of efforts, in developing outreach procedures the Department shall establish system linkages to ensure the collaboration and coordination of information between and among the Program and such ongoing programs and efforts as:

WIC Program.
Maternal and Child Health Block Grant.
Children's Special Health Services.
Smart Start.
Head Start.

The Department shall seek private and federal grant funds for outreach activities. The Department shall also seek the participation of the private sector in providing no-cost or low-cost avenues for publicizing the Program in local communities and statewide. The Department may work with the State Health Plan Purchasing Alliance Board to develop programs that utilize the expertise and resources of the Alliances in outreach activities to employees of small businesses.

(c) Appeals. — A person who is dissatisfied with the action of a county department of social services with respect to the determination of eligibility for

benefits under the Program may appeal the action in accordance with G.S. 108A-79. (1998-1, s. 1.)

§ 108A-70.27. Data collection; reporting.

(a) The Department shall ensure that the following data are collected, analyzed, and reported in a manner that will most effectively and expeditiously enable the State to evaluate Program goals, objectives, operations, and health outcomes for children:

(1) Number of applicants for coverage under the Program;
(2) Number of Program applicants deemed eligible for Medicaid;
(3) Number of applicants deemed eligible for the Program, by income level, age, and family size;
(4) Number of applicants deemed ineligible for the Program and the basis for ineligibility;
(5) Number of applications made at county departments of social services, public health departments, and by mail;
(6) Total number of children enrolled in the Program to date and for the immediately preceding fiscal year;
(7) Total number of children enrolled in Medicaid through the Program application process;
(8) Trends showing the Program's impact on hospital utilization, immunization rates, and other indicators of quality of care, and cost-effectiveness and efficiency;
(9) Trends relating to the health status of children;
(10) Other data that would be useful in carrying out the purposes of this Part.

(b) The Department shall report annually to the Joint Legislative Health Care Oversight Committee and shall provide a copy of the report to the Joint Appropriations Subcommittees on Health and Human Services. The report shall include:

(1) Data collected as required under subsection (a) of this section and an analysis thereof giving trends and projections for continued Program funding;
(2) Program areas working most effectively and least effectively;
(3) Performance measures used to ensure Program quality, fiscal integrity, ease of access, and appropriate utilization of preventive and medical care;
(4) Effectiveness of system linkages in addressing access, quality of care, and Program efficiency;
(5) Recommended changes in the Program necessary to improve Program efficiency and effectiveness;
(6) Any other information requested by the Committee pertinent to the provision of health insurance for children and the implementation of the Program.

(c) The Executive Administrator and Board of Trustees of the North Carolina Teachers' and State Employees' Major Medical Plan ("Plan") shall provide to the Department data required under this section that are collected by the Plan. Data shall be reported by the Plan in sufficient detail to meet federal reporting requirements under Title XXI. The Plan shall report periodically to the Joint Legislative Health Care Oversight Committee claims processing data for the Program and any other information the Plan or the Committee deems appropriate and relevant to assist the Committee in its review of the Program. (1998-1, s. 1.)

§ 108A-70.28. Fraudulent misrepresentation.

(a) It shall be unlawful for any person to knowingly and willfully, and with intent to defraud, make or cause to be made a false statement or representation of a material fact in an application for coverage under this Part or intended for use in determining eligibility for coverage.

(b) It shall be unlawful for any applicant, recipient, or person acting on behalf of the applicant or recipient to knowingly and willfully, and with intent to defraud, conceal, or fail to disclose any condition, fact, or event affecting the applicant's or recipient's initial or continued eligibility to receive coverage or benefits under this Part.

(c) It is unlawful for any person knowingly, willingly, and with intent to defraud, to obtain or attempt to obtain, or to assist, aid, or abet another person, either directly or indirectly, to obtain money, services, or any other thing of value to which the person is not entitled as a recipient under this Part, or otherwise to deliberately misuse a Program identification card. This misuse includes the sale, alteration, or lending of the Program identification card to others for services and the use of the card by someone other than the recipient to receive or attempt to receive Program coverage for services rendered to that individual.

Proof of intent to defraud does not require proof of intent to defraud any particular person.

(d) A person who violates a provision of this section shall be guilty of a Class I felony.

(e) For purposes of this section the word "person" includes any natural person, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1998-1, s. 1.)

ARTICLE 3.

Social Services Programs.

§ 108A-71. Authorization of social services programs.

The Department is hereby authorized to accept all grants-in-aid available for programs of social services under the Social Security Act, other federal laws or regulations, State appropriations and other non-federal sources. The Department is designated as the single State agency responsible for administering or supervising the administration of such programs. It is the intent of this Article that programs of social services be administered so that the State and its citizens may benefit fully from any grants-in-aid. (1981, c. 275, s. 1.)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Limitations on Rule Making Authority of Social Services Commission. — The Social Services Commission has and continues to have general rule making authority under its grant in § 143B-153 and by the provision of this section which authorizes the Department of Human Resources to accept all "State appropriations" for programs of social services. That grant became limited, however, by Chapter 150B upon its enactment, thereby requiring the Commission to comply with certain procedural requirements in adopting rules if specifically authorized by legislative enactment to adopt rules. Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

Administration of State Abortion Fund. — Since the State Abortion Fund prior to the

enactment of Session Laws 1985, c. 479, s. 93 was merely a "state appropriation," the Department of Human Resources, through its Social Services Commission, could and did enact rules and regulations pertaining to the program. However, by the passage of Section 93, which specifically limits by legislative enactment how the Fund is to be administered, the Department of Human Resources and the Commission's rule making authority must comply with the requirements of Chapter 150B. Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 398 S.E.2d 40 (1990).

Cited in Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986).

§ 108A-72. Social services checks payable to decedents.

In the event of the death of a recipient of a cash payment service, any check or checks payable to such recipient but not endorsed prior to such recipient's death shall be returned to the issuing agency, made void, and reissued to the provider of the service. (1981, c. 275, s. 1.)

§ 108A-73. Services appeals and confidentiality of records.

The provisions of Article 4 on public assistance and social services appeals and confidentiality of records shall be applicable to social services programs authorized under this Article. (1981, c. 275, s. 1.)

§ 108A-74. County department failure to provide services; State intervention in or control of service delivery.

(a) Notwithstanding any other provision of law to the contrary, the Secretary of Health and Human Services may take action in accordance with this section to ensure the delivery of child welfare services in accordance with State laws and applicable rules. As used in this section, the terms:

(1) "County department of social service" also means the consolidated human services agency, whichever applies;

(2) "County director of social services" also means the human services director, whichever applies; and

(3) "County board of social services" also means the consolidated human services board, whichever applies.

(b) If the Secretary of Health and Human Services determines that a county department of social services is not providing child protective services, foster care services, or adoption services in accordance with State law and with applicable rules adopted by the Social Services Commission, or fails to demonstrate reasonable efforts to do so, then the Secretary, after providing written notification of intent to the county director of social services, to the chair of the county board of commissioners, and to the chair of the county board of social services, and after providing them with an opportunity to be heard, may intervene in the particular service or services in question. Intervention includes, but is not limited to, the following activities:

(1) Sending staff of the Department of Health and Human Services to the county department of social services to provide technical assistance and to monitor the services being provided;

(2) Establishing a corrective plan of action to correct inappropriate policies and procedures; and

(3) Advising county personnel as to appropriate policies and procedures.

If within 60 days of completion of the intervention activities, the Secretary finds that the county department of social services is not providing in

accordance with State laws and applicable rules the particular service or services for which intervention was initiated, or has not demonstrated reasonable efforts to do so, the Secretary shall withhold State and federal child welfare services administrative funds until the particular service or services are provided in accordance with State laws and applicable rules.

(c) If the Secretary determines that a county department of social services is not providing child protective, foster care, or adoption services in accordance with State law and with applicable rules adopted by the Social Services Commission, or fails to demonstrate reasonable efforts to do so, and the failure to provide the services poses a substantial threat to the safety and welfare of children in the county who receive or are eligible to receive the services, then the Secretary, after providing written notification of intent to the chair of the county board of commissioners, to the chair of the county board of social services, and to the county director of social services, and after providing them with an opportunity to be heard, shall withhold funding for the particular service or services in question and shall ensure the provision of these services through contracts with public or private agencies or by direct operation by the Department of Health and Human Services.

(d) In the event that the Secretary assumes control of service delivery pursuant to subsection (c) of this section, the county director of social services shall be divested of all service delivery powers conferred upon the director by G.S. 108A-14 and other applicable State law as the powers pertain to the services in question. Upon assumption of control of service delivery, the Secretary may assign any of the powers and duties of the county director of social services to the Director of the Division of Social Services of the Department of Health and Human Services or to a contractor as the Secretary deems necessary and appropriate to continue the provision of the services in the county.

(e) In the event the Secretary takes action under this section, the Department of Health and Human Services shall, in conjunction with the county board of commissioners, the county board of social services, and the county director of social services develop and implement a corrective plan of action. The Department of Health and Human Services shall also keep the chair of the county board of commissioners, the chair of the county board of social services, and the county director of social services informed of any ongoing concerns or problems with the delivery of the services in question.

(f) Upon the Secretary taking action pursuant to subsection (c) of this section, county funding of the services in question shall continue and at no time during the period of time that the Secretary is taking action shall a county withdraw funds previously obligated or appropriated for the services. Upon the Secretary's assumption of the control of service delivery, the county shall also pay the nonfederal share of any additional cost that may be incurred to operate the services in question at the level necessary to comply fully with State law and Social Services Commission rules.

(g) During the period of time that the Secretary is taking action pursuant to subsection (c) of this section, the Department of Health and Human Services shall work with the county board of commissioners, the county board of social services, and the county director of social services, to enable service delivery to be returned to the county if and when the Secretary has determined that services can be provided by the county in accordance with State law and applicable rules. (1997-390, s. 10; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1997-390, s. 12, made this section effective January 1, 1998.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§§ 108A-75 through 108A-78: Reserved for future codification purposes.

ARTICLE 4.

Public Assistance and Social Services Appeals and Access to Records.

§ 108A-79. Appeals.

(a) A public assistance applicant or recipient shall have a right to appeal the decision of the county board of social services, county department of social services, or the board of county commissioners granting, denying, terminating, or modifying assistance, or the failure of the county board of social services or county department of social services to act within a reasonable time under the rules and regulations of the Social Services Commission or the Department. Each applicant or recipient shall be notified in writing of his right to appeal upon denial of his application for assistance and at the time of any subsequent action on his case.

(b) In cases involving termination or modification of assistance, no action shall become effective until 10 workdays after notice of this action and of the right to appeal is mailed or delivered by hand to the recipient; provided, however, termination or modification of assistance may be effective immediately upon the mailing or delivery of notice in the following circumstances:

(1) When the modification is beneficial to the recipient; or

(2) When federal regulations permit immediate termination or modification upon mailing or delivery of notice and the Social Services Commission or the Department of Health and Human Services promulgates regulations adopting said federal law or regulations. When federal and State regulations permit immediate termination or modification, the recipient shall have no right to continued assistance at the present level pending a hearing, as would otherwise be provided by subsection (d) of this section.

(c) The notice of action and the right to appeal shall comply with all applicable federal and State law and regulations; provided, such notice shall, at a minimum contain a clear statement of:

(1) The action which was or is to be taken;

(2) The reasons for which this action was or is to be taken;

(3) The regulations supporting this action;

(4) The applicant's or recipient's right to both a local and State level hearing, or to a State level hearing in the case of the food stamp program, on the decision to take this action and the method for obtaining these hearings;

(5) The right to be represented at the hearings by a personal representative, including an attorney obtained at the applicant's or recipient's expense;

(6) In cases involving termination or modification of assistance, the recipient's right upon timely request to continue receiving assistance at the present level pending an appeal hearing and decision on that hearing.

An applicant or recipient may give notice of appeal by written or oral statement to the county department of social services, which shall record such notice by completing a form developed by the Department.

Such notice of appeal must be given within 60 days from the date of the action, or 90 days from the date of notification in the case of the food stamp

program. Failure to give timely notice of appeal constitutes a waiver of the right to a hearing except that, for good cause shown, the county department of social services may permit an appeal notwithstanding the waiver. The waiver shall not affect the right to reapply for benefits.

(d) If there is such timely appeal in cases not involving disability, in the first instance the hearing shall consist of a local appeal hearing before the county director or a designated representative of the county director, provided whoever hears the local appeal shall not have been involved directly in the initial decision giving rise to the appeal. If there is such timely appeal in cases involving disability, the county director or a designated representative of the county director shall within five days of the request for an appeal forward the request to the Department of Health and Human Services, and the Department shall designate a hearing officer who shall promptly hold a hearing in the county according to the provisions of subsections (i) and (j) of this section. In cases involving termination or modification of assistance (other than cases of immediate termination or modification of assistance pursuant to subsection (b) (2) of this section), the recipient shall continue to receive assistance at the present level pending the decision at the initial hearing, whether that be the local appeal hearing decision or, in cases involving questions of disability, the Department of Health and Human Services hearing decision, provided that in order to continue receiving assistance pending the initial hearing decision the recipient must request a hearing on or before the effective date of the termination or modification of assistance.

(e) The local appeal hearing shall be held not more than five days after the request for it is received. The recipient may, for good cause shown as defined by rule or regulation of the Social Services Commission or the Department, petition the county department of social services, in writing, for a delay, but in no event shall the local appeal hearing be held more than 15 days after the receipt of the request for hearing. At the local appeal hearing:

(1) The appellant and the county department may be represented by personal representatives, including attorneys, obtained at their expense.

(2) The appellant or his personal representative and the county department shall present such sworn evidence and law or regulations as bear upon the case. The hearing need not be recorded or transcribed, but the director or his representative shall summarize in writing the substance of the hearing.

(3) The appellant or his personal representative and the county department may cross-examine witnesses and present closing arguments summarizing their views of the case and the law.

(4) Prior to and during the hearing, the appellant or his personal representative shall have adequate opportunity to examine the contents of his case file for the matter pending together with those portions of other public assistance or social services case files which pertain to the appeal, and all documents and records which the county department of social services intends to use at the hearing. Those portions of the public assistance or social services case file which do not pertain to the appeal or which are required by federal statutes or regulations or by State statutes or regulations to be held confidential shall not be released to the appellant or his personal representative. In cases where the appellant has been denied access to the public assistance or social services case file the hearing officer shall certify as part of the official record that the hearing officer has examined the case files and that no portion of those files pertain to the appeal. Such certification may be subject to judicial review as provided in subsection (k) of this section. Nothing in this section is intended to restrict

an applicant or recipient access to information if that access is allowed by rules and regulations promulgated pursuant to G.S. 108A-80.

(f) The director or his designated representative shall make the decision based upon the evidence presented at the hearing and all applicable regulations, and shall prepare a written statement of his decision citing the regulations and evidence to support it. This written statement of the decision will be served by certified mail on the appellant within five days of the local appeal hearing. If the decision terminating or modifying the appellant's benefits is affirmed, the assistance shall be terminated or modified, not earlier than the date the decision is mailed, and any assistance received during the time of the appeal is subject to recovery.

(g) If the appellant is dissatisfied with the decision of the local appeal hearing, he may within 15 days of the mailing notification of the decision take a further appeal to the Department. However, assistance may not be received pending this further appeal. Failure to give timely notice of further appeal constitutes a waiver of the right to a hearing before an official of the Department except that, for good cause shown, the Department may issue an order permitting a review of the local appeal hearing notwithstanding the waiver. The waiver shall not affect the right to reapply for benefits.

(h) Subsections (d)-(g) of this section shall not apply to the food stamp program. The first appeal for a food stamp recipient or his representative shall be to the Department. Pending hearing, the recipient's assistance shall be continued at the present level upon timely request.

(i) If there is an appeal from the local appeal hearing decision, or from a food stamp recipient or his representative where there is no local hearing, or if there is an appeal of a case involving questions of disability the county director shall notify the Department according to its rules and regulations. The Department shall designate a hearing officer who shall promptly hold a de novo administrative hearing in the county after giving reasonable notice of the time and place of such hearing to the appellant and the county department of social services. Such hearing shall be conducted according to applicable federal law and regulations and Article 3, Chapter 150B, of the General Statutes of North Carolina; provided the Department shall adopt rules and regulations to ensure the following:

(1) Prior to and during the hearing, the appellant or his personal representative shall have adequate opportunity to examine his case file and all documents and records which the county department of social services intends to use at the hearing together with those portions of other public assistance or social services case files which pertain to the appeal. Those portions of the public assistance or social services case files which do not pertain to the appeal or which are required by federal statutes or regulations or by State statutes or regulations to be held confidential shall not be released to the appellant or his personal representative. In cases where the appellant has been denied access to portions of the public assistance or social services case file, the hearing officer shall certify as part of the official record that the hearing officer has examined the case files and that no portion of those files pertain to the appeal. Such certification may be subject to judicial review as provided in subsection (k) of this section. Nothing in this section is intended to restrict an applicant or recipient access to information if that access is allowed by rules or regulations promulgated pursuant to G.S. 108A-80.

(2) At the appeal hearing, the appellant and personnel of the county department of social services may present such sworn evidence, law and regulations as bear upon the case.

(3) The appellant and county department shall have the right to be represented by the person of his choice, including an attorney obtained at his own expense.

(4) The appellant and county department shall have the right to cross-examine the other party as well as make a closing argument summarizing his view of the case and the law.

(5) The appeal hearing shall be recorded; however, no transcript will be prepared unless a petition for judicial review is filed pursuant to subsection (k) herein, in which case, the transcript will be made a part of the official record. In the absence of the filing of a petition for a judicial review, the recording of the appeal hearing may be erased or otherwise destroyed 180 days after the final decision is mailed.

(6) Notwithstanding G.S. 150B-28 or any other provision of State law, discovery shall be no more extensive or formal than that required by federal law and regulations applicable to such hearings.

(j) After the administrative hearing, the hearing officer shall prepare a proposal for decision, citing pertinent law, regulations, and evidence, which shall be served upon the appellant and the county department of social services or their personal representatives. The appellant and the county department of social services shall have the opportunity to present oral and written arguments in opposition to or in support of the proposal for decision to the designated official of the Department who is to make the final decision. The final decision shall be based on, conform to, and set forth in detail the relevant evidence, pertinent State and federal law and regulations, and matters officially noticed. The decision shall be rendered not more than 90 days, or 45 days in the case of the food stamp program, from the date of request for the hearing, unless the hearing was delayed at the request of the appellant. If the hearing was delayed at the appellant's request, the decision may only be delayed for the length of time the appellant requested a delay. The final decision shall be served upon the appellant and upon the county department of social services by certified mail, with a copy furnished to either party's attorney of record. In the absence of a petition for judicial review filed pursuant to subsection (k) herein, the final decision shall be binding upon the appellant, the county department of social services, the county board of social services, and the board of county commissioners.

(k) Any applicant or recipient who is dissatisfied with the final decision of the Department may file, within 30 days of the receipt of notice of such decision, a petition for judicial review in superior court of the county from which the case arose. Failure to file a petition within the time stated shall operate as a waiver of the right of such party to review, except that, for good cause shown, a judge of the superior court resident in the district or holding court in the county from which the case arose may issue an order permitting a review of the agency decision under this Chapter notwithstanding such waiver. The hearing shall be conducted according to the provisions of Article 4, Chapter 150B, of the North Carolina General Statutes. The court shall, on request, examine the evidence excluded at the hearing under G.S. 108A-79(e)(4) or G.S. 108A-79(i)(1) and if the evidence was improperly excluded, the court shall consider it. Notwithstanding the foregoing provisions, the court may take testimony and examine into the facts of the case, including excluded evidence, to determine whether the final decision is in error under federal and State law, and under the rules and regulations of the Social Services Commission or the Department of Health and Human Services. Furthermore, the court shall set the matter for hearing within 15 days from the filing of the record under G.S. 150B-47 and after reasonable written notice to the Department of Health and Human Services and the applicant or recipient. Nothing in this subsection shall be construed to abrogate any rights that the county may have under Article 4 of Chapter 150B.

(*l*) In the event of conflict between federal law or regulations and State law or regulations, the federal law or regulations shall control. (1937, c. 288, ss. 18,

48; 1939, c. 395, s. 1; 1957, c. 100, s. 1; 1969, c. 546, s. 1; cc. 735, 754; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, ss. 14-18; 1979, c. 691; 1981, c. 275, s. 1; c. 419, ss. 1-3; c. 420, ss. 1-3; 1987, c. 599, ss. 1-3; c. 827, s. 1; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Failure to Give Notice of Right to Counsel. — The omission of information concerning the right to counsel in the notice of termination of services under subsection (c) was a serious error; lack of assistance of counsel could have a major impact on the proceedings, and the notice fell short of the necessary specificity regarding the reasons for termination. King v. North Carolina Dep't of Human Resources, 93 N.C. App. 89, 376 S.E.2d 245 (1989).

Failure to Apprise Petitioner of Basis for Decision. — Use of the general language "continuing refusal to cooperate" did not sufficiently apprise the petitioner of the basis for the decision and seriously impaired his ability to rebut those grounds at the subsequent hearing. King v. North Carolina Dep't of Human Resources, 93 N.C. App. 89, 376 S.E.2d 245 (1989).

Standing to Appeal Eligibility Decision. — Daughter of deceased Medicaid recipient had no right to appeal from Department of Human Resources decision regarding her father's eligibility, as she was neither an "applicant" nor a "recipient," nor the legal representative of her father's estate. Yates v. North Carolina Dep't of Human Resources, 98 N.C. App. 402, 390 S.E.2d 761 (1990).

Omission of Information Concerning Right to Counsel Was Error. — The omission of information concerning the right to counsel in the notice of termination of services under subsection (c) was a serious error; lack of assistance of counsel could have a major impact on the proceedings, and the notice fell short of the necessary specificity regarding the reasons for termination; the general "continuing refusal to cooperate" does not sufficiently apprise the petitioner of the basis for the decision and seriously impairs his ability to rebut those grounds at the subsequent hearing; therefore, plaintiff's benefits were improperly terminated by the failure to follow prescribed statutory requirements for notice. King v. North Carolina Dep't of Human Resources, 93 N.C. App. 89, 376 S.E.2d 245 (1989).

Applied in Surgeon v. Division of Social Servs., 86 N.C. App. 252, 357 S.E.2d 388 (1987).

Cited in Alexander v. Hill, 549 F. Supp. 1355 (W.D.N.C. 1982); Alexander v. Hill, 625 F. Supp. 564 (W.D.N.C. 1985); Hunt v. Robeson County Dep't of Social Servs., 816 F.2d 150 (4th Cir. 1987); Johnson v. Division of Social Servs., 89 N.C. App. 481, 366 S.E.2d 538 (1988); Campos v. Flaherty, 93 N.C. App. 219, 377 S.E.2d 282 (1989); Tay v. Flaherty, 100 N.C. App. 51, 394 S.E.2d 217 (1990); Kempson v. North Carolina Dep't of Human Resources, 100 N.C. App. 482, 397 S.E.2d 314 (1990); Correll v. Division of Social Servs., 103 N.C. App. 562, 406 S.E.2d 633 (1991); Dillingham v. North Carolina Dep't of Human Resources, — N.C. App. —, 513 S.E.2d 823 (1999).

OPINIONS OF ATTORNEY GENERAL

Provisions Governing Appeals. — Appeals by applicants and recipients of public assistance or social services from adverse decisions of county agencies or boards are governed by the substantive provisions and procedural requirements of this section, including the procedural provisions of the Administrative Procedure Act (§ 150B-1 et seq.), consistent with the statute, to the extent that substance and procedure are not in conflict with applicable federal law and regulations. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department of Human Resources, 55 N.C.A.G. 91 (1986).

Substantive Provisions of Section Govern over Administrative Procedure Act. — Given the detailed substantive provisions of this section, designed specifically to apply to appeals of county agency decisions, and the fact that the Administrative Procedure Act, by its terms, does not apply to such appeals, the legislature, by reference to such act, did not intend to substitute the act's substantive requirements for those of this section. The citation to the act simply indicated a legislative intent to incorporate the powers of hearing officers and the hearing procedures detailed in the act into subsection (i) of this section by reference. See opinion of Attorney General to Mr. Phillip J. Kirk, Jr., Secretary, Department

of Human Resources, 55 N.C.A.G. 91 (1986).

Secretary May Delegate Decision- Making Authority Regarding Appeals. — See opinion of Attorney General to Mr. David T. Flaherty, N.C. Department of Human Resources, 42 N.C.A.G. 313 (1973), issued under former Chapter 108.

§ 108A-80. Confidentiality of records.

(a) Except as provided in (b) below, it shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files or communications of the Department or the county boards of social services, or county departments of social services or acquired in the course of performing official duties except for the purposes directly connected with the administration of the programs of public assistance and social services in accordance with federal law, rules and regulations, and the rules of the Social Services Commission or the Department.

(b) The Department shall furnish a copy of the recipient check register monthly to each county auditor showing a complete list of all recipients of Work First Family Assistance in Standard Program Counties and State-County Special Assistance for Adults, their addresses, and the amounts of the monthly grants. An Electing County whose checks are not being issued by the State shall furnish a copy of the recipient check register monthly to its county auditor showing a complete list of all recipients of Work First Family Assistance in the Electing County, their addresses, and the amounts of the monthly payments. These registers shall be public records open to public inspection during the regular office hours of the county auditor, but the registers or the information contained therein may not be used for any commercial or political purpose. Any violation of this section shall constitute a Class 1 misdemeanor.

(c) Any listing of recipients of benefits under any public assistance or social services program compiled by or used for official purposes by a county board of social services or a county department of social services shall not be used as a mailing list for political purposes. This prohibition shall apply to any list of recipients of benefits of any federal, State, county or mixed public assistance or social services program. Further, this prohibition shall apply to the use of such listing by any person, organization, corporation, or business, including but not limited to public officers or employees of federal, State, county, or other local governments, as a mailing list for political purposes. Any violation of this section shall be punishable as a Class 1 misdemeanor.

(d) The Social Services Commission may adopt rules governing access to case files for social services and public assistance programs, except the Medical Assistance Program. The Secretary of the Department of Health and Human Services shall have the authority to adopt rules governing access to medical assistance case files. (1937, c. 288, ss. 18, 48; 1939, c. 395, s. 1; 1957, c. 100, s. 1; 1969, c. 546, s. 1; cc. 735, 754; 1973, c. 476, s. 138; 1977, 2nd Sess., c. 1219, s. 19; 1981, c. 275, s. 1; c. 419, s. 4; 1993, c. 539, ss. 819, 820; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, ss. 11A.118(a), 12.12.)

CASE NOTES

Test for State Interest Justifying Confidentiality. — In order to justify the application of a confidentiality rule, there must be shown a state interest in confidentiality applicable on the facts which outweighs the public and individual interests in the particular statements made. Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981), decided under former Chapter 108.

OPINIONS OF ATTORNEY GENERAL

Although the public assistance recipient check register is a public record, it may not be used for any commercial or political reason, including publication by the media. See opinion of Attorney General to Dr. Renee P. Hill, Director, Division of Social Services, N.C. Department of Human Resources, 45 N.C.A.G. 273 (1976), issued under former Chapter 108.

§§ 108A-81 through 108A-85: Reserved for future codification purposes.

Article 5.

Financing of Programs of Public Assistance and Social Services.

§ 108A-86. Financial transactions between the State and counties.

The Secretary shall have the power to promulgate rules and regulations establishing procedures for the counties to follow in financing programs of public assistance and social services under Article 2 and Article 3. (1981, c. 275, s. 1.)

Legal Periodicals. — For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

Quoted in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

§ 108A-87. Allocation of nonfederal shares.

(a) The nonfederal share of the annual cost of each public assistance and social services program and related administrative costs may be divided between the State and counties as determined by the General Assembly and in a manner consistent with federal laws and regulations.

(b) The nonfederal share of the annual cost of public assistance and social services programs and related administrative costs provided to Indians living on federal reservations held in trust by the United States on their behalf shall be borne entirely by the State. (1965, c. 708; 1969, c. 546, s. 1; 1973, c. 476, s. 138; 1981, c. 275, s. 1.)

CASE NOTES

Quoted in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

OPINIONS OF ATTORNEY GENERAL

State Must Pay All Nonfederal Share of Medicaid Benefits for Indians Living on Federal Reservation. — See opinion of Attorney General to Mr. Clifton M. Craig, Commissioner, Department of Social Services, 41 N.C.A.G. 140 (1970), issued under former Chapter 108.

§ 108A-88. Determination of State and county financial participation.

Before February 15 of each year, the Secretary shall notify the director of social services of each county of the amount of State and federal moneys estimated to be available, as best can be determined, to that county for programs of public assistance, social services and related administrative costs, as well as the percentage of county participation expected to be required for the budget for the succeeding fiscal year. In odd-numbered years, in making such notification, the Secretary shall notify the counties of any changes in funding levels, formulas, or programs relating to public assistance proposed by the Governor to the General Assembly in the proposed budget and budget report submitted under the Executive Budget Act. Counties shall be notified of additional changes in the proposed budget of the Governor and the Advisory Budget Commission that are made by the General Assembly or the United States Congress subsequent to the February 15 estimates. (1937, c. 288, ss. 9, 21, 39, 51; 1943, c. 505, s. 8; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 1418, s. 1; 1977, c. 1089, s. 1; 1977, 2nd Sess., c. 1219, s. 21; 1979, 2nd Sess., c. 1198; 1981, c. 275, s. 1.)

CASE NOTES

Determination of Budget by Department of Human Resources as Final and Binding. — The Department of Human Resources has the power to make a final determination of an appropriate budget of total county funds that is binding upon the county. Fracaro v. Priddy, 514 F. Supp. 191 (M.D.N.C. 1981), decided under former Chapter 108.

Stated in Shell v. Wall, 808 F. Supp. 481 (W.D.N.C. 1992).

§ 108A-89. State Public Assistance Contingency Loan Program.

(a) The Department is authorized and empowered to establish a program known as the "State Public Assistance Contingency Loan Program." The purpose of this program shall be to make loans available to counties whose actual expenditures, excluding related administrative costs, exceed the estimates for public assistance programs only provided by the Department under G.S. 108A-88.

(b) Loans shall be made to the counties at any time during the fiscal year by the Department, when satisfied of the county's need for such loan under this Article.

(c) A loan provided under this section shall be used by a county only to pay the county share of public assistance costs that exceeds the estimate provided by the Department under G.S. 108A-88 in order to sustain an adequate program of public assistance in that county.

(d) Any amount borrowed by a county from the "State Public Assistance Contingency Fund" during one fiscal year shall be repaid to said fund within the next two fiscal years. (1973, c. 1418, s. 2; 1977, c. 1089, s. 2; 1977, 2nd Sess., c. 1219, s. 22; 1981, c. 275, s. 1.)

Cross References. — As to withholding of state moneys from counties failing to pay public assistance cost, see § 108A-93.

§ 108A-90. Counties to levy taxes.

(a) Whenever the Secretary or his representative assigns a portion of the nonfederal share of public assistance expenses to the counties under the rules and regulations of the Social Services Commission or the Department, the board of commissioners of each county shall levy and collect the taxes required to meet the county's share of such expenses.

(b) The board of county commissioners may combine any or all of the separate special taxes for each program of public assistance and for the related administrative costs of such programs in place of levying separate special taxes for each item. This consolidated tax shall be sufficient, when combined with other funds available for use for public assistance expenses from any other source of county income and revenue (including borrowing in anticipation of collection of taxes), to meet the financial requirements of public assistance programs, and the related administrative costs of each program. The appropriations and expenditures for each of the several programs and for related administrative costs shall be separately stated and accounted for. (1937, c. 288, ss. 9, 39; 1969, c. 546, s. 1; 1971, c. 780, s. 35; 1973, c. 476, s. 138; c. 1418, s. 4; 1981, c. 275, s. 1.)

CASE NOTES

Cited in Meares v. Brunswick County, 615 F. Supp. 14 (E.D.N.C. 1985).

§ 108A-91. Appropriations not to revert.

County appropriations for public assistance expenses or related administrative costs shall not lapse or revert, and the unexpended balances may be considered in making further public assistance or administrative appropriations. At any time during the fiscal year, any county may transfer county funds from one public assistance program to another and between programs of public assistance and administration if such action appears to be both necessary and feasible, provided the county secures the approval of the Secretary or his representative. (1953, c. 891; 1967, c. 554; 1969, c. 546, s. 1; 1973, c. 476, s. 138; c. 1418, s. 5; 1981, c. 275, s. 1.)

§ 108A-92: Repealed by Session Laws 1997-443, s. 12.14.

§ 108A-93. Withholding of State moneys from counties failing to pay public assistance costs.

The Director of the Budget may withhold from any county that does not pay its full share of public assistance costs to the State and has not obtained a loan for repayment under G.S. 108A-89, any State moneys appropriated from the General Fund for public assistance and related administrative costs, or may direct the Secretary of Revenue and State Controller to withhold any tax owed to a county under G.S. 105-113.82, Subchapter VIII of Chapter 105 of the General Statutes, or Chapter 1096 of the Session Laws of 1967. The Director of the Budget shall notify the chair of the board of county commissioners of the proposed action prior to the withholding of funds. (1981, c. 859, s. 16; 1985, c. 114, s. 13; 1995, c. 41, s. 9.)

Editor's Note. — Session Laws 1995, c. 41, s. 11, provides in part "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before its amendment or repeal; nor does it affect the

right to any refund or credit of a tax that would otherwise have been available under the amended or repealed statute before its amendment or repeal."

§§ 108A-94 through 108A-98: Reserved for future codification purposes.

ARTICLE 6.

Protection of the Abused, Neglected or Exploited Disabled Adult Act.

§§ 110-73 through 108A-84: Reserved for future codification purposes.

§ 108A-99. Short title.

This Article may be cited as the "Protection of the Abused, Neglected, or Exploited Disabled Adult Act." (1973, c. 1378; s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

CASE NOTES

Cited in In re Wheeler, 85 N.C. App. 150, 354 S.E.2d 374 (1987).

§ 108A-100. Legislative intent and purpose.

Determined to protect the increasing number of disabled adults in North Carolina who are abused, neglected, or exploited, the General Assembly enacts this Article to provide protective services for such persons. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-101. Definitions.

(a) The word "abuse" means the willful infliction of physical pain, injury or mental anguish, unreasonable confinement, or the willful deprivation by a caretaker of services which are necessary to maintain mental and physical health.

(b) The word "caretaker" shall mean an individual who has the responsibility for the care of the disabled adult as a result of family relationship or who has assumed the responsibility for the care of the disabled adult voluntarily or by contract.

(c) The word "director" shall mean the director of the county department of social services in the county in which the person resides or is present, or his representative as authorized in G.S. 108A-14.

(d) The words "disabled adult" shall mean any person 18 years of age or over or any lawfully emancipated minor who is present in the State of North Carolina and who is physically or mentally incapacitated due to mental retardation, cerebral palsy, epilepsy or autism; organic brain damage caused by advanced age or other physical degeneration in connection therewith; or due to conditions incurred at any age which are the result of accident, organic brain damage, mental or physical illness, or continued consumption or absorption of substances.

(e) A "disabled adult" shall be "in need of protective services" if that person, due to his physical or mental incapacity, is unable to perform or obtain for

himself essential services and if that person is without able, responsible, and willing persons to perform or obtain for his essential services.

(f) The words "district court" shall mean the judge of that court.

(g) The word "emergency" refers to a situation where (i) the disabled adult is in substantial danger of death or irreparable harm if protective services are not provided immediately, (ii) the disabled adult is unable to consent to services, (iii) no responsible, able, or willing caretaker is available to consent to emergency services, and (iv) there is insufficient time to utilize procedure provided in G.S. 108A-105.

(h) The words "emergency services" refer to those services necessary to maintain the person's vital functions and without which there is reasonable belief that the person would suffer irreparable harm or death. This may include taking physical custody of the disabled person.

(i) The words "essential services" shall refer to those social, medical, psychiatric, psychological or legal services necessary to safeguard the disabled adult's rights and resources and to maintain the physical or mental well-being of the individual. These services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, protection from health and safety hazards, protection from physical mistreatment, and protection from exploitation. The words "essential services" shall not include taking the person into physical custody without his consent except as provided for in G.S. 108A-106 and in Chapter 122C of the General Statutes.

(j) The word "exploitation" means the illegal or improper use of a disabled adult or his resources for another's profit or advantage.

(k) The word "indigent" shall mean indigent as defined in G.S. 7A-450.

(*l*) The words "lacks the capacity to consent" shall mean lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including but not limited to provisions for health or mental health care, food, clothing, or shelter, because of physical or mental incapacity. This may be reasonably determined by the director or he may seek a physician's or psychologist's assistance in making this determination.

(m) The word "neglect" refers to a disabled adult who is either living alone and not able to provide for himself the services which are necessary to maintain his mental or physical health or is not receiving services from his caretaker. A person is not receiving services from his caretaker if, among other things and not by way of limitation, he is a resident of one of the State-owned hospitals for the mentally ill, centers for the mentally retarded or North Carolina Special Care Center he is, in the opinion of the professional staff of that hospital or center, mentally incompetent to give his consent to medical treatment, he has no legal guardian appointed pursuant to Chapter 35A, or guardian as defined in G.S. 122C-3(15), and he needs medical treatment.

(n) The words "protective services" shall mean services provided by the State or other government or private organizations or individuals which are necessary to protect the disabled adult from abuse, neglect, or exploitation. They shall consist of evaluation of the need for service and mobilization of essential services on behalf of the disabled adult. (1973, c. 1378, s. 1; 1975, c. 797; 1979, c. 1044, ss. 1-4; 1981, c. 275, s. 1; 1985, c. 589, s. 34; 1987, c. 550, s. 24; 1989, c. 770, s. 29; 1991, c. 258, s. 2.)

CASE NOTES

Whether "spankings or beatings" of a "disabled adult" amount to abuse within the meaning of subsection (a) of this section depends on the circumstances under which such spankings or beatings are administered. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

§ 108A-102. Duty to report; content of report; immunity.

(a) Any person having reasonable cause to believe that a disabled adult is in need of protective services shall report such information to the director.

(b) The report may be made orally or in writing. The report shall include the name and address of the disabled adult; the name and address of the disabled adult's caretaker; the age of the disabled adult; the nature and extent of the disabled adult's injury or condition resulting from abuse or neglect; and other pertinent information.

(c) Anyone who makes a report pursuant to this statute, who testifies in any judicial proceeding arising from the report, or who participates in a required evaluation shall be immune from any civil or criminal liability on account of such report or testimony or participation, unless such person acted in bad faith or with a malicious purpose. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-103. Duty of director upon receiving report.

(a) Any director receiving a report that a disabled adult is in need of protective services shall make a prompt and thorough evaluation to determine whether the disabled adult is in need of protective services and what services are needed. The evaluation shall include a visit to the person and consultation with others having knowledge of the facts of the particular case. When necessary for a complete evaluation of the report, the director shall have the authority to review and copy any and all records, or any part of such records, related to the care and treatment of the disabled adult that have been maintained by any individual, facility or agency acting as a caretaker for the disabled adult. This shall include but not be limited to records maintained by facilities licensed by the North Carolina Department of Health and Human Services. Use of information so obtained shall be subject to and governed by the provisions of G.S. 108A-80 and Article 3 of Chapter 122C of the General Statutes. The director shall have the authority to conduct an interview with the disabled adult with no other persons present. After completing the evaluation the director shall make a written report of the case indicating whether he believes protective services are needed and shall notify the individual making the report of his determination as to whether the disabled adult needs protective services.

(b) The staff and physicians of local health departments, area mental health, developmental disabilities, and substance abuse authorities, and other public or private agencies shall cooperate fully with the director in the performance of his duties. These duties include immediate accessible evaluations and in-home evaluations where the director deems this necessary.

(c) The director may contract with an agency or private physician for the purpose of providing immediate accessible medical evaluations in the location that the director deems most appropriate.

(d) The director shall initiate the evaluation described in subsection (a) of this section as follows:

(1) Immediately upon receipt of the complaint if the complaint alleges a life-threatening situation.

(2) Within 24 hours if the complaint alleges abuse of a resident as defined by G.S. 131D-20(1).

(3) Within 48 hours if the complaint alleges neglect of a resident as defined by G.S. 131D-20(8).

(4) Within two weeks in all other situations.

The investigation shall be completed within 30 days. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1; 1985, c. 589, s. 35; c. 658, s. 1; 1985 (Reg. Sess., 1986), c. 863, s. 6; 1991, c. 636, s. 19(c); 1997-443, s. 11A.118(a); 1999-334, s. 1.10.)

Effect of Amendments. — Session Laws 1999-334, s. 1.10, effective July 22, 1999, added subsection (d).

§ 108A-104. Provision of protective services with the consent of the person; withdrawal of consent; caretaker refusal.

(a) If the director determines that a disabled adult is in need of protective services, he shall immediately provide or arrange for the provision of protective services, provided that the disabled adult consents.

(b) When a caretaker of a disabled adult who consents to the receipt of protective services refuses to allow the provision of such services to the disabled adult, the director may petition the district court for an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services. If the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and consents to the receipt of protective services and that the caretaker refuses to allow the provision of such services, he may issue an order enjoining the caretaker from interfering with the provision of protective services to the disabled adult.

(c) If a disabled adult does not consent to the receipt of protective services, or if he withdraws his consent, the services shall not be provided. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-105. Provision of protective services to disabled adults who lack the capacity to consent; hearing, findings, etc.

(a) If the director reasonably determines that a disabled adult is being abused, neglected, or exploited and lacks capacity to consent to protective services, then the director may petition the district court for an order authorizing the provision of protective services. The petition must allege specific facts sufficient to show that the disabled adult is in need of protective services and lacks capacity to consent to them.

(b) The court shall set the case for hearing within 14 days after the filing of the petition. The disabled adult must receive at least five days' notice of the hearing. He has the right to be present and represented by counsel at the hearing. If the person, in the determination of the judge, lacks the capacity to waive the right to counsel, then the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17. If the person is indigent, the cost of representation shall be borne by the State.

(c) If, at the hearing, the judge finds by clear, cogent, and convincing evidence that the disabled adult is in need of protective services and lacks capacity to consent to protective services, he may issue an order authorizing the provision of protective services. This order may include the designation of an individual or organization to be responsible for the performing or obtaining of essential services on behalf of the disabled adult or otherwise consenting to protective services in his behalf. Within 60 days from the appointment of such an individual or organization, the court will conduct a review to determine if a petition should be initiated in accordance with Chapter 35A; for good cause shown, the court may extend the 60 day period for an additional 60 days, at the end of which it shall conduct a review to determine if a petition should be

initiated in accordance with Chapter 35A. No disabled adult may be committed to a mental health facility under this Article.

(d) A determination by the court that a person lacks the capacity to consent to protective services under the provisions of this Chapter shall in no way affect incompetency proceedings as set forth in Chapters 33, 35 or 122 of the General Statutes of North Carolina, or any other proceedings, and incompetency proceedings as set forth in Chapters 33, 35, or 122 shall have no conclusive effect upon the question of capacity to consent to protective services as set forth in this Chapter. (1973, c. 1378, s. 1; 1975, c. 797; 1977, c. 725, s. 3, 1979, c. 1044, s. 5; 1981, c. 275, s. 1; 1985, c. 658, s. 2; 1987, c. 550, s. 25.)

Editor's Note. — Chapter 33, referred to in subsection (d) above, has been repealed and recodified. As to incompetency and guardianship, see now Chapter 35A.

Chapter 122, referred to in subsection (d) above, was repealed by Session Laws 1985, c. 589, s. 1, effective January 1, 1986. See now Chapter 122C.

CASE NOTES

Applied in In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

§ 108A-106. Emergency intervention; findings by court; limitations; contents of petition; notice of petition; court authorized entry of premises; immunity of petitioner.

(a) Upon petition by the director, a court may order the provision of emergency services to a disabled adult after finding that there is reasonable cause to believe that:

(1) A disabled adult lacks capacity to consent and that he is in need of protective service;

(2) An emergency exists; and

(3) No other person authorized by law or order to give consent for the person is available and willing to arrange for emergency services.

(b) The court shall order only such emergency services as are necessary to remove the conditions creating the emergency. In the event that such services will be needed for more than 14 days, the director shall petition the court in accordance with G.S. 108A-105.

(c) The petition for emergency services shall set forth the name, address, and authority of the petitioner; the name, age and residence of the disabled adult; the nature of the emergency; the nature of the disability if determinable; the proposed emergency services; the petitioner's reasonable belief as to the existence of the conditions set forth in subsection (a) above; and facts showing petitioner's attempts to obtain the disabled adult's consent to the services.

(d) Notice of the filing of such petition and other relevant information, including the factual basis of the belief that emergency services are needed and a description of the exact services to be rendered shall be given to the person, to his spouse, or if none, to his adult children or next of kin, to his guardian, if any. Such notice shall be given at least 24 hours prior to the hearing of the petition for emergency intervention; provided, however, that the court may issue immediate emergency order ex parte upon finding as fact (i) that the conditions specified in G.S. 108A-106(a) exist; (ii) that there is likelihood that the disabled adult may suffer irreparable injury or death if such order be delayed; and (iii) that reasonable attempts have been made to locate interested parties and secure from them such services or their consent to petitioner's provision of such service; and such order shall contain a show-cause notice to

each person upon whom served directing such person to appear immediately or at any time up to and including the time for the hearing of the petition for emergency services and show cause, if any exists, for the dissolution or modification of the said order. Copies of the said order together with such other appropriate notices as the court may direct shall be issued and served upon all of the interested parties designated in the first sentence of this subsection. Unless dissolved by the court for good cause shown, the emergency order ex parte shall be in effect until the hearing is held on the petition for emergency services. At such hearing, if the court determines that the emergency continues to exist, the court may order the provision of emergency services in accordance with subsections (a) and (b) of this section.

(e) Where it is necessary to enter a premises without the disabled adult's consent after obtaining a court order in compliance with subsection (a) above, the representative of the petitioner shall do so.

(f)(1) Upon petition by the director, a court may order that:

a. The disabled adult's financial records be made available at a certain day and time for inspection by the director or his designated agent; and

b. The disabled adult's financial assets be frozen and not withdrawn, spent or transferred without prior order of the court.

(2) Such an order shall not issue unless the court first finds that there is reasonable cause to believe that:

a. A disabled adult lacks the capacity to consent and that he is in need of protective services;

b. The disabled adult is being financially exploited by his caretaker; and

c. No other person is able or willing to arrange for protective services.

(3) Provided, before any such inspection is done, the caretaker and every financial institution involved shall be given notice and a reasonable opportunity to appear and show good cause why this inspection should not be done. And, provided further, that any order freezing assets shall expire ten days after such inspection is completed, unless the court for good cause shown, extends it.

(g) No petitioner shall be held liable in any action brought by the disabled adult if the petitioner acted in good faith. (1975, c. 797; 1981, c. 275, s. 1; 1985, c. 658, s. 3.)

§ 108A-107. Motion in the cause.

Notwithstanding any finding by the court of lack of capacity of the disabled adult to consent, the disabled adult or the individual or organization designated to be responsible for the disabled adult shall have the right to bring a motion in the cause for review of any order issued pursuant to this Article. (1973, c. 1378, s. 1; 1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-108. Payment for essential services.

At the time the director, in accordance with the provisions of G.S. 108A-103 makes an evaluation of the case reported, then it shall be determined, according to regulations set by the Social Services Commission, whether the individual is financially capable of paying for the essential services. If he is, he shall make reimbursement for the costs of providing the needed essential services. If it is determined that he is not financially capable of paying for such essential services, they shall be provided at no cost to the recipient of the services. (1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-109. Reporting abuse.

Upon finding evidence indicating that a person has abused, neglected, or exploited a disabled adult, the director shall notify the district attorney. (1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-110. Funding of protective services.

Any funds appropriated by counties for home health care, boarding home, nursing home, emergency assistance, medical or psychiatric evaluations, and other protective services and for the development and improvement of a system of protective services, including additional staff, may be matched by State and federal funds. Such funds shall be utilized by the county department of social services for the benefit of disabled adults in need of protective services. (1975, c. 797; 1981, c. 275, s. 1.)

§ 108A-111. Adoption of standards.

The Department and the administrative office of the court shall adopt standards and other procedures and guidelines with forms to insure the effective implementation of the provisions of this Article. (1975, c. 797; 1981, c. 275, s. 1.)

Chapter 108B.

Community Action Programs.

Article 1.

Reserved.

Sec.
108B-1 through 108B-20. [Reserved.]

Article 2.

Community Action Partnership Act.

108B-21. Short title.
108B-22. Purpose.
Sec.
108B-23. Designation of administering agency powers and responsibilities.
108B-24. Designation of eligible agencies.
108B-25. Activities of Community Action Agency.
108B-26. Organization and authority.

Article 1.

[Reserved.]

§§ 108B-1 through 108B-20: Reserved for future codification purposes.

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1004, s. 34(b) reserves Article 1 of Chapter 108B for future codification purposes.

Article 2.

Community Action Partnership Act.

§ 108B-21. Short title.

This Article may be cited as the Community Action Partnership Act. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).)

Editor's Note. — This Article is Article 1D of Chapter 113, §§ 113-28.21 through 113-28.26, as rewritten and recodified as Article 2 of Chapter 108B by Session Laws 1989 (Reg. Sess., 1990), c. 1004, s. 34(c). Where appropriate, the historical citations to the former sections have been added to the corresponding sections in this Article as rewritten and recodified.

§ 108B-22. Purpose.

It is the purpose of this Article to provide financial assistance to Community Action Agencies and Limited Purpose Agencies (hereinafter referred to as "agency" or "agencies") to enable those agencies to effectively mobilize public and private resources in order to promote economic self-sufficiency among the poor of the State and to expand those services to all political subdivisions of the State. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).)

§ 108B-23. Designation of administering agency powers and responsibilities.

(a) For purposes of this Article, "Department" means the Department of Health and Human Services and "Secretary" means the Secretary of Health and Human Services.

(b) The Department is directed to carry out the purposes and provisions of this Article. In carrying out this directive, the Secretary shall promulgate rules consistent with the purposes and provisions of this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989, c. 727, s. 48; c. 751, ss. 7(9), 8(11a); 1989 (Reg. Sess., 1990), c. 1004, ss. 34(c), 35; 1997-443, s. 11A.118(a).)

§ 108B-24. Designation of eligible agencies.

The Secretary shall designate agencies to fulfill the requirements of this Article in the service areas governed by one or more units of local government. An agency so designated may be one of the following:

(1) Agencies which have been officially designated as community action agencies or limited purpose agencies pursuant to Section 210 of the Economic Opportunity Act of 1964, Public Law 88-452, 78 Stat. 508 and which have not lost their designation as a result of a failure to comply with the provisions of that act.

(2) Private nonprofit agencies designated by the chief elected official of a political subdivision or one or more political subdivisions, in areas not served by agencies as defined in subdivision (1) of this section on July 1, 1984. Agencies eligible under this subdivision must apply to the Secretary for designation 60 days in advance of the beginning date of their fiscal year. Political subdivisions designated under this section are authorized to join existing community action agencies contiguous with their boundaries or to organize their own community action agency in order to provide services pursuant to this Article. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).)

§ 108B-25. Activities of Community Action Agency.

Agencies shall serve as the local catalyst for the reduction of the causes, conditions, and effects of poverty and shall provide social and economic opportunities that foster self-sufficiency for low-income persons. As such, agencies designated pursuant to G.S. 108B-24(1) shall be sponsors of the Community Services Block Grant and any successor program thereto. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).)

§ 108B-26. Organization and authority.

(a) Agencies, as provided in G.S. 108B-24 shall have or be required to establish a governing board of directors which shall consist of not less than 15 nor more than 51 members. One-third of the members shall be low-income, elderly, or handicapped consumers residing in the service area of the agency. Consumer representatives shall be selected through a democratic process pursuant to guidelines established by the Department. Not less than one-third of the members of the board shall be appointed by the chief elected officials in the service area. The remaining positions on the board, if any, shall be filled by officials or members of business, industry, labor, religious, welfare, education, or civic organizations located in the service area.

(b) The board of directors shall be responsible for all of the following:

(1) The appointment and dismissal of an executive director.
(2) The approval of contracts, budgets, requests, and major modifications of budgets and contracts.
(3) The performance of an annual audit by certified public accountants to include all assets, liabilities, revenue, and expenditures.
(4) The establishment of policies for the operation of the agency.
(5) Annually advising the chief elected officials of the units of local government within the service area of the nature and extent of poverty within the area. Included in this annual report will be an assessment of the community action agency policies and programs and their impact on the problems of poverty in the service area.
(6) The convening of public meetings to provide low-income and other persons the opportunity to comment upon public policies and programs to reduce poverty. (1983 (Reg. Sess., 1984), c. 1034, s. 111.1; 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).)

Chapter 109.

Bonds.

§§ 109-1 through 109-41: Recodified as Articles 72 to 77 of Chapter 58.

Editor's Note. — This Chapter has been recodified as Articles 72 through 77 of Chapter 58 under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

Chapter 110.

Child Welfare.

Article 1.

Child Labor Regulations.

[Repealed.]

Sec.

110-1 through 110-20. [Repealed.]

Article 1A.

Exhibition of Children.

110-20.1. Exhibition of certain children prohibited.

Article 2.

Juvenile Services.

[Repealed and transferred.]

110-21 to 110-22.1. [Repealed.]
110-23. [Repealed.]
110-23.1 through 110-25. [Repealed.]
110-25.1. [Transferred.]
110-26 through 110-38. [Repealed.]
110-39. [Transferred.]
110-40 through 110-44. [Repealed.]

Article 2A.

Parental Control of Children.

[Repealed.]

110-44.1 through 110-44.4. [Repealed.]

Article 3.

Control over Child-Caring Facilities.

110-45. Institution has authority of parent or guardian.
110-46. Regulations of institution not abrogated.
110-47. Enticing a child from institution.
110-48. Violation a misdemeanor.
110-49. [Repealed.]

Article 4.

Placing or Adoption of Juvenile Delinquents or Dependents.

[Repealed.]

110-50 through 110-57. [Repealed.]

Article 4A.

Interstate Compact on the Placement of Children.

[Repealed.]

110-57.1 through 110-57.7. [Repealed.]

Article 5.

Interstate Compact on Juveniles.

[Repealed.]

Sec.

110-58 through 110-64.5. [Repealed.]

Article 5A.

Interstate Parole and Probation Hearing Procedures for Juveniles.

[Repealed.]

110-64.6 through 110-64.9. [Repealed.]

Article 6.

Governor's Advocacy Council on Children and Youth.

[Repealed.]

110-65 through 110-84. [Repealed.]

Article 7.

Child Care Facilities.

110-85. Legislative intent and purpose.
110-86. Definitions.
110-87. [Repealed.]
110-88. Powers and duties of the Commission.
110-88.1. Commission may not interfere with religious training offered in religious-sponsored child care facilities.
110-89. [Repealed.]
110-90. Powers and duties of Secretary of Health and Human Services.
110-90.1. [Repealed.]
110-90.2. Mandatory child care providers' criminal history checks.
110-91. Mandatory standards for a license.
110-92. Duties of State and local agencies.
110-93. Application for a license.
110-94. Administrative Procedure Act.
110-95 through 110-97. [Repealed.]
110-98. Mandatory compliance.
110-98.1. Prima facie evidence of existence of child care.
110-99. Display of license.
110-100. [Repealed.]
110-101. [Repealed.]
110-101.1. Corporal punishment banned in certain "nonlicensed" homes.
110-102. Information for parents.
110-102.1. Reporting of missing or deceased children.
110-102.2. Administrative penalties.
110-103. Criminal penalty.

Sec.
110-103.1. Civil penalty.
110-104. Injunctive relief.
110-105. Authority to inspect facilities.
110-105.1. [Repealed.]
110-105.2. Abuse and neglect violations.
110-106. Religious sponsored child care facilities.
110-106.1. [Repealed.]
110-107. Fraudulent misrepresentation.
110-108. Financial incentives for counties to investigate and pursue alleged child care fraud.
110-109 through 110-114. [Reserved.]

Article 8.

Child Abuse and Neglect.

[Repealed.]

110-115 through 110-123. [Repealed.]
110-124 through 110-127. [Reserved.]

Article 9.

Child Support.

110-128. Purposes.
110-129. Definitions.
110-129.1. Additional powers and duties of the Department.
110-129.2. State Directory of New Hires established; employers required to report; civil penalties for noncompliance; definitions.
110-130. Action by the designated representatives of the county commissioners.
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110-131. Compelling disclosure of information respecting the nonsupporting responsible parent of a child receiving public assistance.
110-131.1. Notice; due process requirements met.
110-132. Acknowledgment of paternity and agreement to support.
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110-132.2. Expedited procedures to establish paternity in IV-D cases.
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110-135. Debt to State created.
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110-136.6. Amount to be withheld.
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110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.
110-138. Duty of county to obtain support.
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110-139. Location of absent parents.
110-139.1. Access to federal parent locator service; parental kidnapping and child custody cases.
110-139.2. Data match system; agreements with financial institutions.
110-139.3. High-volume, automated administrative enforcement in interstate cases (AEI).
110-140. Conformity with federal requirements; restriction on options without federal funding.
110-141. Effectuation of intent of Article.
110-142. Definitions; suspension and revocation of occupational, professional, or business licenses of obligors who are delinquent in court-ordered child support, or who are not in compliance with subpoenas issued pursuant to child support or paternity establishment proceedings.
110-142.1. IV-D notified suspension, revocation, and issuance of occupational, professional, or business licenses of obligors who are delinquent in court-ordered child support or who are not in compliance with subpoenas issued pursuant to child support or paternity establishment proceedings.
110-142.2. Suspension, revocation, restriction of license to operate a motor vehicle or hunting, fishing, or trapping licenses; refusal of registration of motor vehicle.
110-143 through 110-146. [Reserved.]

Article 10.

Prevention of Child Abuse and Neglect.

[Repealed.]

110-147 through 110-150. [Repealed.]

ARTICLE 1.

Child Labor Regulations.

§§ 110-1 through 110-20: Repealed by Session Laws 1979, c. 839, s. 2.

Cross References. — For present provisions as to youth employment, see §§ 95-25.5, 95-25.23.

ARTICLE 1A.

Exhibition of Children.

§ 110-20.1. Exhibition of certain children prohibited.

(a) Except to the extent otherwise provided in subsection (d) of this section, it is unlawful to exhibit publicly for any purpose, or to exhibit privately for the purpose of entertainment, or solely or primarily for the satisfaction of the curiosity of any observer, any child under the age of 18 years who is mentally ill or mentally retarded or who presents the appearance of having any deformity or unnatural physical formation or development, whether or not the exhibiting of the child is in return for a monetary or other consideration.

(b) It is unlawful to employ, use, have custody of, or in any way be associated with any child described in subsection (a) for the purpose of an exhibition forbidden therein, or for one who has the care, custody or control of the child as a parent, relative, guardian, employer or otherwise, to neglect or refuse to restrain the child from participating in the exhibition.

(c) It is unlawful to procure or arrange for, or participate in procuring or arranging for, anything made unlawful by subsections (a) and (b).

(d) This section does not apply to the transmission of an image by television by a duly licensed television station, or to any exhibition by a federal, State, county or municipal government, or political subdivision or agency thereof, or to any exhibition by any corporation, unincorporated association, or other organization organized and operated exclusively for religious, charitable, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

(e) Any violation of this Article shall be a Class 3 misdemeanor. Each day during which any violation of this Article continues after notice to the violator, from any county social services director, to cease and desist from any violation of this section shall constitute a separate and distinct offense. Any act or omission forbidden by this Article shall, with respect to each child described therein constitute a separate and distinct offense. (1969, c. 457, s. 1; c. 982; 1993, c. 539, s. 821; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Pursuant to former § 108-1, "county social services director" has been substituted for "county welfare director" in the second sentence of subsection (e).

OPINIONS OF ATTORNEY GENERAL

Television coverage of children in children's unit of charity hospital is not prohibited when programs are prepared for public or general benefit or for purposes of treatment of children. See opinion of Attorney General to Mr. S.S. Haney, 41 N.C.A.G. 590 (1971).

Article 2.

Juvenile Services.

§ 110-21: Repealed by Session Laws 1973, c. 1339, s. 2.

Cross References. — As to the North Carolina Juvenile Code, see § 7B-100 et seq.

§ 110-21.1: Repealed by Session Laws 1969, c. 911, s. 1.

§ 110-22: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — For present provisions as to conditional release and revocation of conditional release of juveniles, see now §§ 7B-906, 7B-2514 and 7B-2516.

§ 110-22.1: Repealed by Session Laws 1969, c. 911, s. 1.

§ 110-23: Repealed by Session Laws 1998-202, s. 1(a), effective January 1, 1999.

§ 110-23.1: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — As to the North Carolina Juvenile Code, see § 7B-100 et seq.

§ 110-24: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — For present provisions as to the requirements for taking juveniles into custody, see now § 7B-500 et seq. and § 7B-1900 et seq.

§ 110-25: Repealed by Session Laws 1969, c. 911, s. 1.

§ 110-25.1: Transferred to § 130-58.1 by Session Laws 1969, c. 911, s. 3.

Editor's Note. — Section 130-58.1 was repealed by Session Laws 1977, c. 127.

§§ 110-26 through 110-38: Repealed by Session Laws 1969, c. 911, s. 1.

Editor's Note. — Session Laws 1999-293, s. 16, effective October 1, 1999, provided: "Section 16. G.S. 110-36.3 is amended by adding a new subsection to read:

'(d1) Employment Verifications. — For the purpose of establishing or modifying a child support order, the amount of the obligor's gross income may be established by a written statement signed by the obligor's employer or the employer's designee or an Employee Verification form produced by the Automated Collections Tracking System that has been completed and signed by the obligor's employer or the employer's designee. A written statement signed by the employer of the obligor or the employer's designee that sets forth an obligor's gross income, as well as an Employee Verification form signed by the obligor's employer or the employer's designee, shall be admissible evidence in any action establishing or modifying a child support order'."

There is no G.S. 110-36.3, and G.S. 110-26 to 110-38 were repealed in 1969. It appears likely that the intent of the act was to add a subsection (d1) to G.S. 110-136.3

§ 110-39: Transferred to § 14-316.1 by Session Laws 1969, c. 911, s. 4.

§§ 110-40 through 110-44: Repealed by Session Laws 1969, c. 911, s. 1.

ARTICLE 2A.

Parental Control of Children.

§§ 110-44.1 through 110-44.4: Repealed by Session Laws 1998-202, s. 5, effective July 1, 1999.

Cross References. — As to parental authority over juveniles, see now § 7B-3400 et seq.

ARTICLE 3.

Control over Child-Caring Facilities.

§ 110-45. Institution has authority of parent or guardian.

Every indigent child which may be placed in any orphanage, children's home, or child-placing institution in this State, which shall be an institution existing under and by virtue of the laws of this State, shall be under the control of the authorities of such institution so long as, under the rules and regulations of such institution, the child is entitled to remain in the same. The authority of the institution shall be the same as that of a parent or guardian before the child was placed in the institution; but such authority shall extend only to the person of the child. (1917, c. 133, s. 1; C.S., s. 5063.)

§ 110-46. Regulations of institution not abrogated.

Nothing in this Article shall be construed in any way to abrogate any of the rules and regulations of such institutions insofar as the rules and regulations have for their purpose the welfare and protection of the institutions. (1917, c. 133, s. 2; C.S., s. 5064.)

§ 110-47. Enticing a child from institution.

It is unlawful for any person to entice or attempt to entice, persuade, harbor, or conceal, or in any manner induce any indigent child to leave any of the institutions hereinbefore mentioned without the knowledge or consent of the authorities of such institutions. But this Article shall not interfere with a mother's right to her child in case she becomes able to sustain her child; and the county commissioners in the county in which she resides shall in case of doubt have authority to recommend to the institution concerning the child. (1917, c. 133, s. 3; C.S., s. 5065.)

§ 110-48. Violation a misdemeanor.

Any person violating any of the provisions of G.S. 110-45, 110-46 and 110-47 shall be guilty of a Class 1 misdemeanor. (1917, c. 133, s. 4; C.S., s. 5066; 1993, c. 539, s. 822; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 110-49: Repealed by Session Laws 1983, c. 637, s. 3.

ARTICLE 4.

Placing or Adoption of Juvenile Delinquents or Dependents.

§§ 110-50 through 110-57: Repealed by Session Laws 1998, c. 202, s. 5, effective July 1, 1999.

Cross References. — As to placing or adoption of juvenile delinquents or dependents, see now § 7B-3700 et seq.

Editor's Note. — Repealed § 110-53 had been repealed by Session Laws 1947, c. 609, s. 4. Repealed § 110-54 had been repealed by Session Laws 1943, c. 753, s. 2.

ARTICLE 4A.

Interstate Compact on the Placement of Children.

§§ 110-57.1 through 110-57.7: Repealed by Session Laws 1998, c. 202, s. 5, effective July 1, 1999.

Cross References. — For Interstate Compact on the Placement of Children, see now § 7B-3800 et seq.

ARTICLE 5.

Interstate Compact on Juveniles.

§§ 110-58 through 110-64.5: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — As to the Interstate Compact on Juveniles, see now § 7B-2800 et seq.

ARTICLE 5A.

Interstate Parole and Probation Hearing Procedures for Juveniles.

§§ 110-64.6 through 110-64.9: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — For present provisions as to interstate parole and probation hearing procedures for juveniles, see now §§ 7B-2822 through 7B-2825.

Article 6.

Governor's Advocacy Council on Children and Youth.

§§ 110-65, 110-66: Repealed by Session Laws 1977, c. 872, s. 7.

Cross References. — For present provisions as to the Governor's Advocacy Council on Children and Youth, see §§ 143B-414 through 143B-416.

§§ 110-67 through 110-70: Repealed by Session Laws 1973, c. 476, s. 182.

§ 110-71: Repealed by Session Laws 1977, c. 872, s. 7.

Cross References. — For present provisions as to the Governor's Advocacy Council on Children and Youth, see §§ 143B-414 through 143B-416.

§ 110-72: Repealed by Session Laws 1973, c. 476, s. 182.

Article 7.

Child Care Facilities.

§ 110-85. Legislative intent and purpose.

Recognizing the importance of the early years of life to a child's development, the General Assembly hereby declares its intent with respect to the early care and education of children:

(1) The State should protect children in child care facilities by ensuring that these facilities provide a physically safe and healthy environment where the developmental needs of these children are met and where these children are cared for by qualified persons of good moral character.

(2) Repealed by Session Laws 1997-506, s. 2, effective September 16, 1997.

(3) Achieving this level of protection and early education requires the following elements: mandatory licensing of child care facilities; promotion of higher quality child care through the development of enhanced standards which operators may comply with on a voluntary basis; and a program of education to help operators improve their programs and to deepen public understanding of child care needs and issues. (1971, c. 803, s. 1; 1987, c. 788, s. 1; 1997-506, ss. 1, 2.)

Cross References. — As to privilege license tax on day-care facilities, see § 105-60.

Editor's Note. — Session Laws 1997-506, s. 28.2, provides: "(a) There is established the Legislative Study Commission on Child Care. The Commission shall study the substantive issues contained in Part 1 of this act. There shall be 20 members of the Commission as follows:

"(1) Ten members appointed by the Speaker of the House of Representatives, seven of whom shall be members of the House of Representatives at the time of their appointment, and three of whom shall be members of the general public interested in child care;

"(2) Ten members appointed by the President Pro Tempore of the Senate, seven of whom shall be members of the Senate at the time of their appointment, and three of whom shall be members of the general public interested in child care.

"(b) Commission members shall receive no salary for serving, but shall recieve necessary subsistence and travel expenses in accordance

with G.S. 120-3.1, 138-5, and 138-6 as applicable. Staff to the Commission shall be provided as authorized by the Leislative Services Commission. The Commission may meet in the Legislative Building or the Legislative Office Building upon approval of the Legislative Services Officer.

"(c) The Commission shall report its findings and recommendations, including proposed legislation, to the 1997 General Assembly, Regular Session 1998, and shall make its final report to the 1999 General Assembly upon its convening. Upon issuing its final report, the Commission shall expire."

Session Laws 1997-506, s. 28.3 provides that the Department of Human Resources [now Department of Health and Human Services], Division of Child Development and the Child Care Commission shall not promote or require the utilization of training materials, curriculum, or policy developed or provided by the National Association for the Education of Young Children or the National Institute for Early Childhood Professional Development. The Division and the Commission shall permit individual facilities to make curriculum decisions.

Legal Periodicals. — For survey of 1979 constitutional law, see 58 N.C.L. Rev. 1326 (1980).

CASE NOTES

Quoted in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

Cited in Smith v. Kinder Care Learning Ctrs., Inc., 94 N.C. App. 663, 381 S.E.2d 193 (1989).

OPINIONS OF ATTORNEY GENERAL

Educational programs operated by public schools for three- and four-year-old children are not subject to licensure and regulation by the Child Day Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

Educational programs for three- and four-year-old children housed in public school buildings but operated by private providers are subject to licensure and regulations by the Child Day Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

State is not prohibited from purchasing day care services from day care programs operated by public schools, even though those programs are not licensed by the Child Day Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

§ 110-86. Definitions.

Unless the context or subject matter otherwise requires, the terms or phrases used in this Article shall be defined as follows:

(1) Commission. — The Child Care Commission created under this Article.

(2) Child care. — A program or arrangement where three or more children less than 13 years old, who do not reside where the care is provided, receive care on a regular basis of at least once per week for more than four hours but less than 24 hours per day from persons other than their guardians or full-time custodians, or from persons not related to them by birth, marriage, or adoption. Child care does not include the following:

a. Arrangements operated in the home of any child receiving care if all of the children in care are related to each other and no more than two additional children are in care;

b. Recreational programs operated for less than four consecutive months in a year;

c. Specialized activities or instruction such as athletics, dance, art, music lessons, horseback riding, gymnastics, or organized clubs

for children, such as Boy Scouts, Girl Scouts, 4-H groups, or boys and girls clubs;

d. Drop-in or short-term care provided while parents participate in activities that are not employment related and where the parents are on the premises or otherwise easily accessible, such as drop-in or short-term care provided in health spas, bowling alleys, shopping malls, resort hotels, or churches;

e. Public schools;

f. Nonpublic schools described in Part 2 of Article 39 of Chapter 115C of the General Statutes that are accredited by the Southern Association of Colleges and Schools and that operate a child care facility as defined in subdivision (3) of this section for less than six and one-half hours per day either on or off the school site;

g. Bible schools conducted during vacation periods;

h. Care provided by facilities licensed under Article 2 of Chapter 122C of the General Statutes;

i. Cooperative arrangements among parents to provide care for their own children as a convenience rather than for employment; and

j. Any child care program or arrangement consisting of two or more separate components, each of which operates for four hours or less per day with different children attending each component.

(2a) Child care administrator. — A person who is responsible for the operation of a child care facility and is on-site on a regular basis.

(3) Child care facility. — Includes child care centers, family child care homes, and any other child care arrangement not excluded by G.S. 110-86(2), that provides child care, regardless of the time of day, wherever operated, and whether or not operated for profit.

a. A child care center is an arrangement where, at any one time, there are three or more preschool-age children or nine or more school-age children receiving child care.

b. A family child care home is a child care arrangement located in a residence where, at any one time, more than two children, but less than nine children, receive child care.

(4) Repealed by Session Laws 1997-506, s. 3.

(4a) Department. — Department of Health and Human Services.

(5) Repealed by Session Laws 1975, c. 879, s. 15.

(5a) Lead teacher. — An individual who is responsible for planning and implementing the daily program of activities for a group of children in a child care facility.

(6) License. — A permit issued by the Secretary to any child care facility which meets the statutory standards established under this Article.

(7) Operator. — Includes the owner, director or other person having primary responsibility for operation of a child care facility subject to licensing.

(8) Secretary. — The Secretary of the Department of Health and Human Services. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, ss. 1-3; 1983, c. 46, s. 1; c. 297, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 1034, s. 78; 1985, c. 589, s. 36; c. 757, s. 155(c); 1987, c. 788, s. 2; 1989, c. 234; 1991, c. 273, s. 1; 1991 (Reg. Sess., 1992), c. 904, ss. 1, 2; c. 1024, s. 1; c. 1030, s. 51.12; 1997-443, ss. 11A.118(a), 11A.122; 1997-506, s. 3.)

Cross References. — As to the Child Care Commission, see § 143B-168.3 et seq.

Legal Periodicals. — For survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

CASE NOTES

Quoted in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980); Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ., 55 N.C. App. 134, 285 S.E.2d 110 (1981).

OPINIONS OF ATTORNEY GENERAL

Educational programs operated by public schools for three- and four-year-old children are not subject to licensure and regulation by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, — N.C.A.G. — (October 3, 1990).

Educational programs for three- and four-year-old children housed in public school buildings but operated by private providers are subject to licensure and regulations by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, — N.C.A.G. — (October 3, 1990).

Day-care facilities operated by a public agency or with substantial public money support are required to be licensed. See opinion of Attorney General to Mr. Clifton M. Craig, Department of Social Services, 41 N.C.A.G. 887 (1972).

A day-care facility operated by the Armed Forces on a federal reservation is subject to licensing unless the area is one in which the federal government has exclusive jurisdiction. See opinion of Attorney General to Mr. John Sokol, N.C. Day-Care Licensing Board, 42 N.C.A.G. 128 (1972).

State is not prohibited from purchasing day care services from day care programs operated by public schools, even though those programs are not licensed by Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, — N.C.A.G. — (October 3, 1990).

§ 110-87: Repealed by Session Laws 1975, c. 879, s. 15.

§ 110-88. Powers and duties of the Commission.

The Commission shall have the following powers and duties:

(1) To develop policies and procedures for the issuance of a license to any child care facility that meets all applicable standards established under this Article.

(1a) To adopt applicable rules and standards based upon the capacity of a child care facility.

(2) To require inspections by and satisfactory written reports from representatives of local or State health agencies, fire and building inspection agencies, and from representatives of the Department prior to the issuance of an initial license to any child care center.

(2a) To require annually, inspections by and satisfactory written reports from representatives of local or State health agencies and fire inspection agencies after a license is issued.

(3) Repealed by Session Laws 1997-506, s. 4.

(4) Repealed by Session Laws 1975, c. 879, s. 15.

(5) To adopt rules and develop policies for implementation of this Article, including procedures for application, approval, annual compliance visits for centers, and revocation of licenses.

(6) To adopt rules for the issuance of a provisional license that shall be in effect for no more than 12 consecutive months to a child care facility that does not conform in every respect with the standards established in this Article and rules adopted by the Commission pursuant to this Article but that is making a reasonable effort to conform to the standards.

(6a) To adopt rules for administrative action against a child care facility when the Secretary's investigations pursuant to G.S. 110-105(a)(3)

substantiate that child abuse or neglect did occur in the facility. The rules shall provide for types of sanctions which shall depend upon the severity of the incident and the probability of reoccurrence. The rules shall also provide for written warnings and special provisional licenses.

(7) To develop and adopt voluntary enhanced program standards which reflect higher quality child care than the mandatory standards established by this Article. These enhanced program standards must address, at a minimum, staff/child ratios, staff qualifications, parent involvement, operational and personnel policies, developmentally appropriate curricula, and facility square footage.

(8) To develop a procedure by which the Department shall furnish those forms as may be required for implementation of this Article.

(9) Repealed by Session Laws 1985, c. 757, s. 156(66).

(10) To adopt rules for the issuance of a temporary license which shall expire in six months and which may be issued to the operator of a new center or to the operator of a previously licensed center when a change in ownership or location occurs.

(11) To adopt rules for child care facilities which provide care for children who are mildly sick.

(12) To adopt rules regulating the amount of time a child care administrator shall be on-site at a child care center.

The Division and the Commission shall permit individual facilities to make curriculum decisions and may not require the standards, policies, or curriculum of any single accrediting child care organization. If Division inquiries to providers include database fields or questions regarding accreditation, the inquiry shall permit daycare providers to fill in any accrediting organization from which they have received accreditation. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1985, c. 757, s. 155(d), (e), 156(a), (z), (aa), (bb); 1987, c. 543, s. 2; c. 788, s. 3; c. 827, s. 232; 1991, c. 273, s. 2; 1993, c. 185, s. 1; 1997-506, ss. 4(a), 28.3; 1999-130, ss. 1, 5.)

Editor's Note. — A former subdivision (10), relating to travel and per diem expenses, was repealed by Session Laws 1975, c. 879, s. 15.

Session Laws 1997-506, s. 4(b), provided that the enhanced program standards adopted by the Commission pursuant to G.S. 110-88(7) would expire July 1, 1999. However, this provision was repealed by Session Laws 1999-130, s. 5.

Session Laws 1997-506, s. 28 provides: "G.S. 110-91(6) limits the authority of the Child Care Commission to adopt rules to ensure that outdoor play area equipment and furnishings at child care facilities are free of hazards that pose a threat of serious injury to children while engaged in normal supervised play activities. Accordingly, pursuant to G.S. 150B-21.7, rules adopted by the Child Care Commission requiring conformance to United States Consumer Product Safety Commission guidelines for playground safety, including amendments thereto, are repealed."

Session Laws 1997-506, s. 28.1 provides that 10 NCAC 3U .0510(e), Activity Areas: Preschool Children Two Years and Older, and 10 NCAC 3U .0714(g), Other Staffing Requirements, are repealed.

Session Laws 1997-506, s. 28.2, provides: "(a) There is established the Legislative Study Commission on Child Care. The Commission shall study the substantive issues contained in Part 1 of this act. There shall be 20 members of the Commission as follows:

"(1) Ten members appointed by the Speaker of the House of Representatives, seven of whom shall be members of the House of Representatives at the time of their appointment, and three of whom shall be members of the general public interested in child care;

"(2) Ten members appointed by the President Pro Tempore of the Senate, seven of whom shall be members of the Senate at the time of their appointment, and three of whom shall be members of the general public interested in child care.

"(b) Commission members shall receive no salary for serving, but shall receive necessary subsistence and travel expenses in accordance with G.S. 120-3.1, 138-5, and 138-6 as applicable. Staff to the Commission shall be provided as authorized by the Legislative Services Commission. The Commission may meet in the Legislative Building or the Legislative Office Building upon approval of the Legislative Services Officer.

"(c) The Commission shall report its findings and recommendations, including proposed legislation, to the 1997 General Assembly, Regular Session 1998, and shall make its final report to the 1999 General Assembly upon its convening. Upon issuing its final report, the Commission shall expire."

Effect of Amendments. — Session Laws 1999-130, s. 1, effective June 4, 1999, in subdivision (2), deleted "and" following "agencies," inserted "and building," and substituted "an initial" for "a"; rewrote the last paragraph of the section; and made a minor stylistic change.

Legal Periodicals. — For comment on sectarian education and the state, see 1980 Duke L.J. 801.

§ 110-88.1. Commission may not interfere with religious training offered in religious-sponsored child care facilities.

Nothing in this Article shall be interpreted to allow the State to determine the training or curriculum offered in any religious-sponsored child care facility as defined in G.S. 110-106(a). (1999-130, s. 6.)

Editor's Note. — Session Laws 1999-130, s. 7, made this section effective June 4, 1999.

§ 110-89: Repealed by Session Laws 1975, c. 879, s. 15.

§ 110-90. Powers and duties of Secretary of Health and Human Services.

The Secretary shall have the following powers and duties under the policies and rules of the Commission:

(1) To administer the licensing program for child care facilities.

(2) To obtain and coordinate the necessary services from other State departments and units of local government which are necessary to implement the provisions of this Article.

(3) To employ the administrative personnel and staff as may be necessary to implement this Article where required services, inspections or reports are not available from existing State agencies and units of local government.

(4) To issue a rated license to any child care facility which meets the standards established by this Article. The rating shall be based on program standards, education levels of staff, and compliance history of the child care facility.

(5) To revoke the license of any child care facility that ceases to meet the standards established by this Article and rules on these standards adopted by the Commission, or that demonstrates a pattern of noncompliance with this Article or the rules, or to deny a license to any applicant that fails to meet the standards or the rules. These revocations and denials shall be done in accordance with the procedures set out in G.S. 150B and this Article and rules adopted by the Commission.

(6) To prosecute or defend on behalf of the State, through the office of the Attorney General, any legal actions arising out of the administration or enforcement of this Article.

(7) To promote and coordinate educational programs and materials for operators of child care facilities which are designed to improve the quality of child care available in the State, using the resources of other State and local agencies and educational institutions where appropriate.

(8) Repealed by Session Laws 1997-506, s. 5, effective September 16, 1997.

(9) To levy a civil penalty pursuant to G.S. 110-103.1, or an administrative penalty pursuant to G.S. 110-102.2, or to order summary suspension of a license. These actions shall be done in accordance with the procedures set out in G.S. 150B and this Article and rules adopted by the Commission.

(10) To issue final agency decisions in all G.S. 150B contested cases proceedings filed as a result of actions taken under this Article including, but not limited to the denial, revocation, or suspension of a license or the levying of a civil or administrative penalty.

(11) To issue a license to any child care arrangement that does not meet the definition of child care facility in G.S. 110-86 whenever the operator of the arrangement chooses to comply with the requirements of this Article and the rules adopted by the Commission and voluntarily applies for a child care facility license. The Commission shall adopt rules for the issuance or removal of the licenses. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1985, c. 757, ss. 155(g), 156(cc), (dd); 1987, c. 788, s. 4; c. 827, s. 233; 1991, c. 273, s. 3; 1993, c. 185, s. 2; 1997-443, s. 11A.118(a); 1997-506, s. 5.)

Editor's Note. — See last paragraph of § 110-88 for provision regarding curriculum decisions.

§ 110-90.1: Repealed by Session Laws 1997-506, s. 6.

§ 110-90.2. Mandatory child care providers' criminal history checks.

(a) For purposes of this section:

(1) "Child care", notwithstanding the definition in G.S. 110-86, means any child care provided in child care facilities required to be licensed under this Article and nonlicensed child care homes approved to receive or receiving State or federal funds for providing child care.

(2) "Child care provider" means a person who:

a. Is employed by or seeks to be employed by a child care facility providing child care as defined in subdivision (1) of this subsection and has contact with the children;

b. Owns or operates or seeks to own or operate a child care facility or nonlicensed child care home providing child care as defined in subdivision (1) of this subsection; or

c. Is a member of the household in a family child care home or nonlicensed child care home and is over 15 years old and is present when children are in care. This subdivision shall apply only to new family child care homes and nonlicensed homes beginning March 1, 1998.

(3) "Criminal history" means a county, state, or federal criminal history of conviction or pending indictment of a crime, whether a misdemeanor or a felony, that bears upon an individual's fitness to have responsibility for the safety and well-being of children as set forth in G.S. 110-91(8). Such crimes include the following North Carolina crimes contained in any of the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 26, Offenses Against Public Morality and Decency; Article 27, Prostitution; Article 39, Protection of Minors; Article 40,

Protection of the Family; and Article 59, Public Intoxication. Such crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5. In addition to the North Carolina crimes listed in this subdivision, such crimes also include similar crimes under federal law or under the laws of other states.

(b) Effective January 1, 1996, the Department shall ensure that the criminal history of all child care providers is checked and a determination is made of the child care provider's fitness to have responsibility for the safety and well-being of children based on the criminal history. The Department shall ensure that child care providers who have lived in North Carolina continuously for the previous five years are checked for county and State criminal histories. The Department shall ensure that all other child care providers are checked for county, State, and national criminal histories. The Department may prohibit a child care provider from providing child care if the Department determines that the child care provider is unfit to have responsibility for the safety and well-being of children based on the criminal history, in accordance with G.S. 110-91(8).

(c) The Department of Justice shall provide to the Division of Child Development, Department of Health and Human Services, the criminal history from the State and National Repositories of Criminal Histories of any child care provider as requested by the Division.

The Division shall provide to the Department of Justice, along with the request, the fingerprints of the provider to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the repositories signed by the child care provider to be checked. The fingerprints of the provider shall be forwarded to the State Bureau of Investigation for a search of their criminal history record file and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

At the time of application the child care provider whose criminal history is to be checked shall be furnished with a statement substantially similar to the following:

"NOTICE

CHILD CARE PROVIDER
MANDATORY CRIMINAL HISTORY CHECK

NORTH CAROLINA LAW REQUIRES THAT A CRIMINAL HISTORY CHECK BE CONDUCTED ON ALL PERSONS WHO PROVIDE CHILD CARE IN A LICENSED CHILD CARE FACILITY, AND ALL PERSONS PROVIDING CHILD CARE IN NONLICENSED CHILD CARE HOMES THAT RECEIVE STATE OR FEDERAL FUNDS.

"Criminal history" includes county, state, and federal convictions or pending indictments of any of the following crimes: the following Articles of Chapter 14 of the General Statutes: Article 6, Homicide; Article 7A, Rape and Kindred Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by Use of Explosive or Incendiary Device or Material; Article 26, Offenses Against Public Morality and Decency; Article

27, Prostitution; Article 39, Protection of Minors; Article 40, Protection of the Family; and Article 59, Public Intoxication; violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20- 138.5; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).

If it is determined, based on your criminal history, that you are unfit to have responsibility for the safety and well-being of children, you shall have the opportunity to complete, or challenge the accuracy of, the information contained in the SBI or FBI identification records.

If you disagree with the determination of the North Carolina Department of Health and Human Services on your fitness to provide child care, you may file a civil lawsuit within 60 days after receiving written notification of disqualification in the district court in the county where you live.

Any child care provider who intentionally falsifies any information required to be furnished to conduct the criminal history shall be guilty of a Class 2 misdemeanor."

Refusal to consent to a criminal history check is grounds for the Department to prohibit the child care provider from providing child care. Any child care provider who intentionally falsifies any information required to be furnished to conduct the criminal history shall be guilty of a Class 2 misdemeanor.

(d) The Department shall notify in writing the child care provider, and the child care provider's employer, if any, or for nonlicensed child care homes the local purchasing agency, of the determination by the Department whether the child care provider is qualified to provide child care based on the child care provider's criminal history. In accordance with the law regulating the dissemination of the contents of the criminal history file furnished by the Federal Bureau of Investigation, the Department shall not release nor disclose any portion of the child care provider's criminal history to the child care provider or the child care provider's employer or local purchasing agency. The Department shall also notify the child care provider of the procedure for completing or challenging the accuracy of the criminal history and the child care provider's right to contest the Department's determination in court.

A child care provider who disagrees with the Department's decision may file a civil action in the district court of the county of residence of the child care provider within 60 days after receiving written notification of disqualification.

(e) All the information that the Department receives through the checking of the criminal history is privileged information and is not a public record but is for the exclusive use of the Department and those persons authorized under this section to receive the information. The Department may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(f) There shall be no liability for negligence on the part of an employer of a child care provider, an owner or operator of a child care facility, a State or local agency, or the employees of a State or local agency, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection is waived to the extent of indemnification by insurance, indemnification under Article 31A of

Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Torts Claim Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(g) The child care provider shall pay the cost of the fingerprinting and the local check. The Department of Justice shall perform the State criminal history check. If the Department determines that a child care provider who has lived continuously in the State less than five years is not disqualified based on the local and State criminal history record check, the Department shall request a criminal history check from the National Repository of Criminal History from the Department of Justice. The Department of Health and Human Services shall pay the cost for the national criminal history record check. (1995, c. 507, s. 23.25(a); c. 542, s. 25.2; 1997-443, s. 11A.118(a); 1997-506, s. 7.)

Editor's Note. — Session Laws 1995, c. 507, which enacted this section, in s. 23.25(c) provides: "The North Carolina Day Care Commission shall adopt rules to implement this section, in consultation with the Divisions of Child Development and Social Services of the Department of Human Resources, and the Division of Criminal Information of the Department of Justice."

§ 110-91. Mandatory standards for a license.

All child care facilities shall comply with all State laws and federal laws and local ordinances that pertain to child health, safety, and welfare. Except as otherwise provided in this Article, the standards in this section shall be complied with by all child care facilities. However, none of the standards in this section apply to the school-age children of the operator of a child care facility but do apply to the preschool-age children of the operator. Children 13 years of age or older may receive child care on a voluntary basis provided all applicable required standards are met. The standards in this section, along with any other applicable State laws and federal laws or local ordinances, shall be the required standards for the issuance of a license by the Secretary under the policies and procedures of the Commission except that the Commission may, in its discretion, adopt less stringent standards for the licensing of facilities which provide care on a temporary, part-time, drop-in, seasonal, after-school or other than a full-time basis.

(1) Medical Care and Sanitation. — The Commission for Health Services shall adopt rules which establish minimum sanitation standards for child care centers and their personnel. The sanitation rules adopted by the Commission for Health Services shall cover such matters as the cleanliness of floors, walls, ceilings, storage spaces, utensils, and other facilities; adequacy of ventilation; sanitation of water supply, lavatory facilities, toilet facilities, sewage disposal, food protection facilities, bactericidal treatment of eating and drinking utensils, and solid-waste storage and disposal; methods of food preparation and serving; infectious disease control; sleeping facilities; and other items and facilities as are necessary in the interest of the public health. The Commission for Health Services shall allow child care centers to use domestic kitchen equipment, provided appropriate temperature levels for heating, cooling, and storing are maintained. Child care centers that fry foods shall use commercial hoods. These rules shall be developed in consultation with the Department.

The Commission shall adopt rules for child care facilities to establish minimum requirements for child and staff health assessments and medical care procedures. These rules shall be developed in consultation with the Department. Each child shall have a health assessment before being admitted or within 30 days following admission to a child care facility. The assessment shall be done by: (i) a

licensed physician, (ii) the physician's authorized agent who is currently approved by the North Carolina Medical Board, or comparable certifying board in any state contiguous to North Carolina, (iii) a certified nurse practitioner, or (iv) a public health nurse meeting the Departments Standards for Early Periodic Screening, Diagnosis, and Treatment Program. However, no health assessment shall be required of any staff or child who is and has been in normal health when the staff, or the child's parent, guardian, or full-time custodian objects in writing to a health assessment on religious grounds which conform to the teachings and practice of any recognized church or religious denomination.

Organizations that provide prepared meals to child care centers only are considered child care centers for purposes of compliance with appropriate sanitation standards.

(2) Health-Related Activities. — The Commission shall adopt rules for child care facilities to ensure that all children receive nutritious food and beverages according to their developmental needs. After consultation with the State Health Director, nutrition standards shall provide for requirements appropriate for children of different ages.

Each child care facility shall have a rest period for each child in care after lunch or at some other appropriate time and arrange for each child in care to be out-of-doors each day if weather conditions permit.

(3) Location. — Each child care facility shall be located in an area which is free from conditions which are considered hazardous to the physical and moral welfare of the children in care in the opinion of the Secretary.

(4) Building. — Each child care facility shall be located in a building which meets the appropriate requirements of the North Carolina Building Code under standards which shall be developed by the Building Code Council, subject to adoption by the Commission specifically for child care facilities, including facilities operated in a private residence. These standards shall be consistent with the provisions of this Article. A local building code enforcement officer shall approve any proposed alternate material, design, or method of construction, provided the building code enforcement officer finds that the alternate, for the purpose intended, is at least the equivalent of that prescribed in the technical building codes in quality, strength, effectiveness, fire resistance, durability, or safety. A local building code enforcement officer shall require that sufficient evidence or proof be submitted to substantiate any claim made regarding the alternate. The Child Care Commission may request changes to the Building Code to suit the special needs of preschool children. Satisfactorily written reports from representatives of building inspection agencies shall be required prior to the issuance of a license and whenever renovations are made to a child care center, or when the operator requests licensure of space not previously approved for child care.

(5) Fire Prevention. — Each child care facility shall be located in a building that meets appropriate requirements for fire prevention and safe evacuation that apply to child care facilities as established by the Department of Insurance in consultation with the Department. Except for child care centers located on State property, each child care center shall be inspected at least annually by a local fire department or volunteer fire department for compliance with these requirements. Child care centers located on State property shall be inspected at least annually by an official designated by the Department of Insurance.

(6) Space and Equipment Requirements. — There shall be no less than 25 square feet of indoor space for each child for which a child care center

is licensed, exclusive of closets, passageways, kitchens, and bathrooms, and this floor space shall provide during rest periods 200 cubic feet of airspace per child for which the center is licensed. There shall be adequate outdoor play area for each child under rules adopted by the Commission which shall be related to the size of center and the availability and location of outside land area. In no event shall the minimum required exceed 75 square feet per child. The outdoor area shall be protected to assure the safety of the children receiving child care by an adequate fence or other protection. A center operated in a public school shall be deemed to have adequate fencing protection. A center operating exclusively during the evening and early morning hours, between 6:00 P.M. and 6:00 A.M., need not meet the outdoor play area requirements mandated by this subdivision.

Each child care facility shall provide indoor area equipment and furnishings that are child size, sturdy, safe, and in good repair. Each child care facility that provides outdoor area equipment and furnishings shall provide outdoor area equipment and furnishings that are child size, sturdy, free of hazards that pose a threat of serious injury to children while engaged in normal play activities, and in good repair. The Commission shall adopt standards to establish minimum requirements for equipment appropriate for the size of child care facility. Space shall be available for proper storage of beds, cribs, mats, cots, sleeping garments, and linens as well as designated space for each child's personal belongings.

(7) Staff-Child Ratio and Capacity for Child Care Facilities. — In determining the staff-child ratio in child care facilities, all children younger than 13 years old shall be counted.

a. The Commission shall adopt rules for child care centers regarding staff-child ratios, group sizes and multi-age groupings other than for infants and toddlers, provided that these rules shall be no less stringent than those currently required for staff-child ratios as enacted in Section 156(e) of Chapter 757 of the 1985 Session Laws.

1. Except as otherwise provided in this subdivision, the staff-child ratios and group sizes for infants and toddlers in child care centers shall be no less stringent than as follows:

Age	Ratio Staff/Children	Group Size
0 to 12 months	1/5	10
12 to 24 months	1/6	12
2 to 3 years	1/10	20.

No child care center shall care for more than 25 children in one group. Child care centers providing care for 26 or more children shall provide for two or more groups according to the ages of children and shall provide separate supervisory personnel and separate identifiable space for each group.

2. When any preschool-aged child is enrolled in a child care center and the licensed capacity of the center is six through 12 children, the staff-child ratios shall be no less stringent than as follows:

Age	Ratio Staff/Children
0 to 12 months	1/5 preschool children plus 3 additional school-aged children
12 to 24 months	1/6 preschool children plus 2 additional school-aged children.

The following shall also apply:

I. There is no specific group size.

II. When only one caregiver is required to meet the staff-child ratio, the operator shall make available to parents the name, address, and phone number of an adult who is nearby and available for emergency relief.

III. Children shall be supervised at all times. All children who are not asleep or resting shall be visually supervised. Children may sleep or rest in another room as long as a caregiver can hear them and respond immediately.

b. Family Child Care Home Capacity. — Of the children present at any one time in a family child care home, no more than five children shall be preschool-aged, including the operator's own preschool-age children.

(8) Qualifications for Staff. — All child care center administrators shall be at least 21 years of age. All child care center administrators shall have the North Carolina Early Childhood Administration Credential or its equivalent as determined by the Department. All child care administrators performing administrative duties as of the date this act becomes law and child care administrators who assume administrative duties at any time after this act becomes law and until September 1, 1998, shall obtain the required credential by September 1, 2000. Child care administrators who assume administrative duties after September 1, 1998, shall begin working toward the completion of the North Carolina Early Childhood Administration Credential or its equivalent within six months after assuming administrative duties and shall complete the credential or its equivalent within two years after beginning work to complete the credential. Each child care center shall be under the direction or supervision of a person meeting these requirements. All staff counted toward meeting the required staff-child ratio shall be at least 16 years of age, provided that persons younger than 18 years of age work under the direct supervision of a credentialed staff person who is at least 21 years of age. All lead teachers in a child care center shall have at least a North Carolina Early Childhood Credential or its equivalent as determined by the Department. Lead teachers shall be enrolled in the North Carolina Early Childhood Credential coursework or its equivalent as determined by the Department within six months after becoming employed as a lead teacher or within six months after this act becomes law, whichever is later, and shall complete the credential or its equivalent within 18 months after enrollment.

For child care centers licensed to care for 200 or more children, the Department, in collaboration with the North Carolina Institute for Early Childhood Professional Development, shall establish categories to recognize the levels of education achieved by child care center administrators and teachers who perform administrative functions. The Department shall use these categories to establish appropriate staffing based on the size of the center and the individual staff responsibilities.

Effective January 1, 1998, an operator of a licensed family child care home shall be at least 21 years old and have a high school diploma or its equivalent. Operators of a family child care home licensed prior to January 1, 1998, shall be at least 18 years of age and literate. Literate is defined as understanding licensing requirements and having the ability to communicate with the family and relevant emergency personnel. Any operator of a licensed family child care home shall be the person on-site providing child care.

No person shall be an operator of nor be employed in a child care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is an habitually excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

The Commission shall adopt standards to establish appropriate qualifications for all staff in child care centers. These standards shall reflect training, experience, education and credentialing and shall be appropriate for the size center and the level of individual staff responsibilities. It is the intent of this provision to guarantee that all children in child care are cared for by qualified people. Pursuant to G.S. 110-106, no requirements may interfere with the teachings or doctrine of any established religious organization. The staff qualification requirements of this subdivision do not apply to religious-sponsored child care facilities pursuant to G.S. 110-106.

(9) Records. — Each child care facility shall keep accurate records on each child receiving care in the child care facility and on each staff member or other person delegated responsibility for the care of children in accordance with a form furnished or approved by the Commission, and shall submit records as required by the Department.

All records of any child care facility, except financial records, shall be available for review by the Secretary or by duly authorized representatives of the Department or a cooperating agency who shall be designated by the Secretary and shall be submitted as required by the Department.

(10) Each operator or staff member shall attend to any child in a nurturing and appropriate manner, and in keeping with the child's developmental needs.

Each child care facility shall have a written policy on discipline, describing the methods and practices used to discipline children enrolled in that facility. This written policy shall be discussed with, and a copy given to, each child's parent prior to the first time the child attends the facility. Subsequently, any change in discipline methods or practices shall be communicated in writing to the parents prior to the effective date of the change.

The use of corporal punishment as a form of discipline is prohibited in child care facilities and may not be used by any operator or staff member of any child care facility, except that corporal punishment may be used in religious sponsored child care facilities as defined in G.S. 110-106, only if (i) the religious sponsored child care facility files with the Department a notice stating that corporal punishment is part of the religious training of its program, and (ii) the religious sponsored child care facility clearly states in its written policy of discipline that corporal punishment is part of the religious training of its program. The written policy on discipline of nonreligious sponsored child care facilities shall clearly state the prohibition on corporal punishment.

(11) Staff Development. — The Commission shall adopt minimum standards for ongoing staff development for facilities but limited to the following topic areas:

a. Planning a safe, healthy learning environment;
b. Steps to advance children's physical and intellectual development;
c. Positive ways to support children's social and emotional development;
d. Strategies to establish productive relationships with families;

e. Strategies to manage an effective program operation;
f. Maintaining a commitment to professionalism;
g. Observing and recording children's behavior;
h. Principles of child growth and development; and
i. Learning activities that promote inclusion of children with special needs.

These standards shall include annual requirements for ongoing staff development appropriate to job responsibilities. A person may carry forward in-service training hours that are in excess of the previous year's requirement to meet up to one-half of the current year's required in-service training hours.

(12) Developmentally Appropriate Activities. — Each facility shall have developmentally appropriate activities and play materials. The Commission shall establish minimum standards for developmentally appropriate activities for child care facilities. Each child care facility shall have a planned schedule of developmentally appropriate activities displayed in a prominent place for parents to review and the appropriate materials and equipment available to implement the scheduled activities. Each child care center shall make four of the following activity areas available daily: art and other creative play, children's books, blocks and block building, manipulatives, and family living and dramatic play.

(13) Transportation. — When a child care facility staff person or a volunteer of a child care facility transports children in a vehicle, each adult and child shall be restrained by an appropriate seat safety belt or restraint device when the vehicle is in motion. Children may never be left unattended in a vehicle.

The ratio of adults to children in child care vehicles may not be less than the staff/child ratios prescribed by G.S. 110-91(7). The Commission shall adopt standards for transporting children under the age of two, including standards addressing this particular age's staff/child ratio during transportation.

(14) Any effort to falsify information provided to the Department shall be considered by the Secretary to be evidence of violation of this Article on the part of the operator or sponsor of the child care facility and shall constitute a cause for revoking or denying a license to such child care facility. (1971, c. 803, s. 1; 1973, c. 476, s. 128; 1975, c. 879, s. 15; 1977, c. 1011, s. 4; c. 1104; 1979, c. 9, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1382, ss. 1, 2; 1983, c. 46, s. 2; cc. 62, 277, 612; 1985, c. 757, ss. 155(h), (i), 156(c)-(h); 1987, c. 543, s. 3; c. 788, s. 6; c. 827, s. 234; 1989 (Reg. Sess., 1990), c. 1004, s. 56; 1991, c. 273, s. 5; c. 640, s. 1; 1993, c. 185, s. 3; c. 321, s. 254(c); c. 513, s. 9; c. 553, s. 32; 1995, c. 94, s. 32; 1997-443, s. 11A.44; 1997-456, s. 43.1(a); 1997-506, s. 8(a); 1998-217, s. 11; 1999-130, s. 2.)

Cross References. — As to standards applicable to child care facilities operated by churches, synagogues, or schools of religious charter, see § 110-106.

Editor's Note. — Section 156(e) of Session Laws 1985, c. 757, referred to in subdivision (7) of this section, was formerly codified as paragraphs (7)a to (7)c of this section.

Session Laws 1997-506, s. 28, provides: "G.S. 110-91(6) limits the authority of the Child Care Commission to adopt rules to ensure that outdoor play area equipment and furnishings at child care facilities are free of hazards that pose a threat of serious injury to children while engaged in normal supervised play activities. Accordingly, pursuant to G.S. 150B-21.7, rules adopted by the Child Care Commission requiring conformance to United States Consumer Product Safety Commission guidelines for playground safety, including amendments thereto, are repealed."

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, made technical corrections, by deleting repetitions of

"child," "religious sponsored child," and "nonreligious sponsored child" in the third paragraph of subdivision (10).

Session Laws 1999-130, s. 2, effective June 4, 1999, in subdivision (8), inserted "credentialed" in the sixth sentence of the first paragraph, and in the last paragraph, deleted "other" following "qualifications for all," inserted "Pursuant to G.S. 110-106," and added the last sentence.

CASE NOTES

Stated in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

Cited in Smith v. Kinder Care Learning Centers, Inc., 94 N.C. App. 663, 381 S.E.2d 193 (1989).

OPINIONS OF ATTORNEY GENERAL

Size of Group and Child-Staff Ratio in Day-Care Facility. — See opinion of Attorney General to Mrs. Karen James, Office of Child Day-Care Licensing, 42 N.C.A.G. 221 (1973).

Child-staff ratio requirements are applicable during all periods of the day unless modified by the board. See opinion of Attorney General to Mr. John S. Sokol, Director, Child Day-Care Licensing Board, 42 N.C.A.G. 301 (1973).

§ 110-92. Duties of State and local agencies.

When requested by an operator of a child care center or by the Secretary, it shall be the duty of local and district health departments to visit and inspect a child care center to determine whether the center complies with the health and sanitation standards required by this Article and with the minimum sanitation standards adopted as rules by the Commission for Health Services as authorized by G.S. 110-91(1), and to submit written reports on these visits or inspections to the Department on forms approved and provided by the Department of Environment and Natural Resources.

When requested by an operator of a child care center or by the Secretary, it shall be the duty of the building inspector, fire prevention inspector, or fireman employed by local government, or any fireman having jurisdiction, or other officials or personnel of local government to visit and inspect a child care center for the purposes specified in this Article, including plans for evacuation of the premises and protection of children in case of fire, and to report on these visits or inspections in writing to the Secretary so that these reports may serve as the basis for action or decisions by the Secretary or Department as authorized by this Article. (1971, c. 803, s. 1; 1973, c. 476, ss. 128, 138; 1975, c. 879, s. 15; 1985, c. 757, s. 155(j); 1987, c. 543, s. 4; 1989, c. 727, s. 31; 1989 (Reg. Sess., 1990), c. 1024, s. 21; 1991, c. 273, s. 6; 1997-443, s. 11A.45; 1997-506, s. 9.)

§ 110-93. Application for a license.

(a) Each person who seeks to operate a child care facility shall apply to the Department for a license. The application shall be in the form required by the Department. Each applicant seeking a license shall be responsible for supplying with the application the necessary supporting data and reports to show conformity with rules adopted by the Commission for Health Services pursuant to G.S. 110-91(1) and with the standards established or authorized by this Article, including any required reports from the local and district health departments, local building inspectors, local firemen, voluntary firemen, and others, on forms which shall be provided by the Department.

(b) If an applicant conforms to the rules adopted by the Commission for Health Services pursuant to G.S. 110-91(1) and with the standards established or authorized by this Article as shown in the application and other supporting data, the Secretary shall issue a license that shall remain valid until the Secretary notifies the licensee otherwise pursuant to G.S. 150B-3 or other

provisions of this Article, subject to suspension or revocation for cause as provided in this Article. If the applicant fails to conform to the required rules and standards, the Secretary may issue a provisional license under the policies of the Commission. The Department shall notify the applicant in writing by registered or certified mail the reasons the Department issued a provisional license.

(c) Repealed by Session Laws 1997-506, s. 10, effective September 16, 1997.

(d) Repealed by Session Laws 1977, c. 929, s. 1. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 4, s. 4; c. 929, s. 1; 1985, c. 757, s. 155(k), (l); 1987, c. 543, ss. 5, 6; c. 788, s. 7; 1991, c. 273, s. 7; 1997-443, s. 11A.118(a); 1997-506, s. 10; 1999-130, s. 3.)

Effect of Amendments. — Session Laws 1999-130, s. 3, effective June 4, 1999, substituted "applicant" for "operator" in subsections (a) and (b).

CASE NOTES

Stated in State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (1980).

§ 110-94. Administrative Procedure Act.

The provisions of Chapter 150B of the General Statutes shall be applicable to the Commission, to the rules the Commission adopts, and to child care contested cases. However, a child care operator shall have 30 days to file a petition for a contested case pursuant to G.S. 150B-23. The contested case hearing shall be scheduled to be held within 120 days of the date the petition for a hearing is received, pursuant to G.S. 150B-23(a), in any contested case resulting from administrative action taken by the Secretary to revoke a license or Letter of Compliance or from administrative action taken in a situation in which child abuse or neglect in a child care facility has been substantiated. A request for continuance of a hearing shall be granted upon a showing of good cause by either party. (1971, c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 929, s. 2; 1985, c. 757, s. 155(m); 1987, c. 788, s. 8; 1989, c. 429; 1991, c. 273, s. 8; 1997-506, s. 11.)

§§ 110-95 through 110-97: Repealed by Session Laws 1977, c. 929, s. 1.

Cross References. — As to administrative hearings, and judicial review of administrative decisions, see § 150B-1 et seq.

§ 110-98. Mandatory compliance.

It shall be unlawful for any person to:

(1) Offer or provide child care without complying with the provisions of this Article; or

(2) Advertise without disclosing the child care facility's identifying number that is on the license or the letter of compliance. (1971, c. 803, s. 1; 1985, c. 757, s. 156(ee); 1987, c. 788, s. 9; 1997-506, s. 12.)

§ 110-98.1. Prima facie evidence of existence of child care.

A child care arrangement providing child care for more than two children for more than four hours per day on two or more consecutive days shall be prima

facie evidence of the existence of a child care facility. (1977, c. 4, s. 6; 1987, c. 788, s. 10; 1997-506, s. 13.)

§ 110-99. Display of license.

(a) Each child care facility shall display its current license in a prominent place at all times so that the public may be on notice that the facility is licensed and may observe any rating which may appear on the license. Any license issued to a child care facility under this Article shall remain the property of the State and may be removed by persons employed or designated by the Secretary in the event that the license is revoked or suspended, or in the event that the rating is changed.

(b) A person who provides only drop-in or short-term child care as described in G.S. 110-86(2)(d), excluding drop-in or short-term child care provided in churches, shall notify the Department that the person is providing only drop-in or short-term child care. Any person providing only drop-in or short-term child care as described in G.S. 110-86(2)(d), excluding drop-in or short-term child care provided in churches, shall display in a prominent place at all times a notice that the child care arrangement is not required to be licensed and regulated by the Department and is not licensed and regulated by the Department. (1971, c. 803, s. 1; 1997-506, s. 14; 1999-130, s. 4.)

Effect of Amendments. — Session Laws 1999-130, s. 4, effective June 4, 1999, inserted "excluding drop-in or short-term child care provided in churches" twice in subsection (b).

§ 110-100: Repealed by Session Laws 1997-506, s. 15.

§ 110-101: Repealed by Session Laws 1997-506, s. 16.

§ 110-101.1. Corporal punishment banned in certain "nonlicensed" homes.

The use of corporal punishment as a form of discipline is prohibited in those child care homes that are not required to be licensed under this Article but that receive State or federal subsidies for child care unless this care is provided to children by their parents, stepparents, grandparents, aunts, uncles, step-grandparents, or great-grandparents. Care provided children by their parents, stepparents, grandparents, aunts, uncles, step-grandparents, or great-grandparents is not subject to this section. Religious sponsored nonlicensed homes are also exempt from this section. (1993, c. 268, s. 1; 1997-506, s. 17.)

§ 110-102. Information for parents.

The Secretary shall provide to each operator of a child care facility a summary of this Article for the parents, guardian, or full-time custodian of each child receiving child care in the facility to be distributed by the operator. The summary shall include the name and address of the Secretary and the address of the Commission. The summary shall also include a statement regarding the mandatory duty prescribed in G.S. 7B-301 of any person suspecting child abuse or neglect has taken place in child care, or elsewhere, to report to the county Department of Social Services. The statement shall include the definitions of child abuse and neglect described in the Juvenile Code in G.S. 7B-101 and of child abuse described in the Criminal Code in G.S. 14-318.2 and G.S. 14-318.4. The statement shall stress that this reporting law does not require that the person reporting reveal the person's identity. (1971,

c. 803, s. 1; 1975, c. 879, s. 15; 1977, c. 1011, s. 3; 1985, c. 757, ss. 155(o), 156(v); 1997-443, s. 11A.118(a); 1997-506, s. 18; 1998-202, s. 13(w).)

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, and applicable to acts committed on or after that date, substituted "G.S. 7B-301" for "G.S. 7A-543" in the third sentence; and substituted "G.S. 7B-101" for "G.S. 7A-517" in the fourth sentence.

Legal Periodicals. — For survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

§ 110-102.1. Reporting of missing or deceased children.

(a) Operators and staff, as defined in G.S. 110-86(7), and G.S. 110-91(8), or any adult present with the approval of the care provider in a child care facility as defined in G.S. 110-86(3) and G.S. 110-106, upon learning that a child which has been placed in their care or presence is missing, shall immediately report the missing child to law enforcement. For purposes of this Article, a child is anyone under the age of 18.

(b) If a child dies while in child care, or of injuries sustained in child care, a report of the death must be made by the child care operator to the Secretary within 24 hours of the child's death or on the next working day. (1985, c. 392; 1987, c. 788, s. 12; 1997-506, s. 19.)

§ 110-102.2. Administrative penalties.

For failure to comply with this Article, the Secretary may:

(1) Issue a written warning and a request for compliance;
(2) Issue an official written reprimand;
(3) Place a licensee upon probation until his compliance with this Article has been verified by the Commission or its agent;
(4) Order suspension of a license for a specified length of time not to exceed one year;
(5) Permanently revoke a license issued under this Article.

The issuance of an administrative penalty may be appealed as provided in G.S. 110-90(5) and G.S. 110-90(9). (1985, c. 757, s. 156(ff); 1987, c. 788, s. 13; c. 827, s. 235.)

Editor's Note. — The introductory language of the first sentence is set out as rewritten by Session Laws 1987, c. 827, s. 235, at the direction of the Revisor of Statutes.

§ 110-103. Criminal penalty.

Any person who violates the provisions of G.S. 110-98 through G.S. 110-99 or G.S. 110-102 shall be guilty of a Class 1 misdemeanor, except that any person operating a family child care home as defined in G.S. 110-86(3) who violates the provisions of G.S. 110-98 through G.S. 110-99 or G.S. 110-102 shall be guilty of a Class 3 misdemeanor. (1971, c. 803, s. 1; 1983, c. 297, s. 3; 1985, c. 757, s. 156(gg); 1987, c. 788, s. 14; 1993, c. 539, s. 824; 1994, Ex. Sess., c. 24, s. 14(c); 1997-506, s. 20.)

OPINIONS OF ATTORNEY GENERAL

Educational programs operated by public schools for three- and four-year-old children are not subject to licensure and regulation by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

Educational programs for three- and four-year-old children housed in public school buildings but operated by private providers are subject to licensure and regula-

tions by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

State is not prohibited from purchasing day care services from day care programs operated by public schools, even though those programs are not licensed by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

§ 110-103.1. Civil penalty.

(a) A civil penalty may be levied against any operator of any child care facility who violates any provision of this Article. The penalty shall not exceed one thousand dollars ($1,000) for each violation documented on any given date. Every operator shall be provided a schedule of the civil penalties established by the Commission pursuant to this Article.

(b) In determining the amount of the penalty, the threat of or extent of harm to children in care as well as consistency of violations shall be considered, and no penalty shall be imposed under this section unless there is a specific finding that this action is reasonably necessary to enforce the provisions of this Article or its rules.

(c) A person who is assessed a penalty shall be notified of the penalty by registered or certified mail. The notice shall state the reasons for the penalty. If a person fails to pay a penalty, the Secretary shall refer the matter to the Attorney General for collection.

(d) The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1985, c. 757, s. 156(gg); 1987, c. 788, s. 15; c. 827, s. 236; 1991, c. 273, s. 9; 1997-506, s. 21; 1998-215, s. 75.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added subsection (d).

OPINIONS OF ATTORNEY GENERAL

Educational programs operated by public schools for three- and four-year-old children are not subject to licensure and regulation by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

Educational programs for three- and four-year-old children housed in public school buildings but operated by private providers are subject to licensure and regulations by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

State is not prohibited from purchasing day care services from day care programs operated by public schools, even though those programs are not licensed by the Child [Day] Care Commission. See opinion of Attorney General to Mr. Harry E. Wilson, Legal Specialist, North Carolina Department of Public Instruction, 60 N.C.A.G. 36 (1990).

§ 110-104. Injunctive relief.

The Secretary or the Secretary's designee may seek injunctive relief in the district court of the county in which a child care facility is located against the continuing operation of that child care facility at any time, whether or not any administrative proceedings are pending. The district court may grant injunctive relief, temporary, preliminary, or permanent, when there is any violation of this Article or of the rules promulgated by the Commission or the Commission for Health Services that threatens serious harm to children in the child

care facility, or when a final order to deny or revoke a license has been violated, or when a child care facility is operating without a license, or when a child care facility repeatedly violates the provisions of this Article or rules adopted pursuant to it after having been notified of the violation. (1977, c. 4, s. 5; c. 929, s. 3; c. 1011, s. 1; 1985, c. 757, s. 156(hh); 1987, c. 543, s. 7; c. 788, s. 16; c. 827, s. 237; 1997-506, s. 22.)

Legal Periodicals. — For survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

CASE NOTES

Action for Declaratory Judgment Not Barred. — The spirit and intent of this section do not permit, much less compel, a conclusion that the Day-Care Facilities Act is intended to restrict the general statewide jurisdiction of the superior court or to limit the scope of relief normally available in declaratory judgment actions. The mere existence of an alternate adequate remedy under this section will not be held to bar an appropriate action for declaratory judgment. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Preliminary injunction serves to place the parties in the position they were before the dispute between them arose. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Defendants' compliance with preliminary injunction does not moot issues raised by defendants' assertions of constitutional defenses to the State's action. The preliminary injunction requires defendants to comply with the statutory licensing requirements until a final determination can be made on fully developed facts of the ultimate question in the case, i.e., whether the licensing statutes can be constitutionally applied to these defendants. Until such a determination is made the statutes, conceded to be facially valid, are presumably applicable to defendants and defendants must perforce comply with them. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

Preliminary injunction under this section is not immediately appealable. State, Child Day-Care Licensing Comm'n v. Fayetteville St. Christian School, 299 N.C. 731, 265 S.E.2d 387, appeal dismissed, 449 U.S. 807, 101 S. Ct. 55, 66 L. Ed. 2d 11 (1980).

§ 110-105. Authority to inspect facilities.

(a) The Commission shall adopt standards and rules under this subsection which provide for the following types of inspections:

(1) An initial licensing inspection, which shall not occur until the administrator of the facility receives prior notice of the initial inspection visit;

(2) A plan for visits to all facilities, including announced and unannounced visits, which shall be confidential unless a court orders its disclosure;

(3) An inspection that may be conducted without notice, if there is probable cause to believe that an emergency situation exists or there is a complaint alleging a violation of licensure law. When the Department is notified by the county director of social services that the director has received a report of child abuse or neglect in a child care facility, or when the Department is notified by any other person that alleged abuse or neglect has occurred in a facility, the Commission's rules shall provide for an inspection conducted without notice to the child care facility to determine whether the alleged abuse or neglect has occurred. This inspection shall be conducted within seven calendar days of receipt of the report, and when circumstances warrant, additional visits shall be conducted.

The Secretary or the Secretary's designee, upon presenting appropriate credentials to the operator of the child care facility, may perform inspections in accordance with the standards and rules promulgated under this subsection. The Secretary or the Secretary's designee may inspect any area of a building in which there is reasonable evidence that children are in care.

(b) If an operator refuses to allow the Secretary or the Secretary's designee to inspect the child care facility, the Secretary shall seek an administrative warrant in accordance with G.S. 15-27.2. (1983, c. 261, s. 1; 1985, c. 757, s. 156(ii); 1987, c. 788, s. 17; c. 827, s. 238; 1991, c. 273, s. 10; 1997-506, s. 23.)

§ 110-105.1: Repealed by Session Laws 1997-506, s. 24.

§ 110-105.2. Abuse and neglect violations.

(a) For purposes of this Article, child abuse and neglect, as defined in G.S. 7B-101 and in G.S. 14-318.2 and G.S. 14-318.4, occurring in child care facilities, are violations of the licensure standards and of the licensure law.

(b) When an investigation pursuant to G.S. 110-105(a)(3) substantiates that child abuse or neglect did occur in a child care facility, the Department may issue a written warning which shall specify any corrective action to be taken by the operator. The Department shall make an unannounced visit within one month after issuance of the written warning to determine whether the corrective action has occurred. If the corrective action has not occurred, then the Department may issue a special provisional license.

(c) When the Department issues a special provisional license pursuant to this section, the Department shall send a letter which states the reasons for the special provisional status, and the license shall specify corrective action that shall be taken by the operator. A special provisional license issued pursuant to this section shall be in effect for no more than six months from issuance. The operator shall post, where parents can see them, the letter stating the reasons for the special provisional status and the special provisional license. Under the terms of the special provisional license, the Secretary may limit enrollment of new children until satisfied the abusive or neglectful situation no longer exists. The Department shall make unannounced visits as often as the Department believes it is necessary during the period the special provisional license is in effect.

(d) Specific corrective action required by a written warning, special provisional license, or any other administrative penalty authorized by this Article may include the permanent removal of the substantiated abuser or neglecter from child care.

(e) Nothing in this section shall restrict the Secretary from using any other statutory or administrative remedies available. (1985, c. 757, s. 156(w); 1987, c. 788, s. 19; 1997-506, s. 25; 1998-202, s. 13(x).)

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, and applicable to acts committed on or after that date, substituted "G.S. 7B-101" for "G.S. 7A-517" in subsection (a).

§ 110-106. Religious sponsored child care facilities.

(a) The term "religious sponsored child care facility" as used in this section shall include any child care facility or summer day camp operated by a church, synagogue or school of religious charter.

(b) Procedure Regarding Religious Sponsored Child Care Facilities. —

(1) Religious sponsored child care facilities shall file with the Department a notice of intent to operate a child care facility and the date it will

begin operation at least 30 days prior to that date. Within 30 days after beginning operation, the facility shall provide to the Department written reports and supporting data which show the facility is in compliance with applicable provisions of G.S. 110-91. After the religious sponsored child care facility has filed this information with the Department, the facility shall be visited by a representative of the Department to ensure compliance with the applicable provisions of G.S. 110-91.

(2) Each religious sponsored child care facility shall file with the Department a report indicating that it meets the minimum standards for facilities as provided in the applicable provisions of G.S. 110-91 as required by the Department. The reports shall be in accordance with rules adopted by the Commission. Each religious sponsored child care facility shall be responsible for supplying with its report the necessary supporting data to show conformity with those minimum standards, including reports from the local and district health departments, local building inspectors, local firemen, volunteer firemen, and other, on forms which shall be provided by the Department.

(3) It shall be the responsibility of the Department to notify the facility if it fails to meet the minimum requirements. The Secretary shall be responsible for carrying out the enforcement provisions provided by the General Assembly in Article 7 of Chapter 110 including inspection to ensure compliance. The Secretary may issue an order requiring a religious sponsored child care facility which fails to meet the standards established pursuant to this Article to cease operating. A religious sponsored child care facility may request a hearing to determine if it is in compliance with the applicable provisions of G.S. 110-91. If the Secretary determines that it is not, the Secretary may order the facility to cease operation until it is in compliance.

(4) Religious sponsored child care facilities including summer day camps shall be exempt from the requirement that they obtain a license and that the license be displayed and shall be exempt from any subsequent rule or regulatory program not dealing specifically with the minimum standards as provided in the applicable provisions of G.S. 110-91. Nothing in this Article shall be interpreted to allow the State to regulate or otherwise interfere with the religious training offered as a part of any religious sponsored child care program. Nothing in this Article shall prohibit any religious sponsored child care facility from becoming licensed by the State if it so chooses.

(5) Religious sponsored child care facilities found to be in violation of the applicable provisions of G.S. 110-91 shall be subject to the injunctive provisions of G.S. 110-104, except that they may not be enjoined for operating without a license. The Secretary may seek an injunction against any religious sponsored child care facility under the conditions specified in G.S. 110-104 with the above exception and when any religious sponsored child care facility operates without submitting the required forms and following the procedures required by this Article.

(c) G.S. 110-91(8), 110-91(11), 110-91(12) do not apply to religious sponsored child care facilities, and these facilities are exempt from any requirements prescribed by subsection (b) of this section that arise out of these provisions.

(d) No person shall be an operator of nor be employed in a religious sponsored child care facility who has been convicted of a crime involving child neglect, child abuse, or moral turpitude, or who is a habitually excessive user of alcohol or who illegally uses narcotic or other impairing drugs, or who is mentally or emotionally impaired to an extent that may be injurious to children.

(e) Each religious sponsored child care facility shall be under the direction or supervision of a literate person at least 21 years of age. All staff counted toward meeting the required staff/child ratio shall be at least 16 years old, provided that persons younger than 18 years old work under the direct supervision of a literate staff person at least 21 years old. Effective January 1, 1998, a person operating a religious sponsored child care home must be at least 21 years old and literate. Persons operating religious sponsored child care homes prior to January 1, 1998, shall be at least 18 years old and literate. The definition of literate in G.S. 110-91(8) shall apply to this subsection. (1983, c. 283, ss. 1, 2; 1985, c. 757, ss. 155(p), 156(k); 1987, c. 788, s. 20; 1997-506, s. 26.)

§ 110-106.1: Repealed by Session Laws 1997-506, s. 27.

§ 110-107. Fraudulent misrepresentation.

(a) A person, whether a provider or recipient of child care subsidies or someone claiming to be a provider or recipient of child care subsidies, commits the offense of fraudulent misrepresentation when both of the following occur:

(1) With the intent to deceive, that person makes a false statement or representation regarding a material fact, or fails to disclose a material fact.

(2) As a result of the false statement or representation or the omission, that person obtains, attempts to obtain, or continues to receive a child care subsidy for himself or herself or for another person.

(b) If the child care subsidy is not more than one thousand dollars ($1,000), the person is guilty of a Class 1 misdemeanor. If the child care subsidy is more than one thousand dollars ($1,000), the person is guilty of a Class I felony.

(c) As used in this section:

(1) "Child care subsidy" means the use of public funds to pay for day care services for children.

(2) "Person" means an individual, association, consortium, corporation, body politic, partnership, or other group, entity, or organization. (1999-279, s. 1.)

Editor's Note. — Session Laws 1999-279, s. 3, made this section effective December 1, 1999, and applicable to offenses committed on or after that date.

§ 110-108. Financial incentives for counties to investigate and pursue alleged child care fraud.

The Department of Health and Human Services shall allow each local purchasing agency to retain as an incentive bonus the actual amount of child care fraud and overpayment claims collected by the local purchasing agency. Incentive bonuses under this section shall be used by the agency for the purchase of subsidized child care or to enhance and improve program integrity. The agency shall use at least seventy-five percent (75%) of the incentive bonus funds under this section for the purchase of subsidized child care. The agency shall not use more than twenty-five percent (25%) of the incentive bonus funds under this section for program integrity. On or before October 1 each year, each agency shall report to the Department of Health and Human Services on the use of the incentive bonuses under this section during the previous fiscal year. This section does not apply to overpayments due to administrative errors of local purchasing agency staff. (1999-279, s. 2.)

Editor's Note. — Session Laws 1999-279, s. 3, made this section effective July 1, 1999.

§§ 110-109 through 110-114: Reserved for future codification purposes.

Article 8.

Child Abuse and Neglect.

§§ 110-115 through 110-123: Repealed by Session Laws 1979, c. 815, s. 2.

Cross References. — For present provisions as to the screening of abuse and neglect complaints, see now §§ 7B-300 through 7B-311.

§§ 110-124 through 110-127: Reserved for future codification purposes.

Article 9.

Child Support.

§ 110-128. Purposes.

The purposes of this Article are to provide for the financial support of dependent children; to enforce spousal support when a child support order is being enforced; to provide that public assistance paid to dependent children is a supplement to the support required to be provided by the responsible parent; to provide that the payment of public assistance creates a debt to the State; to provide that the acceptance of public assistance operates as an assignment of the right to child support; to provide for the location of absent parents; to provide for a determination that a responsible parent is able to support his children; and to provide for enforcement of the responsible parent's obligation to furnish support and to provide for the establishment and administration of a program of child support enforcement in North Carolina. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 1; 1985, c. 506, s. 2.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

CASE NOTES

Intervention in Support Action Brought by State. — The language of § 110-137 operates to assign to the state or county only the right to reimbursement for those amounts of support money provided through AFDC. Thus grandmother who had cared for child since her birth and had applied for assistance from the AFDC program retained her interest in defendant father's support obligation, and was entitled to intervene in an action for child support brought against defendant by the State. State ex rel. Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

Blood Test Appropriate. — Court did not err in ordering defendant to submit to a blood grouping test where blood test evidence demonstrated that another man was not the father and defendant admitted to having had sexual

relations with plaintiff at the approximate time of conception. Guilford County ex rel. Child Support Enforcement Unit ex rel. Gardner v. Davis, 123 N.C. App. 527, 473 S.E.2d 640 (1996).

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983); In re Ballard, 311 N.C. 708, 319 S.E.2d 227 (1984).

Quoted in State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984).

Cited in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Wake County ex rel. Denning v. Ferrell, 71 N.C. App. 185, 321 S.E.2d 913 (1984); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

OPINIONS OF ATTORNEY GENERAL

This Article Provides Statutory Basis for North Carolina Child Support Enforcement Program. — See opinion of Attorney General to Jean Prewitt Bost, Supervisor, Mecklenburg-Union Counties Child Support Enforcement Unit, 47 N.C.A.G. 45 (1977).

§ 110-129. Definitions.

As used in this Article:

(1) "Court order" means any judgment or order of the courts of this State or of another state.

(2) "Dependent child" means any person under the age of 18 who is not otherwise emancipated, married or a member of the armed forces of the United States, or any person over the age of 18 for whom a court orders that support payments continue as provided in G.S. 50-13.4(c).

(3) "Responsible parent" means the natural or adoptive parent of a dependent child who has the legal duty to support said child and includes the father of a child born out-of-wedlock and the parents of a dependent child who is the custodial or noncustodial parent of the dependent child requiring support. If both the parents of the child requiring support were unemancipated minors at the time of the child's conception, the parents of both minor parents share primary liability for their grandchild's support until both minor parents reach the age of 18 or become emancipated. If only one parent of the child requiring support was an unemancipated minor at the time of the child's conception, the parents of both parents are liable for any arrearages in child support owed by the adult or emancipated parent until the other parent reaches the age of 18 or becomes emancipated.

(4) "Program" means the Child Support Enforcement Program established and administered pursuant to the provisions of this Article and Title IV-D of the Social Security Act.

(5) "Designated representative" means any person or agency designated by a board of county commissioners or the Department of Health and Human Services to administer a program of child support enforcement for a county or region of the State.

(6) "Disposable income" means any form of periodic payment to an individual, regardless of sources, including but not limited to wages, salary, commission, self-employment income, bonus pay, severance pay, sick pay, incentive pay, vacation pay, compensation as an independent contractor, worker's compensation, unemployment compensation benefits, disability, annuity, survivor's benefits, pension and retirement benefits, interest, dividends, rents, royalties, trust income and other similar payments, which remain after the deduction of amounts for federal, State, and local taxes, Social Security, and involuntary retirement contributions. However, Supplemental Security Income, Work First Family Assistance, and other public assis-

tance payments shall be excluded from disposable income. For employers, disposable income means "wage" as it is defined by G.S. 95-25.2(16). Unemployment compensation benefits shall be treated as disposable income only for the purposes of income withholding under the provisions of G.S. 110-136.4, and the amount withheld shall not exceed twenty-five percent (25%) of the unemployment compensation benefits.

(7) "IV-D case" means a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the Social Security Act as amended and this Article.

(8) "Non-IV-D case" means any case, other than a IV-D case, in which child support is legally obligated to be paid.

(9) "Initiating party" means the party, the attorney for a party, a child support enforcement agency, or the clerk of superior court who initiates an action, proceeding, or procedure as allowed or required by law for the establishment or enforcement of a child support obligation.

(10) "Mistake of fact" means that the obligor:

a. Is not in arrears in an amount equal to the support payable for one month; or

b. Did not request that withholding begin, if withholding is pursuant to a purported request by the obligor for withholding; or

c. Is not the person subject to the court order of support for the child named in the advance notice of withholding; or

d. Does not owe the amount of current support or arrearages specified in the advance notice or motion of withholding; or

e. Has a rate of withholding which exceeds the amount of support specified in the court order.

(11) "Obligee", in a IV-D case, means the child support enforcement agency, and in a non-IV-D case means the individual to whom a duty of support, whether child support, alimony, or postseparation support, is owed or the individual's legal representative.

(12) "Obligor" means the individual who owes a duty to make child support payments or payments of alimony or postseparation support under a court order.

(13) "Payor" means any payor, including any federal, State, or local governmental unit, of disposable income to an obligor. When the payor is an employer, payor means employer as is defined at 29 USC § 203(d) in the Fair Labor Standards Act. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 2, 3; 1985, c. 592; 1985 (Reg. Sess., 1986), c. 949, s. 1; 1987, c. 764, s. 3; 1989, c. 601, s. 1; 1991, c. 541, s. 3; 1995, c. 518, s. 2; 1997-443, ss. 11A.118(a), 12.27; 1997-465, s. 27; 1998-176, ss. 9, 10.)

Editor's Note. — Session Laws, c. 518, s. 2, amended this section effective October 1, 1995, and applicable to child support assessed for children born on or after that date.

Subdivisions (10)(a) through (10)(e) were renumbered as subdivisions (10)a. through (10)e. pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, and applicable to actions pending on or after the effective date, substituted "support, whether child support, alimony, or postseparation support" for "support" in subdivision (11) and "or payments of alimony or postseparation support" in subdivision (12).

CASE NOTES

Responsible Parent Remains Liable for Future Support. — Section 49-7, read together with § 50-13.7, clearly contemplates a continuing obligation on the part of the parents of an illegitimate child to provide support, including when necessary the modification or increase of payments ordered to satisfy this obligation. Having been conclusively determined a "responsible parent," as that term is defined in this section, the father of an illegitimate child must necessarily remain liable for the future support of his minor child. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Plea of guilty may be considered as evidentiary admission by defendant on issue of paternity, where defendant makes no attempt to refute or explain this evidence and it is therefore uncontroverted. It is unnecessary to determine whether defendant's plea of guilty to an earlier criminal charge of nonsupport must be given collateral estoppel effect. Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

The credible, uncontroverted evidence of defendant's plea of guilty to a criminal charge of nonsupport of the minor child is sufficient to establish paternity so as to bring defendant within the definition of "responsible parent" under this section. That definition includes "the father of an illegitimate child." Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Stated in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Cited in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989); Jackson County ex rel. Child Support Enforcement Agency ex rel. Smoker v. Smoker, 115 N.C. App. 400, 445 S.E.2d 408 (1994); McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995).

§ 110-129.1. Additional powers and duties of the Department.

(a) In addition to other powers and duties conferred upon the Department of Health and Human Services, Child Support Enforcement Program, by this Chapter or other State law, the Department shall have the following powers and duties:

(1) Upon authorization of the Secretary, to issue a subpoena for the production of books, papers, correspondence, memoranda, agreements, or other information, documents, or records relevant to a child support establishment or enforcement proceeding or paternity establishment proceeding. The subpoena shall be signed by the Secretary and shall state the name of the person or entity required to produce the information authorized under this section, and a description of the information compelled to be produced. The subpoena may be served in the manner provided for service of subpoenas under the North Carolina Rules of Civil Procedure. The form of subpoena shall generally follow the practice in the General Court of Justice in North Carolina. Return of the subpoena shall be to the person who issued the subpoena. Upon the refusal of any person to comply with the subpoena, it shall be the duty of any judge of the district court, upon application by the person who issued the subpoena, to order the person subpoenaed to show cause why he should not comply with the requirements, if in the discretion of the judge the requirements are reasonable and proper. Refusal to comply with the subpoena or with the order shall be dealt with as for contempt of court and as otherwise provided by law. Information obtained as a result of a subpoena issued pursuant to this subdivision is confidential and may be used only by the Child Support Enforcement Program in conjunction with a child

support establishment or enforcement proceeding or paternity establishment proceeding.

(2) For the purposes of locating persons, establishing paternity, or enforcing child support orders, the Program shall have access to any information or data storage and retrieval system maintained and used by the Department of Transportation for drivers license issuance or motor vehicle registration, or by a law enforcement agency in this State for law enforcement purposes, as permitted pursuant to G.S. 132-1.4, except that the Program shall have access to information available to the law enforcement agency pertaining to drivers licenses and motor vehicle registrations issued in other states.

(3) Establish and implement procedures under which in IV-D cases either parent or, in the case of an assignment of support, the State may request that a child support order enforced under this Chapter be reviewed and, if appropriate, adjusted in accordance with the most recently adopted uniform statewide child support guidelines prescribed by the Conference of Chief District Court Judges.

(4) Develop procedures for entering into agreements with financial institutions to develop and operate a data match system as provided under G.S. 110-139.2.

(5) Develop procedures for ensuring that when a noncustodial parent providing health care coverage pursuant to a court order changes employers and is eligible for health care coverage from the new employer, the new employer, upon receipt of notice of the order from the Department, enrolls the child in the employer's health care plan.

(6) Develop and implement an administrative process for paternity establishment in accordance with G.S. 110-132.2.

(7) Establish and implement administrative procedures to change the child support payee to ensure that child support payments are made to the appropriate caretaker when custody of the child has changed, in accordance with G.S. 50-13.4(d).

(8) Establish and implement expedited procedures to take the following actions relating to the establishment of paternity or to establishment of support orders, without obtaining an order from a judicial tribunal:

a. Subpoena the parties to undergo genetic testing as provided under G.S. 110-132.2;

b. Implement income withholding in accordance with this Chapter;

c. For the purpose of securing overdue support, increase the amount of monthly support payments by implementation of income withholding procedures established under G.S. 110-136.4, or by notice and opportunity to contest to an obligor who is not subject to income withholding. Increases under this subdivision are subject to the limitations of G.S. 110-136.6;

d. For purposes of exerting and retaining jurisdiction in IV-D cases, transfer cases between jurisdictions in this State without the necessity for additional filing by the petitioner or service of process upon the respondent.

(b) As used in this section, the term "Secretary" means the Secretary of Health and Human Services, the Secretary's designee, or a designated representative as defined under G.S. 110-129(5). (1997-433, s. 2; 1997-443, s. 11A.122; 1998-17, s. 1.)

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997.

Session Laws 1997-443, s. 11A.122, provides that "the Revisor of Statutes is authorized to delete any reference to the Department of Human Resources, the Secretary of Human Resources, and the Secretary of the Department of Human Resources in any portion of the General Statutes to which conforming amendments are

not made by this Part and to substitute, as appropriate and consistent with this Part, the Department of Health and Human Services and the Secretary of Health and Human Services." Pursuant to Session Laws 1997-443, s. 11A.122, "Department of Health and Human Services" has been substituted for "Department of Human Resources" in (a), and "Secretary of Health and Human Services" has been substituted for "Secretary of Human Resources" in subsection (b).

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-129.2. State Directory of New Hires established; employers required to report; civil penalties for noncompliance; definitions.

(a) Directory Established. — There is established the State Directory of New Hires. The Directory shall be developed and maintained by the Department. The Directory shall be a central repository for employment information to assist in the location of persons owing child support, and in the establishment and enforcement of child support orders.

(b) Employer Reporting. — Every employer in this State shall report to the Directory the hiring of every employee for whom a federal W-4 form is required to be completed by the employee at the time of hiring. The employer shall report the information required under this section not later than 20 days from the date of hire, or, in the case of an employer who transmits new hire reports magnetically or electronically by two monthly transmissions, not less than 12 nor more than 16 days apart. The Department shall notify employers of the information they must report under this section and of the penalties for not reporting the required information. The required forms must be provided by the Department to employers.

(c) Report Contents. — Each report required by this section shall contain the name, address, and social security number of the employee, and the name and address of the employer and the employer's identifying number assigned under section 6109 of the Internal Revenue Code of 1986 and the employer's State employer identification number. Reports shall be made on the W-4 form or, at the option of the employer, an equivalent form, and may be transmitted magnetically, electronically, or by first-class mail.

(d) Penalties for Failure to Report. — Upon a finding that an employer has failed to comply with the reporting requirements of this section, the district court shall impose a civil penalty in an amount not to exceed twenty-five dollars ($25.00). If the court finds that an employer's failure to comply with the reporting requirements is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report, then the court shall impose upon the employer a civil penalty in an amount not to exceed five hundred dollars ($500.00). Penalties collected under this subsection shall be deposited to the General Fund.

(e) Entry of Report Data Into Directory. — Within five business days of receipt of the report from the employer, the Department shall enter the information from the report into the Directory.

(f) Notice to Employer to Withhold. — Within two business days of the date the information was entered into the Directory, the Department or its designated representative as defined under G.S. 110-129(5) shall transmit notice to the employer of the newly hired employee directing the employer to withhold from the income of the employee an amount equal to the monthly or other periodic child support obligation, including any past-due support obligation of the employee and subject to the limitations of G.S. 110-136.6, unless the employee's income is not subject to withholding.

(g) Other Uses of Directory Information. — The following agencies may access information entered into the Directory from employer reports for the purposes stated:

(1) The Employment Security Commission for the purpose of administering employment security programs.
(2) The North Carolina Industrial Commission for the purpose of administering workers' compensation programs.
(3) The Department of Revenue for the purpose of administering the taxes it has a duty to collect under Chapter 105 of the General Statutes.

(h) Department May Contract for Services. — The Department may contract with other State or private entities to perform the services necessary to implement this section.

(i) Information Confidential. — Except as otherwise provided in this section, information contained in the Directory is confidential and may be used only by the State Child Support Enforcement Program.

(j) Definitions. — As used in this section, unless the context clearly requires otherwise, the term:

(1) "Business day" means a day on which State offices are open for business.
(2) "Department" means the Department of Health and Human Services.
(3) "Employee" means an individual who is an employee within the meaning of Chapter 24 of the Internal Revenue Code of 1986. The term "employee" does not include an employee of a federal or State agency performing intelligence or counterintelligence functions, if the head of the agency has determined that reporting information as required under this section could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.
(4) "Employer" has the meaning given the term in section 3401(d) of the Internal Revenue Code of 1986 and includes persons who are governmental entities and labor organizations. The term "labor organization" shall have the meaning given that term in section 2(5) of the National Labor Relations Act, and includes any entity which is used by the organization and an employer to carry out requirements described in section 8(f)(3) of the National Labor Relations Act of an agreement between the organization and the employer. (1997-433, s. 1; 1997-443, s. 11A.122; 1998-17, s. 1; 1999-438, s. 30.)

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997.

Session Laws 1997-433, s. 8, provides that the Department of Human Resources [Health and Human Services] shall develop a single statewide automated data processing and information retrieval system to enhance enforcement of child support obligations; that the system shall include procedures to ensure that all personnel with access to confidential program data are trained and informed of applicable requirements and penalties; that the Department shall impose administrative penalties for unauthorized access or disclosure or use of confidential data; and that the Department shall provide periodic written progress reports to the Cochairs of the House and Senate Appropriations subcommittees on Human Resources and to the Fiscal Research Division not later than October 1, 1997, March 1, 1998, and October 1, 1998.

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Session Laws 1999-438, s. 31, provides: "This act does not affect the rights or liabilities of the State, a taxpayer, or another person arising under a statute amended or repealed by this act before the effective date of its amendment or repeal; nor does it affect the right to any refund or credit of a tax that accrued under the amended or repealed statute before the effective date of its amendment or repeal."

Effect of Amendments. — Session Laws 1997-443, s. 11A.122, effective August 28, 1997, substituted "Health and Human Services" for "Human Resources" in subdivision (j)(2).

Session Laws 1999-438, s. 30, effective August 10, 1999, rewrote subsection (g).

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§ 110-130. Action by the designated representatives of the county commissioners.

Any county interested in the paternity and/or support of a dependent child may institute civil or criminal proceedings against the responsible parent of the child, or may take up and pursue any paternity and/or support action commenced by the mother, custodian or guardian of the child. Such action shall be undertaken by the designated representative in the county where the mother of the child resides or is found, in the county where the father resides or is found, or in the county where the child resides or is found. Any legal proceeding instituted under this section may be based upon information or belief. The parent of the child may be subpoenaed for testimony at the trial of the action to establish the paternity of and/or to obtain support for the child either instituted or taken up by the designated representative of the county commissioners. The husband-wife privilege shall not be grounds for excusing the mother or father from testifying at the trial nor shall said privilege be grounds for the exclusion of confidential communications between husband and wife. If a parent called for examination declines to answer upon the grounds that his testimony may tend to incriminate him, the court may require him to answer in which event he shall not thereafter be prosecuted for any criminal act involved in the conception of the child whose paternity is in issue and/or for whom support is sought, except for perjury committed in this testimony. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 4; 1985, c. 410.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For note on spousal testimony in criminal proceedings, see 17 Wake Forest L. Rev. 990 (1981).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

County has the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child. The county may bring the action in the name of the mother or in its own name. She is in either case required to cooperate with the county in the trial of the action. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

County is the real party in interest in an action to recover amounts paid by the county for support of a child. The child's mother is not the real party in interest. By accepting public assistance, she assigned her right to child support to the county. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

County Not Estopped by Non-Paternity Ruling in Former Criminal Matter, as County Not in Privity with State. — Although State and county were interested in proving same state of facts (that defendant was child's father), county had no control over previous criminal litigation where it was determined that defendant was not father, and nothing in record indicated that interest of county was legally represented in criminal trial. Accordingly, trial court erred in concluding that county was in privity with State, and doctrine of collateral estoppel did not bar county's action against defendant in its effort to seek reimbursement for public assistance paid on behalf of child. County of Rutherford ex rel. Child Support Enforcement Agency ex rel. Hedrick v. Whitener, 100 N.C. App. 70, 394 S.E.2d 263 (1990).

Past Public Assistance Debt Owed by Indian. — The exercise of state court jurisdiction over paternity actions, where the mother, the child, and the putative father are all Indians living on the reservation, unduly infringes on tribal self-governance. However, once paternity is established, the state courts have subject matter jurisdiction over causes of action brought by the State pursuant to requirements of the Aid to Families with Dependent Children program to collect a debt owed to the State for past public assistance and to obtain a judgement for future child support. Jackson County ex rel. Child Support Enforcement Agency ex rel. Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413, rehearing denied, 319 N.C. 412,

354 S.E.2d 713, cert. denied, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987).

§ 110-130.1. Non-Work First services.

(a) All child support collection and paternity determination services provided under this Article to recipients of public assistance shall be made available to any individual not receiving public assistance in accordance with federal law and as contractually authorized by the nonrecipient, upon proper application and payment of a nonrefundable application fee of twenty-five dollars ($25.00). The fee shall be reduced to ten dollars ($10.00) if the individual applying for the services is indigent. An indigent individual is an individual whose gross income does not exceed one hundred percent (100%) of the federal poverty guidelines issued each year in the Federal Register by the U.S. Department of Health and Human Services. For the purposes of this subsection, the term "gross income" has the same meaning as defined in G.S. 105-134.1.

(b) Repealed by Session Laws 1989, c. 490.

(b1) In cases in which a public assistance debt which accrued pursuant to G.S. 110-135 remains unrecovered, support payments shall be transmitted to the Department of Health and Human Services for appropriate distribution. When services are terminated and all costs and any public assistance debts have been satisfied, the support payment shall be redirected to the client.

(c) Actions or proceedings to establish, enforce, or modify a duty of support or establish paternity as initiated under this Article shall be brought in the name of the county or State agency on behalf of the public assistance recipient or nonrecipient client. Collateral disputes between a custodial parent and noncustodial parent, involving visitation, custody and similar issues, shall be considered only in separate proceedings from actions initiated under this Article. The attorney representing the designated representative of programs under Title IV-D of the Social Security Act shall be deemed attorney of record only for proceedings under this Article, and not for the separate proceedings. No attorney/client relationship shall be considered to have been created between the attorney who represents the child support enforcement agency and any person by virtue of the action of the attorney in providing the services required.

(c1) The Department is hereby authorized to use the electronic and print media in attempting to locate absent and deserting parents. Due diligence must be taken to ensure that the information used is accurate or has been verified. Print media shall be under no obligation or duty, except that of good faith, to anyone to verify the correctness of any information furnished to it by the Department or county departments of social services.

(d) Any fee imposed by the North Carolina Department of Revenue or the Secretary of the Treasury to cover their costs of withholding for non-Work First arrearages certified for the collection of past due support from State or federal income tax refunds shall be borne by the client by deducting the fee from the amount collected.

Any income tax refund offset amounts which are subsequently determined to have been incorrectly withheld and distributed to a client, and which must be refunded by the State to a responsible parent or the nondebtor spouse, shall constitute a debt to the State owed by the client. (1983, c. 527, s. 1; 1985, c. 781, ss. 1-5; 1985 (Reg. Sess., 1986), c. 931, ss. 1-3; 1989, c. 490; 1995, c. 538, s. 3; 1997-223, s. 2; 1997-443, ss. 11A.118(a), 12.28.)

Editor's Note. — Session Laws 1997-223, s. 1, provides that, effective 30 days after that act becomes law, the Department of Human Resources [now Department of Health and Human Services] shall not elect any child support distribution option for families receiving cash

assistance under the State Plan for the Temporary Assistance for Needy Families (TANF) Block Grant Program for which the federal government does not provide funding to the State to exercise the option. Section 1 became effective June 25, 1997.

Legal Periodicals. — For note, "Legislating Responsibility: North Carolina's New Child Support Enforcement Acts," see 65 N.C.L. Rev. 1354 (1987).

CASE NOTES

Child Support Action Not Barred. — The inclusion in a divorce judgment of a paragraph identifying plaintiff's former husband as the father of plaintiff's child operated only to identify the existence of a child born of the marriage and was not the subject of litigation; thus, collateral estoppel did not bar child support action against defendant. Guilford County ex rel. Child Support Enforcement Unit ex rel. Gardner v. Davis, 123 N.C. App. 527, 473 S.E.2d 640 (1996).

§ 110-130.2. Collection of spousal support.

Spousal support shall be collected for a spouse or former spouse with whom the absent parent's child is living when a child support order is being enforced under this Article. However, the spousal support shall be collected: (i) only if there is an order establishing the support obligation with respect to such spouse; and (ii) only if an order establishing the support obligation with respect to the child is being enforced under this Article. The Child Support Enforcement Program is not authorized to assist in the establishment of a spousal support obligation. (1985, c. 506, s. 1.)

§ 110-131. Compelling disclosure of information respecting the nonsupporting responsible parent of a child receiving public assistance.

(a) If a parent of any dependent child receiving public assistance fails or refuses to cooperate with the county in locating and securing support from a nonsupporting responsible parent, this parent may be cited to appear before any judge of the district court and compelled to disclose such information under oath and/or may be declared ineligible for public assistance by the county department of social services for as long as he fails to cooperate.

(b) Any parent who, having been cited to appear before a judge of the district court pursuant to subsection (a), fails or refuses to appear or fails or refuses to provide the information requested may be found to be in contempt of said court and may be fined not more than one hundred dollars ($100.00) or imprisoned not more than six months or both.

(c) Any parent who is declared ineligible for public assistance by the county department of social services shall have his needs excluded from consideration in determining the amount of the grant, and the needs of the remaining family members shall be met in the form of a protective payment in accordance with G.S. 108-50. (1975, c. 827, s. 1.)

CASE NOTES

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

§ 110-131.1. Notice; due process requirements met.

In any child support enforcement proceeding the trial court may deem State due process requirements for notice and service of process to be met with

respect to the nonmoving party, upon delivery of written notice in accordance with the notice requirements of Chapter 1A-1, Rule 5(b) of the Rules of Civil Procedure with respect to all pleadings subsequent to the original complaint. (1997-433, s. 2.3; 1998-17, s. 1.)

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997.

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-132. Acknowledgment of paternity and agreement to support.

(a) In lieu of or in conclusion of any legal proceeding instituted to establish paternity, the written acknowledgment of paternity executed by the putative father of the dependent child when accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child shall constitute an admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation, subject to the right of either signatory to rescind within the earlier of:

(1) 60 days of the date the document is executed, or

(2) The date of entry of an order establishing paternity or an order for the payment of child support.

In order to rescind, a challenger must request the district court to order the recision and to include in the order specific findings of fact that the request for recision was filed with the clerk of court within 60 days of the signing of the document. The court must also find that all parties, including the child support enforcement agency, if appropriate, have been served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. In the event the court orders recision and the putative father is thereafter found not to be the father of the child, then the clerk of court shall send a copy of the order of recision to the State Registrar of Vital Statistics. Upon receipt of an order of recision, the State Registrar shall remove the putative father's name from the birth certificate. In the event that the putative father defaults or fails to present or prosecute the issue of paternity, the trial court shall find the putative father to be the biological father as a matter of law.

After 60 days have elapsed, execution of the document may be challenged in court only upon the basis of fraud, duress, mistake, or excusable neglect. The burden of proof shall be on the challenging party, and the legal responsibilities, including child support obligations, of any signatory arising from the executed documents may not be suspended during the challenge except for good cause shown.

A written agreement to support the child by periodic payments, which may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of prosecution of the paternity action, when acknowledged as provided herein, filed with, and approved by a judge of the district court at any time, shall have the same force and effect as an order of support entered by that court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases. The written affirmation shall contain the social security number of the person executing the affirmation, and the written acknowledgment shall contain the social security number of the person executing the acknowledgment. Voluntary agreements to support shall contain the social security number of each of the parties to the agreement. The written affirmations, acknowledgments and agreements to support shall be sworn to before a certifying officer or notary

public or the equivalent or corresponding person of the state, territory, or foreign country where the affirmation, acknowledgment, or agreement is made, and shall be binding on the person executing the same whether the person is an adult or a minor. The child support enforcement agency shall ensure that the mother and putative father are given oral and written notice of the legal consequences and responsibilities arising from the signing of an acknowledgement of paternity, and of any alternatives to the execution of an acknowledgment or affirmation of paternity. The mother shall not be excused from making the affirmation on the grounds that it may tend to disgrace or incriminate her; nor shall she thereafter be prosecuted for any criminal act involved in the conception of the child as to whose paternity she makes affirmation.

(b) At any time after the filing with the district court of an acknowledgment of paternity, upon the application of any interested party, the court or any judge thereof shall cause a summons signed by him or by the clerk or assistant clerk of superior court, to be issued, requiring the putative father to appear in court at a time and place named therein, to show cause, if any he has, why the court should not enter an order for the support of the child by periodic payments, which order may include provision for reimbursement for medical expenses incident to the pregnancy and the birth of the child, accrued maintenance and reasonable expense of the action under this subsection on the acknowledgment of paternity previously filed with said court. The amount of child support payments so ordered shall be determined as provided in G.S. 50-13.4(c). The prior judgment as to paternity shall be res judicata as to that issue and shall not be reconsidered by the court. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 5, 6; 1981, c. 275, s. 8; 1989, c. 529, s. 8; 1997-433, s. 4.7; 1998-17, s. 1; 1999-293, s. 1.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Effect of Amendments. — Session Laws 1999-293, s. 1, effective October 1, 1999, inserted "and shall have ... child support obligation" in the introductory paragraph of subsection (a).

Legal Periodicals. — For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

CASE NOTES

Legislative Intent. — Judgments of paternity clearly impact heavily on the property interests, liberty interests, and family relationships of the purported father. If the General Assembly intends that such judgments, once entered, are unalterable, regardless of the circumstances, it should expressly so state. The courts are unwilling, by judicial fiat in the process of statutory interpretation, to impose a rule so inflexible and with such potential for manifestly unjust results. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

The apparent legislative purpose in enactment of the "shall be res judicata ... and shall not be reconsidered" provision in the portion of the statute relating solely to support proceedings (subsection (b)) was to avert costly consumption of the finite time resources of the trial courts by relitigation, in proceedings relating solely to support, of the underlying paternity issue. The absence of such a provision from the portion of the statute relating to the paternity issue (subsection (a)) itself, together with the manifest potential for substantial injustice which would result from inability, regardless of the circumstances, to obtain relief from an acknowledgment of paternity, indicates that the General Assembly did not intend to render court approved acknowledgments of paternity a unique category of judgments, peculiarly immune from the grand reservoir of equitable power to do justice in a particular case provided by § 1A-1, Rule 60(b)(6). If such were the case, relief would not be possible, for example, even from an acknowledgment entered under extreme duress, such as a threat of death issued with the apparent means and intent to effectuate it. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

The legislature did not intend for Chapter 50

to control all actions for child support. Reading Chapter 50 together with this chapter, the more specific provisions of this chapter dealing with the procedure for determining and enforcing support obligations of a father who voluntarily acknowledges paternity prevails over any conflicting procedure in Chapter 50 for determining and enforcing custody and support of minor children. Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993).

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Effect of Subsection (a). — Subsection (a) makes a father's voluntary written acknowledgment of paternity and agreement to support his illegitimate child a binding and fully enforceable substitute for a judicial determination of paternity and order of support. Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Acknowledgment Must Be Sworn and Accompanied by Written Affirmation. — Although this section allows a written acknowledgment of paternity in lieu of any legal proceeding instituted to establish paternity in actions to enforce duties of support under this chapter, such an acknowledgment must be sworn to before a certifying officer or notary public, and accompanied by a written affirmation of paternity executed and sworn to by the mother of the dependent child for whom support is sought. Reynolds v. Motley, 96 N.C. App. 299, 385 S.E.2d 548 (1989).

Father's Acknowledgment Must Be Accompanied by Mother's. — The court may not approve defendant's voluntary agreement for support of an illegitimate child where defendant's acknowledgment of paternity is not simultaneously accompanied by a sworn affirmation of paternity by the child's mother as required by this section. Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Standing of County in Action to Modify Support Order. — Where plaintiff mother, who received public assistance under the Aid to Families with Dependent Children Program, assigned to a county her right to receive any support on behalf of her children, the county, by virtue of the assignment pursuant to this section, had an interest in the order for the support of plaintiff's children. Therefore, under § 50-13.7(a), the county had standing to make a motion in an action between plaintiff mother and defendant father to modify a child support order to require that the support be paid to the county. Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979).

A trial court had no authority to dismiss a county's action to show cause for nonpayment of child support, where the putative father had earlier acknowledged paternity under oath and had entered into a voluntary support agreement. Holt v. Shoffner, 63 N.C. App. 381, 304 S.E.2d 787 (1983).

Notice to Putative Father. — Three requirements must be met to enter an order for child support "on the acknowledgment of paternity": (1) the putative father's acknowledgment of paternity must be filed, (2) an interested party must make an application for an order to show cause, and (3) the court or any judge thereof must cause a summons to be issued requiring the putative father to appear in court to show cause why the court should not enter an order for support of the child. These requirements provide sufficient notice to a putative father who has had a judgment of paternity entered against him pursuant to subsection (a) of this section for the court to enter an order for child support on this judgment. Wake County ex rel. Horton v. Ryles, 112 N.C. App. 754, 437 S.E.2d 404 (1993).

Relitigation of Paternity Precluded in Support Proceeding. — A voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time. It cannot, however, be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue. That issue is res judicata and shall not be reconsidered by the court in such a proceeding. Person County ex rel. Lester v. Holloway, 74 N.C. App. 734, 329 S.E.2d 713 (1985).

Where, twelve years before trial, defendant acknowledged that he was the natural father of a child by executing and filing with the court an acknowledgment of paternity, and by executing and filing an agreement to pay $65.00 per month for care and benefit of the child, the trial court improperly ordered blood test to determine whether the putative father was the biological father of the child in an action to enforce child support payments. Sampson County Child Support Enforcement Agency ex rel. McNeil v. Stevens, 101 N.C. App. 719, 400 S.E.2d 776 (1991).

Applied in Beaufort County v. Hopkins, 62 N.C. App. 321, 302 S.E.2d 662 (1983).

Stated in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981).

Cited in Surles v. Surles, 113 N.C. App. 32, 437 S.E.2d 661 (1993).

§ 110-132.1. Paternity determination by another state entitled to full faith and credit.

A paternity determination made by another state:

(1) In accordance with the laws of that state, and

(2) By any means that is recognized in that state as establishing paternity shall be entitled to full faith and credit in this State. (1993 (Reg. Sess., 1994), c. 733, s. 2.)

§ 110-132.2. Expedited procedures to establish paternity in IV-D cases.

(a) In a IV-D court action, a local child support enforcement office may, without obtaining a court order, subpoena a minor child, the minor child's mother, and the putative father of the minor child (including the mother's husband, if different from the putative father) to appear for the purpose of undergoing blood or genetic testing to establish paternity. A subpoena issued pursuant to this section must be served in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. Refusal to comply with a subpoena may be dealt with as for contempt of court, and as otherwise provided under law. A party may contest the results of the genetic or blood test. If the results are contested, the agency shall, upon request and advance payment by the contestant, obtain additional testing.

(b) A person subpoenaed to submit to testing pursuant to subsection (a) of this section may contest the subpoena. To contest the subpoena, a person must, within 15 days of receipt of the subpoena, request a hearing in the county where the local child support enforcement office that issued the subpoena is located. The hearing shall be before the district court and notice of the hearing must be served by the petitioner on all parties to the proceeding. Service shall be in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The hearing shall be held and a determination made within 30 days of the petitioner's request for hearing as to whether the petitioner must comply with the subpoena to undergo testing. If the trial court determines that the petitioner must comply with the subpoena, the determination shall not prejudice any defenses the petitioner may present at any future paternity litigation. (1997-433, s. 4.11; 1998-17, s. 1.)

Editor's Note. — Session Laws 1997-433, s. 11.3, made this section effective October 1, 1997.

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§ 110-133. Agreements of support.

In lieu of or in conclusion of any legal proceeding instituted to obtain support from a responsible parent for a dependent child born of the marriage, a written agreement to support the child by periodic payments executed by the responsible parent when acknowledged before a certifying officer or notary public or the equivalent or corresponding person of the state, territory, or foreign country where the acknowledgment is made and filed with and approved by a judge of the district court in the county where the custodial parent of the child resides or is found, or in the county where the noncustodial parent resides or is found, or in the county where the child resides or is found shall have the same force and effect, retroactively and prospectively, in accordance with the terms of the agreement, as an order of support entered by the court, and shall be enforceable and subject to modification in the same manner as is provided

by law for orders of the court in such cases. A responsible parent executing a written agreement under this section shall provide on the agreement the responsible parent's social security number. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 7; 1995, c. 538, s. 5; 1997-433, s. 4.8; 1998-17, s. 1.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Effect of Amendments. — The 1997 amendment, effective October 1, 1997, added the last sentence.

Legal Periodicals. — For note, "Family Law—Lovers' Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption—Michael H. v. Gerald D.," see 25 Wake Forest L. Rev. 617 (1990).

CASE NOTES

The purpose of a child support proceeding is to determine the nature and extent of the support required. The initial determination is subject to modification or vacation at any time upon motion and a showing of changed circumstances. The support issue thus may be before the court on numerous occasions during a child's minority. Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Modification or Vacation of Agreement. — The voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time. It cannot, however, be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue; that issue is res judicata and shall not be reconsidered by the court in such a proceeding. Beaufort County v. Hopkins, 62 N.C. App. 321, 302 S.E.2d 662 (1983).

Relitigation of Paternity Precluded in Support Proceeding. — A voluntary support agreement may, upon motion and a showing of changed circumstances, be modified or vacated at any time. It cannot, however, be modified or vacated on the basis of relitigation, in a proceeding related solely to the order for support, of the paternity issue. That issue is res judicata and shall not be reconsidered by the court in such a proceeding. Person County ex rel. Lester v. Holloway, 74 N.C. App. 734, 329 S.E.2d 713 (1985).

Where, twelve years before trial, defendant acknowledged that he was the natural father of a child by executing and filing with the court an acknowledgment of paternity, and by executing and filing an agreement to pay $65.00 per month for care and benefit of the child, the trial court improperly ordered a blood test to determine whether the putative father was the biological father of the child in an action to enforce child support payments. Sampson County Child Support Enforcement Agency ex rel. McNeil v. Stevens, 101 N.C. App. 719, 400 S.E.2d 776 (1991).

Stated in Durham County Dep't of Social Servs. v. Williams, 52 N.C. App. 112, 277 S.E.2d 865 (1981).

Cited in Lee v. Lee, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

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The filing fee for a voluntary support agreement set up under this section is $4.00. Opinion of Attorney General to Mr. J. Donald Chappell, Controller, Administrative Office of the Courts, Fiscal Management Division, 47 N.C.A.G. 93 (1977).

§ 110-134. Filing of affirmations, acknowledgments, agreements and orders; fees.

All affirmations, acknowledgments, agreements and resulting orders entered into under the provisions of G.S. 110-132 and G.S. 110-133 shall be filed by the clerk of superior court in the county in which they are entered. The filing fee for the institution of an action through the entry of an order under either of these provisions shall be four dollars ($4.00). (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 8.)

§ 110-135. Debt to State created.

Acceptance of public assistance by or on behalf of a dependent child creates a debt, in the amount of public assistance paid, due and owing the State by the responsible parent or parents of the child. Provided, however, that in those cases in which child support was required to be paid incident to a court order during the time of receipt of public assistance, the debt shall be limited to the amount specified in such court order. This liability shall attach only to public assistance granted subsequent to June 30, 1975, and only with respect to the period of time during which public assistance is granted, and only if the responsible parent or parents were financially able to furnish support during this period.

The United States, the State of North Carolina, and any county within the State which has provided public assistance to or on behalf of a dependent child shall be entitled to share in any sum collected under this section, and their proportionate parts of such sum shall be determined in accordance with the matching formulas in use during the period for which assistance was paid.

No action to collect such debt shall be commenced after the expiration of five years subsequent to the receipt of the last grant of public assistance. The county attorney or an attorney retained by the county and/or State shall represent the State in all proceedings brought under this section. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 9, 10.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For note on default not constituting an admission of facts for purposes of summary judgment, see 17 Wake Forest L. Rev. 49 (1981).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

This section provides that an action to compel reimbursement of debt created must be commenced within "five years subsequent to the receipt of the last grant of public assistance." An action to collect a public assistance debt, if timely filed, may claim all public assistance granted subsequent to June 30, 1975, provided there is no five year gap in payments. State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984).

The only limitations in this section on the extent of reimbursement for which judgment may be obtained relate to the defendant's financial ability to furnish support during the relevant period of time. State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984).

The trial court erred in ruling that the State was not entitled to recover from defendant for benefits paid for the benefit of his minor illegitimate son before he had any knowledge of the birth of his son and before demand was made upon him to support the child. State ex rel. Terry v. Marrow, 71 N.C. App. 170, 321 S.E.2d 575 (1984).

Intervention in Support Action Brought by State. — The language of § 110-137 operates to assign to the state or county only the right to reimbursement for those amounts of support money provided through AFDC. Thus grandmother who had cared for child since her birth and had applied for assistance from the AFDC program retained her interest in defendant father's support obligation, and was entitled to intervene in an action for child support brought against defendant by the State. State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

No Privity Between State and County Program. — Where the State brings an action seeking to establish paternity and recover public assistance paid on behalf of a State-administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program. State ex rel. Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996).

In respective actions where county DSS and the State sought to prove that defendant was the father of child and to recover past public assistance paid, the State had no control over the first action, and the interest of the State was not represented in the first action; thus,

the state was not in privity with county DSS and the doctrines of res judicata and collateral estoppel did not bar the State's action. State ex rel. Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996).

Applied in Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984).

Cited in Cox v. Cox, 44 N.C. App. 339, 260 S.E.2d 812 (1979); Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19 (1986).

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Application of Last Sentence. — The last sentence applies to all proceedings brought by or on behalf of the State under this section and § 110-137. See opinion of Attorney General to Mr. David R. Johnson, Staff Attorney, The North Carolina State Bar, 50 N.C.A.G. 70 (1981).

§ 110-136. Garnishment for enforcement of child-support obligation.

(a) Notwithstanding any other provision of the law, in any case in which a responsible parent is under a court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, a judge of the district court in the county where the mother of the child resides or is found, or in the county where the father resides or is found, or in the county where the child resides or is found may enter an order of garnishment whereby no more than forty percent (40%) of the responsible parent's monthly disposable earnings shall be garnished for the support of his minor child. For purposes of this section, "disposable earnings" is defined as that part of the compensation paid or payable to the responsible parent for personal services, whether denominated as wages, salary, commission, bonus, or otherwise (including periodic payments pursuant to a pension, retirement, or other deferred compensation program) which remains after the deduction of any amounts required by law to be withheld. The garnishee is the person, firm, association, or corporation by whom the responsible parent is employed.

(b) The mother, father, custodian, or guardian of the child or any designated representative interested in the support of a dependent child may move the court for an order of garnishment. The motion shall be verified and shall state that the responsible parent is under court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, that said parent is delinquent in such child support or has been erratic in making child-support payments, the name and address of the employer of the responsible parent, the responsible parent's monthly disposable earnings from said employer (which may be based upon information and belief), and the amount sought to be garnished, not to exceed forty percent (40%) of the responsible parent's monthly disposable earnings. The motion for the wage garnishment order along with a motion to join the alleged employer as a third-party garnishee defendant shall be served on both the responsible parent and the alleged employer in accordance with the provisions of G.S. 1A-1, Rules of Civil Procedure. The time period for answering or otherwise responding to pleadings, motions and other papers issued pursuant to this section shall be in accordance with the time periods set forth in G.S. 1A-1, Rules of Civil Procedure, except that the alleged employer third-party garnishee shall have 10 days from the date of service of process to answer both the motion to join him as a defendant garnishee and the motion for the wage garnishment order.

(b1) In addition to the foregoing method for instituting a continuing wage garnishment proceeding for child support through motion, the mother, father,

custodian, or guardian of the child or any designated representative interested in the support of a dependent child may in an independent proceeding petition the court for an order of continuing wage garnishment. The petition shall be verified and shall state that the responsible parent is under court order or has entered into a written agreement pursuant to G.S. 110-132 or 110-133 to provide child support, that said parent is delinquent in such child support or has been erratic in making child-support payments, the name and address of the alleged-employer garnishee of the responsible parent, the responsible parent's monthly disposable earnings from said employer (which may be based on information and belief), and the amount sought to be garnished, not to exceed forty percent (40%) of the responsible parent's monthly disposable earnings. The petition shall be served on both the responsible parent and his alleged employer in accordance with the provisions for service of process set forth in G.S. 1A-1, Rule 4. The time period for answering or otherwise responding to process issued pursuant to this section shall be in accordance with the time periods set forth in G.S. 1A-1, Rules of Civil Procedure.

(c) Following the hearing held pursuant to this section, the court may enter an order of garnishment not to exceed forty percent (40%) of the responsible parent's monthly disposable earnings. If an order of garnishment is entered, a copy of same shall be served on the responsible parent and the garnishee either personally or by certified or registered mail, return receipt requested. The order shall set forth sufficient findings of fact to support the action by the court and the amount to be garnished for each pay period. The amount garnished shall be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the employer for each payment under the order. The order shall be subject to review for modification and dissolution upon the filing of a motion in the cause.

(d) Upon receipt of an order of garnishment, the garnishee shall transmit without delay to the State Child Support Collection and Disbursement Unit the amount ordered by the court to be garnished. These funds shall be disbursed to the party designated by the court which in those cases of dependent children receiving public assistance shall be the North Carolina Department of Health and Human Services.

(e) Any garnishee violating the terms of an order of garnishment shall be subject to punishment as for contempt. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, ss. 11, 12; 1979, c. 386, ss. 1-8; 1983 (Reg. Sess., 1984), c. 1047, s. 1; 1985, c. 660, s. 2; 1997-443, s. 11A.118(a); 1999-293, s. 17.)

Cross References. — As to garnishment of military benefits, see 10 U.S.C. § 1408 and 42 U.S.C. § 659.

Effect of Amendments. — Session Laws 1999-293, s. 17, effective October 1, 1999, substituted "State Child Support Collection and Disbursement Unit" for "clerk of superior court" in subsection (d).

Legal Periodicals. — For note on the remedy of garnishment in child support, see 56 N.C.L. Rev. 169 (1978).

For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

Section Does Not Authorize Garnishment of Wages for Alimony. — The exception in the case of child support to the long-standing prohibition against garnishment of wages has not been extended to allow garnishment of wages for alimony. Phillips v. Phillips, 34 N.C. App. 612, 239 S.E.2d 743 (1977).

This section does not alter the long-standing rule prohibiting the garnishment of prospective wages for the nonpayment of alimony and other debts. Elmwood v. Elmwood, 34 N.C. App. 652, 241 S.E.2d 693 (1977), modified on other grounds, 295 N.C. 168, 244 S.E.2d 668 (1978).

Garnishment at Higher Rate Than Set in Underlying Support Order Prohibited. — Where, in 1985, court reduced future child

support obligations of non-custodial parent (defendant) to $5.00 per week and set rate for payment on arrearages at $10.00 per week, and in 1987, Child Support Enforcement Agency served defendant with notice of garnishment stating that defendant's wages would be garnished at rate of $60.00 per week, due process required that plaintiff could only garnish automatically at rate set out in controlling support order; once underlying order set out amount of ongoing obligation and amount to be applied toward liquidation of overdue support plaintiff could not garnish at higher rate without first applying by motion for modification in rate at which defendant was to pay arrearage; therefore, defendant was entitled to reimbursement of $100.00 for two weeks he was garnished above $10.00 per week allowed in court's 1985 order. Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

The phrase "notwithstanding any other provision of the law" would include the exemption provision of § 1-362. Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978).

Garnishment of Military Retirement Pay for Child Support. — Defendant's military retirement pay for future pay periods was not subject to garnishment except to the extent of 20% thereof for child support pursuant to this section. Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978) (decided prior to 1977 amendment).

Subsection (c) Contemplates Continuing Order Reaching Future Earnings. — Subsection (c) seems clearly to contemplate the entry of a continuing order of garnishment to enforce a child support order reaching earnings for future pay periods, thus changing the former law of this State with reference to the garnishment of, as yet, unaccrued wages. The liability of the garnishee under such an order would, as to future pay periods, be contingent upon the actual accrual of the defendant employee's earnings in such future pay period. Elmwood v. Elmwood, 295 N.C. 168, 244 S.E.2d 668 (1978).

Petition Need Not Be Served on Responsible Parent's Employer in Advance of Hearing. — Although this section requires a copy of the petition for garnishment to be served on the responsible parent's employer in advance of the hearing thereon, such notice is for the benefit of the employer, rather than the debtor, and can be waived by the party entitled to it. Champion v. Champion, 64 N.C. App. 606, 307 S.E.2d 827 (1983).

Applied in Tate v. Tate, 95 N.C. App. 774, 384 S.E.2d 48 (1989).

Cited in Sturgill v. Sturgill, 49 N.C. App. 580, 272 S.E.2d 423 (1980); Durham County v. Riggsbee, 56 N.C. App. 744, 289 S.E.2d 579 (1982); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); McMahan v. McMahan, 68 N.C. App. 777, 315 S.E.2d 536 (1984).

OPINIONS OF ATTORNEY GENERAL

A city does not have immunity from garnishment proceedings brought for child support under this section. See opinion of Attorney General to Mr. Rufus C. Boutwell, Jr., Assistant City Attorney, City of Durham, Oct. 9, 1979.

§ 110-136.1. Assignment of wages for child support.

Pursuant to G.S. 50-13.4(f) (1), the court may require the responsible parent to execute an assignment of wages, salary, or other income due or to become due whenever his employer's voluntary written acceptance of the wage assignment under G.S. 95-31 is filed with the court. Such acceptance remains effective until the employer files an express written revocation with the court. The amount assigned shall be increased by an additional one dollar ($1.00) processing fee to be assessed and retained by the employer for each payment under the order. (1981, c. 275, s. 7; 1983 (Reg. Sess., 1984), c. 1047, s. 2.)

§ 110-136.2. Use of unemployment compensation benefits for child support.

(a) A responsible parent may voluntarily assign unemployment compensation benefits to a child support agency to satisfy a child support obligation or a child support enforcement agency may request a responsible parent to voluntarily assign unemployment benefits to satisfy a child support obligation. An assignment of less than the full amount of the support obligation shall not relieve the responsible parent of liability for the remaining amount.

(b) Upon notification of a voluntary assignment by the Department of Health and Human Services, the Employment Security Commission shall deduct and withhold the amount assigned by the responsible parent as provided in G.S. 96-17.

(c) Any amount deducted and withheld shall be paid by the Employment Security Commission to the Department of Health and Human Services for distribution as required by federal law.

(d) Voluntary assignment of unemployment compensation benefits shall remain effective until the Employment Security Commission receives notification from the Department of Health and Human Services of an express written revocation by the responsible parent.

(e) The Department of Health and Human Services shall ensure that payments received under this section are properly credited against the responsible parent's child support obligation.

(f) In the absence of a voluntary assignment of unemployment compensation benefits, the Department of Health and Human Services shall implement income withholding as provided in this Article for IV-D cases. The amount withheld shall not exceed twenty-five percent (25%) of the unemployment compensation benefits. Notice of the requirement to withhold shall be served upon the Employment Security Commission and payment shall be made by the Employment Security Commission directly to the Department of Health and Human Services pursuant to G.S. 96-17 or to another state under G.S. 52C-5-501. Except for the requirement to withhold from unemployment compensation benefits and the forwarding of withheld funds to the Department of Health and Human Services or to another state under G.S. 52C-5-501, the Employment Security Commission is exempt from the provisions of G.S. 110-136.8. (1983, c. 33, s. 1; 1987, c. 764, ss. 1, 2; 1997-443, s. 11A.118(a); 1999-293, s. 6.)

Effect of Amendments. — Session Laws 1999-293, s. 6, effective October 1, 1999, inserted "or to another state under G.S. 52C-5-501" twice in subsection (f).

§ 110-136.3. Income withholding procedures; applicability.

(a) Required Contents of Support Orders. All child support orders, civil or criminal, entered or modified in the State in IV-D cases shall include a provision ordering income withholding to take effect immediately. All child support orders, civil or criminal, initially entered in the State in non-IV-D cases on or after January 1, 1994, shall include a provision ordering income withholding to take effect immediately as provided in G.S. 110-136.5(c1), unless one of the exceptions specified in G.S. 110-136.5(c1) applies. A non-IV-D child support order that contains an income withholding requirement and a IV-D child support order shall:

(1) Require the obligor to keep the clerk of court or IV-D agency informed of the obligor's current residence and mailing address;

(2) Repealed by Session Laws 1993, c. 517, s. 1.

(2a) Repealed by Session Laws 1993, c. 517, s. 1.

(3) Require the obligor to cooperate fully with the initiating party in the verification of the amount of the obligor's disposable income;

(4) Require the custodial party to keep the obligor informed of (i) the custodial party's disposable income and the amount and effective date of any substantial change in this disposable income and (ii) the current residence and mailing address of the child, unless the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats that constitute domestic violence under Chapter 50B of the General Statutes; and

(5) Require the obligor to keep the initiating party informed of the name and address of any payor of the obligor's disposable income and of the amount and effective date of any substantial change in this disposable income.

(a1) Payment Plan/Work Requirement for Past-Due Support. In any IV-D case in which an obligor owes past-due support and income withholding has been ordered but cannot be implemented against the obligor, the court may order the obligor to pay the support in accordance with a payment plan approved by the court and, if the obligor is subject to the payment plan and is not incapacitated, the court may order the obligor to participate in such work activities, as defined under 42 U.S.C. § 607, as the court deems appropriate.

(b) When obligor subject to withholding.

(1) In IV-D cases in which a new or modified child support order is entered on or after October 1, 1989, an obligor is subject to income withholding immediately upon entry of the order. In IV-D cases in which the child support order was entered prior to October 1, 1989, an obligor shall become subject to income withholding on the date on which the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month, or the date on which the obligor or obligee requests withholding.

(2) In non-IV-D cases in which the child support order was entered prior to January 1, 1994, an obligor shall be subject to income withholding on the earliest of:

a. The date on which the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month;

b. The date on which the obligor requests withholding; or

c. The date on which the court determines, pursuant to a motion or independent action filed by the obligee under G.S. 110-136.5(a), that the obligor is or has been delinquent in making child support payments or has been erratic in making child support payments.

(3) In IV-D child support cases in which an order was issued or modified in this State prior to October 1, 1996, and in which the obligor is not otherwise subject to withholding, the obligor shall become subject to withholding if the obligor fails to make legally obligated child support payments in an amount equal to the support payable for one month.

(4) In the enforcement of alimony or postseparation support orders pursuant to G.S. 110-130.2, an obligor shall become subject to income withholding on the earlier of:

a. The date on which the obligor fails to make legally obligated alimony or postseparation payments; or

b. The date on which the obligor or obligee requests withholding.

(c) Repealed by Session Laws 1993, c. 517, s. 1.

(d) Interstate cases. An interstate case is one in which a child support order of one state is to be enforced in another state.

(1) In interstate cases withholding provisions shall apply to a child support order of this or any other state. A petition addressed to this State to enforce a child support order of another state or a petition from an initiating party in this State addressed to another state to enforce a child support order entered in this State shall include:

a. A certified copy of the support order with all modifications, including any income withholding notice or order still in effect;

b. A copy of the income withholding law of the jurisdiction which issued the support order, provided that this jurisdiction has a withholding law;

c. A sworn statement of arrearages;

d. The name, address, and social security number of the obligor, if known;

e. The name and address of the obligor's employer or of any other source of income of the obligor derived in the state in which withholding is sought; and

f. The name and address of the agency or person to whom support payments collected by income withholding shall be transmitted.

(2) The law of the state in which the support order was entered shall apply in determining when withholding shall be implemented and interpreting the child support order. The law and procedures of the state where the obligor is employed shall apply in all other respects.

(3) Except as otherwise provided by subdivision (2), income withholding initiated under this subsection is subject to all of the notice, hearing and other provisions of Chapter 110.

(4) In all interstate cases notices and orders to withhold shall be served upon the payor by a North Carolina agency or judicial officer. In all interstate non-IV-D cases, the advance notice to the obligor shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(5) For purposes of enforcing a petition under this subsection, jurisdiction is limited to the purposes of income withholding and Chapter 52A of the General Statutes shall not apply. Nothing in this subsection precludes any remedy otherwise available in a proceeding under Chapter 52A of the General Statutes.

(e) Procedures and regulations. Procedures, rules, regulations, forms, and instructions necessary to effect the income withholding provisions of this Article shall be established by the Secretary of the Department of Health and Human Services or the Secretary's designee and the Administrative Office of the Courts. Forms and instructions shall be sent with each order or notice of withholding. (1985 (Reg. Sess., 1986), c. 949, s. 2; 1987, c. 589, s. 1; 1989, c. 601, s. 2; 1993, c. 517, s. 1; 1997-433, ss. 3, 6.1; 1997-443, s. 11A.118(a); 1998-17, s. 1; 1998-176, s. 4.)

Editor's Note. — Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted."

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Session Laws 1999-293, s. 16, effective October 1, 1999, provided: "G.S. 110-36.3 is amended by adding a new subsection to read: '(d1) Employment Verifications. — For the purpose of establishing or modifying a child support order, the amount of the obligor's gross income may be established by a written statement signed by the obligor's employer or the employer's designee or an Employee Verification form produced by the Automated Collections Tracking System that has been completed and signed by the obligor's employer or the employer's designee. A written statement signed by the employer of the obligor or the employer's designee that sets forth an obligor's gross income, as well as an Employee Verification form signed by the obligor's employer or the employer's designee, shall be admissible evidence in any action establishing or modifying a child support order.'" There is no G.S. 110-36.3 and G.S. 110-26 to 110-38 were repealed in 1969. It appears likely that the intent of the act was to add a subsection (d1) to G.S. 110-136.3.

Effect of Amendments. — Session Laws 1998-176, s. 4, effective January 1, 1999, and applicable to actions pending on or after the effective date, added subdivision (b)(4).

CASE NOTES

In view of the purposes of this section, there is no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Applicability to Non-IV-D Cases. — The statutory provisions for mandatory income

withholding in IV-D cases apply with equal force to orders for current support and to orders directing payment of arrearage. McGee v. McGee, 118 N.C. App. 19, 453 S.E.2d 531 (1995).

Subdivision (b)(2)c specifically provides that the withholding provisions apply when the court determines that the obligor is or has been delinquent. This language reveals that the legislature intended income withholding to apply in any case where the obligor has ever fallen behind a month or more in payments. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

The General Assembly amended the income withholding statute in response to the requirements of the 1984 Amendments to the Social Security Act. The legislative history of the Child Support Enforcement Amendments of 1984 suggests that the purpose of the amendments was to assure that all children in the United States who are in need of assistance in securing financial support from their parents will receive assistance regardless of their circumstances. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Cited in Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989); Greer v. Greer, 101 N.C. App. 351, 399 S.E.2d 399 (1991); Vanburen County Dep't of Social Servs. ex rel. Swearengin v. Swearengin, 118 N.C. App. 324, 455 S.E.2d 161 (1995).

§ 110-136.4. Implementation of withholding in IV-D cases.

(a) Withholding based on arrearages or obligor's request.

(1) Advance notice of withholding. When an obligor in a IV-D case becomes subject to income withholding, the obligee shall, after verifying the obligor's current employer or other payor, wages or other disposable income, and mailing address, serve the obligor with advance notice of withholding in accordance with G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(2) Contents of advance notice. The advance notice to the obligor shall contain, at a minimum, the following information:

a. Whether the proposed withholding is based on the obligor's failure to make legally obligated child support, alimony or postseparation support payments on the obligor's request for withholding, on the obligee's request for withholding, or on the obligor's eligibility for withholding under G.S. 110-136.3(b)(3);

b. The amount of overdue child support, overdue alimony or postseparation support payments, the total amount to be withheld, and when the withholding will occur;

c. The name of each child or person for whose benefit the child support, alimony or postseparation support payments are due and information sufficient to identify the court order under which the obligor has a duty to support the child, spouse, or former spouse;

d. The amount and sources of disposable income;

e. That the withholding will apply to the obligor's wages or other sources of disposable income from current payors and all subsequent payors once the procedures under this section are invoked;

f. An explanation of the obligor's rights and responsibilities pursuant to this section;

g. That withholding will be continued until terminated pursuant to G.S. 110-136.10.

(3) Contested withholding. The obligor may contest the withholding only on the basis of a mistake of fact, except that G.S. 110-129(10)(a) is not applicable if withholding is based on the obligor's or obligee's request for withholding. To contest the withholding, the obligor must, within 10 days of receipt of the advance notice of withholding, request a hearing in the county where the support order was entered before the district court and give notice to the obligee specifying the mistake of fact upon which the hearing request is based. If the asserted mistake

of fact can be resolved by agreement between the obligee and the obligor, no hearing shall occur. Otherwise, a hearing shall be held and a determination made, within 30 days of the obligor's receipt of the advance notice of withholding, as to whether the asserted mistake of fact is valid. No withholding shall occur pending the hearing decision. The failure to hold a hearing within 30 days shall not invalidate an otherwise properly entered order. If it is determined that a mistake of fact exists, no withholding shall occur. Otherwise, within 45 days of the obligor's receipt of the advance notice of withholding, the obligee shall serve the payor, pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure, with notice of his obligation to withhold, and shall mail a copy of such notice to the obligor and file a copy with the clerk. In the event of appeal, withholding shall not be stayed. If the appeal is concluded in favor of the obligor, the obligee shall promptly repay sums wrongfully withheld and notify the payor to cease withholding.

(4) Uncontested withholding. If the obligor does not contest the withholding within the 10-day response period, the obligee shall serve the payor, pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure, with notice of his obligation to withhold, and shall mail a copy of such notice to the obligor and file a copy with the clerk.

(5) Payment not a defense to withholding. The payment of overdue support shall not be a basis for terminating or not implementing withholding.

(6) Inability to implement withholding. When an obligor is subject to withholding, but withholding under this section cannot be implemented because the obligor's location is unknown, because the extent and source of his disposable income cannot be determined, or for any other reason, the obligee shall either request the clerk of superior court to initiate enforcement proceedings under G.S. 15A-1344.1(d) or G.S. 50-13.9(d) or take other appropriate available measures to enforce the support obligation.

(b) Immediate income withholding. When a new or modified child support order is entered, the district court judge shall, after hearing evidence regarding the obligor's disposable income, place the obligor under an order for immediate income withholding. The IV-D agency shall serve the payor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure, with a notice of his obligation to withhold, and shall mail a copy of such notice to the obligor and file a copy with the clerk. If information is unavailable regarding an obligor's disposable income, or the obligor is unemployed, or an agreement is reached between both parties which provides for an alternative arrangement, immediate income withholding shall not apply. The obligor, however, is subject to income withholding pursuant to G.S. 110-136.4(a).

(c) Subsequent payors. If the obligor changes employment or source of disposable income, notice to subsequent payors of their obligation to withhold shall be served as required by G.S. 1A-1, Rule 4, Rules of Civil Procedure. Copies of such notice shall be filed with the clerk of court and served upon the obligor by first class mail.

(d) Multiple withholdings. The obligor must notify the obligee if the obligor is currently subject to another withholding for child support. In the case of two or more withholdings against one obligor, the obligee or obligees shall attempt to resolve any conflict between the orders in a manner that is fair and equitable to all parties and within the limits specified by G.S. 110-136.6. If the conflict cannot be so resolved, an injured party, upon request, shall be granted a hearing in accordance with the procedure specified in G.S. 110-136.4(c). The conflict between the withholding orders shall be resolved in accordance with G.S. 110-136.7.

(e) Modification of withholding. When an order for withholding has been entered under this section, the obligee may modify the withholding based on changed circumstances. The obligee shall proceed as is provided in this section.

(f) Applicability of section. The provisions of this section apply to IV-D cases only. (1985 (Reg. Sess., 1986), c. 949, s. 2; 1989, c. 601, s. 3; 1997-433, s. 6.2; 1998-17, s. 1; 1998-176, s. 5.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Effect of Amendments. — Session Laws 1998-176, s. 5, effective January 1, 1999, and applicable to actions pending on or after the effective date, rewrote subdivisions (a)(2)a., (a)(2)b., and (a)(2)c.

CASE NOTES

Notice Provisions Are Not Contrary to Federal Statute. — The notice provisions of this section which are the basis for wage garnishment proceedings are not contrary to federal statute which mandates advance notice of garnishment to non-custodial parents; the State is exempt from federal advance notice requirements so long as North Carolina's scheme complies with state due process requirements. Sampson County Child Support Enforcement Agency ex rel. Bolton v. Bolton, 93 N.C. App. 134, 377 S.E.2d 88 (1989).

§ 110-136.5. Implementation of withholding in non-IV-D cases.

(a) Withholding based on delinquent or erratic payments. Notwithstanding any other provision of law, when an obligor is delinquent in making child support payments or has been erratic in making child support payments, the obligee may apply to the court, by motion or in an independent action, for an order for income withholding.

(1) The motion or complaint shall be verified and state, to the extent known:
   a. Whether the obligor is under a court order to provide child support and, if so, information sufficient to identify the order;
   b. Either:
      1. That the obligor is currently delinquent in making child support payments; or
      2. That the obligor has been erratic in making child support payments;
   c. The amount of overdue support and the total amount sought to be withheld;
   d. The name of each child for whose benefit support is payable; and
   e. The name, location, and mailing address of the payor or payors from whom withholding is sought and the amount of the obligor's monthly disposable income from each payor.

(2) The motion or complaint shall include or be accompanied by a notice to the obligor, stating:
   a. That withholding, if implemented, will apply to the obligor's current payors and all subsequent payors; and
   b. That withholding, if implemented, will be continued until terminated pursuant to G.S. 110-136.10.

At any time the parties may agree to income withholding by consent order.

(b) Withholding Based on Obligor's Request. The obligor may request at any time that income withholding be implemented. The request may be made either verbally in open court or by written request.

(1) A written request for withholding shall state:

a. That the obligor is under a court order to provide child support, and information sufficient to identify the order;
b. Whether the obligor is delinquent and the amount of any overdue support;
c. The name of each child for whose benefit support is payable;
d. The name, location, and mailing address of the payor or payors from whom the obligor receives disposable income and the amount of the obligor's monthly disposable income from each payor;
e. That the obligor understands that withholding, if implemented, will apply to the obligor's current payors and all subsequent payors and will be continued until terminated pursuant to G.S. 110-136.10; and
f. That the obligor understands that the amount withheld will include an amount sufficient to pay current child support, an additional amount toward liquidation of any arrearages, and a two dollar ($2.00) processing fee to be retained by the employer for each withholding, but that the total amount withheld may not exceed the following percent of disposable income:
1. Forty percent (40%) if there is only one order for withholding;
2. Forty-five percent (45%) if there is more than one order for withholding and the obligor is supporting other dependent children or his or her spouse; or
3. Fifty percent (50%) if there is more than one order for withholding and the obligor is not supporting other dependent children or a spouse.

(2) A written request for withholding shall be filed in the office of the clerk of superior court of the court that entered the order for child support. If the request states and the clerk verifies that the obligor is not delinquent, the court may enter an order for withholding without further notice or hearing. If the request states or the clerk finds that the obligor is delinquent, the matter shall be scheduled for hearing unless the obligor in writing waives his right to a hearing and consents to the entry of an order for withholding of an amount the court determines to be appropriate. The court may require a hearing in any case. Notice of any hearing under this subdivision shall be sent to the obligee.

(c) Order for withholding. If the district court judge finds after hearing evidence that the obligor, at the time of the filing of the motion or complaint was, or at the time of the hearing is, delinquent in child support payments or that the obligor has been erratic in making child support payments in accordance with G.S. 110-136.5(a), or that the obligor has requested that income withholding begin in accordance with G.S. 110-136.5(b), the court shall enter an order for income withholding, unless:

(1) The obligor proves a mistake of fact, except that G.S. 110-129(10)(a) is not applicable if withholding is based on the obligee's motion or independent action alleging that the obligor is delinquent or has been erratic in making child support payments; or
(2) The court finds that the child support obligation can be enforced and the child's right to receive support can be ensured without entry of an order for income withholding; or
(3) The court finds that the obligor has no disposable income subject to withholding or that withholding is not feasible for any other reason.

If the obligor fails to respond or appear, the court shall hear evidence and enter an order as provided herein.

(c1) Immediate income withholding. In non-IV-D cases in which a child support order is initially entered on or after January 1, 1994, an obligor is

subject to income withholding immediately upon entry of the order, unless either of the following applies:

a. One of the parties demonstrates, and the court finds, that there is good cause not to require immediate income withholding.

b. A written agreement is reached between the parties that provides for an alternative arrangement.

The term "good cause" as used in this subsection includes a reasonable and workable plan for consistent and timely payments by some means other than income withholding. In considering whether a plan is reasonable, the court may consider the obligor's employment history and record of meeting financial obligations in a timely manner.

In entering an order for immediate income withholding under this subsection, the court shall follow the requirements and procedures as specified in other sections of this Article, including amount to be withheld, multiple withholdings, notice to payor, and termination of withholding.

(d) Notice to payor and obligor. If an order for income withholding is entered, a notice of obligation to withhold shall be served on the payor as required by G.S. 1A-1, Rule 4, Rules of Civil Procedure. Copies of such notice shall be filed with the clerk of court and served upon the obligor by first class mail.

(e) Modification of withholding. When an order for withholding has been entered under this section, any party may file a motion seeking modification of the withholding based on changed circumstances. The clerk or the court on its own motion may initiate a hearing for modification when it appears that modification of the withholding is required or appropriate. (1985 (Reg. Sess., 1986), c. 949, s. 2; 1987, c. 60; 1989, c. 601, s. 4; 1993, c. 517, s. 2; 1999-293, s. 18.)

Effect of Amendments. — Session Laws 1999-293, s. 18, effective October 1, 1999, added the designations 1 to 3 in subdivision (b)(1)f.; and substituted "of the court that entered the order for child support" for "to which the obligor is directed to make child support payments" in the first sentence in subdivision (b)(2).

CASE NOTES

It was not error for a trial court to enter an order to withhold plaintiff's wages to collect child support arrearages that had been reduced to judgment. Griffin v. Griffin, 103 N.C. App. 65, 404 S.E.2d 478 (1991).

Where Illinois judgment incorporating parties' separation agreement was never registered in North Carolina and remained a valid and fully enforceable judgment of another state entitled to enforcement according to its terms in this State, the trial judge erred in not extending full faith and credit to the judgment by refusing to enforce the automatic adjustment provisions thereof, allowing defendant a credit against his child support obligation, and refusing to award pre-judgment interest to plaintiff. Glatz v. Glatz, 98 N.C. App. 324, 390 S.E.2d 763 (1990).

§ 110-136.6. Amount to be withheld.

(a) Computation of amount. When income withholding is implemented pursuant to this Article, the amount to be withheld shall include:

(1) An amount sufficient to pay current child support; and

(2) An additional amount toward liquidation of arrearages; and

(3) A processing fee of two dollars ($2.00) to cover the cost of withholding, to be retained by the payor for each withholding unless waived by the payor.

The amount withheld may also include court costs and attorneys fees as may be awarded by the court in non-IV-D cases and as may be awarded by the court in IV-D cases pursuant to G.S. 110-130.1.

(b) Limits on amount withheld. Withholding for current support, arrearages, processing fees, court costs, and attorneys fees shall not exceed forty percent (40%) of the obligor's disposable income for one pay period from the payor when there is one order of withholding. The sum of multiple withholdings, for current support, arrearages, processing fees, court costs, and attorneys fees shall not exceed:

(1) Forty-five percent (45%) of disposable income for one pay period from the payor in the case of an obligor who is supporting his spouse or other dependent children; or

(2) Fifty percent (50%) of disposable income for one pay period from the payor in the case of an obligor who is not supporting a spouse or other dependent children.

(b1) When there is an order of income withholding for current or delinquent payments of alimony or postseparation support or for any portion of the payments, the total amount withheld under this Article and under G.S. 50-16.7 shall not exceed the amounts allowed under section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. § 1673(b).

(c) Contents of order and notice. An order or advance notice for withholding and any notice to a payor of his obligation to withhold shall state a specific monetary amount to be withheld and the amount of disposable income from the applicable payor on which the amount to be withheld was determined. The notice shall clearly indicate that in no event shall the amount withheld exceed the appropriate percentage of disposable income paid by a payor as provided in subsection (b). (1985 (Reg. Sess., 1986), c. 949, s. 2; 1998-176, s. 6.)

Effect of Amendments. — The 1998 amendment, effective January 1, 1999 and applicable to actions pending on or after the effective date, added subsection (b1).

CASE NOTES

Assertion of Claim for Costs and Attorney's Fees. — The language in subsection (a) of this section allowing court costs and attorney's fees to be included in the amount withheld by the court clearly contemplates that such claims should be asserted prior to the entry of the withholding order. Therefore, the trial judge had no authority to allow plaintiff's motion for an award of attorney's fees where such motion was filed three months after the entry of the income withholding order. Glatz v. Glatz, 98 N.C. App. 324, 390 S.E.2d 763 (1990).

§ 110-136.7. Multiple withholding.

When an obligor is subject to more than one withholding for child support, withholding for current child support shall have priority over past-due support. Where two or more orders for current support exist, each family shall receive a pro rata share of the total amount withheld based on the respective child support orders being enforced. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

§ 110-136.8. Notice to payor; payor's responsibilities.

(a) Contents of notice. Notice to a payor of his obligation to withhold shall include information regarding the payor's rights and responsibilities, the amount of disposable income attributable to that payor on which that withholding is based, the penalties under this section, and the maximum percentages of disposable income that may be withheld as provided in G.S. 110-136.6.

(b) Payor's responsibilities. A payor who has been properly served with a notice to withhold is required to:

(1) Withhold from the obligor's disposable income and, within 7 business days of the date the obligor is paid, send to the State Child Support Collection and Disbursement Unit the amount specified in the notice

and the date the amount was withheld, but in no event more than the amount allowed by G.S. 110-136.6; however, if a lesser amount of disposable income is available for any pay period, the payor shall either:

a. Compute, and send the appropriate amount to the State Child Support Collection and Disbursement Unit, using the percentages as provided in G.S. 110-136.6; or

b. Request the initiating party to inform the payor of the proper amount to be withheld for that period;

(2) Continue withholding until further notice from the IV-D agency, the clerk of superior court, or the State Child Support Collection and Disbursement Unit;

(3) Withhold for child support before withholding pursuant to any other legal process under State law against the same disposable income;

(4) Begin withholding from the first payment due the obligor in the first pay period that occurs 14 days following the date the notice of the obligation to withhold was served on the payor;

(5) Promptly notify the obligee in a IV-D case, or the clerk of superior court or the State Child Support Collection and Disbursement Unit in a non-IV-D case, in writing:

a. If there are one or more orders of child support withholding for the obligor;

a1. If there are one or more orders of alimony or postseparation support withholding for the obligor;

b. When the obligor terminates employment or otherwise ceases to be entitled to disposable income from the payor, and provide the obligor's last known address, and the name and address of his new employer, if known;

c. Of the payor's inability to comply with the withholding for any reason; and

(6) Cooperate fully with the initiating party in the verification of the amount of the obligor's disposable income.

(c) Change in obligor's employment. If the obligor changes employment within the State when withholding is in effect, the requirement for withholding shall continue, and

(1) In a IV-D case, the IV-D obligee shall make any necessary adjustments to the withholding, notify the obligor and his new employer in accordance with this section, and file a copy of the adjusted withholding with the clerk of superior court;

(2) In a non-IV-D case, the clerk shall serve a notice of obligation to withhold according to the terms of the withholding order on the new employer and on the obligor; if the obligor or payor gives notice that an adjustment to the withholding order, other than the change in payor, is needed, the matter shall be scheduled for hearing before a child support hearing officer or district court judge who shall make any necessary adjustments to the withholding.

(d) The payor may combine amounts withheld from obligors' disposable incomes in a single payment to the State Child Support Collection and Disbursement Unit if the payor separately identifies by name and case number the portion of the single payment attributable to each individual obligor and the date that each payment was withheld from the obligor's disposable income.

(e) Prohibited conduct by payor; civil penalty. Notwithstanding any other provision of law, when a court finds, pursuant to a motion in the cause filed by the initiating party joining the payor as a third party defendant, with 30 days notice to answer the motion, that a payor has willfully refused to comply with the provisions of this section, such payor shall be ordered to commence

withholding and shall be held liable to the initiating party for any amount which such payor should have withheld, except that such payor shall not be required to vary the normal pay or disbursement cycles in order to comply with these provisions.

A payor shall not discharge from employment, refuse to employ, or otherwise take disciplinary action against any obligor solely because of the withholding. When a court finds that a payor has taken any of these actions, the payor shall be liable for a civil penalty. For a first offense, the civil penalty shall be one hundred dollars ($100.00). For second and third offenses, the civil penalty shall be five hundred dollars ($500.00) and one thousand dollars ($1,000), respectively. Any payor who violates any provision of this paragraph shall be liable in a civil action for reasonable damages suffered by an obligor as a result of the violation, and an obligor discharged or demoted in violation of this paragraph shall be entitled to be reinstated to his former position. The statute of limitations for actions under this subsection shall be one year pursuant to G.S. 1-54.

The clear proceeds of civil penalties provided for in this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(f) Any payor who withholds the sum provided in any notice or order to the payor shall not be liable for any penalties under this section. (1985 (Reg. Sess., 1986), c. 949, s. 2; 1987, c. 589, s. 2; 1991, c. 541, ss. 1, 2; 1997-433, s. 6; 1997-465, s. 27; 1998-17, s. 1; 1998-176, s. 7; 1998-215, s. 76; 1999-293, ss. 19, 20.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Subdivisions (b)(1)(a) and (b)(1)(b) were renumbered as subdivisions (b)(1)(i) and (b)(1)(ii) pursuant to Session Laws 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — Session Laws 1998-176, s. 7, effective January 1, 1999, and applicable to actions pending on or after the effective date, in subdivision (b)(5)a. substituted "are one or more orders of child support withholding for the obligor" for "is more than one child support withholding for the obligor", and added subdivision (b)(5)a1.

Session Laws 1998-215, s. 76, effective October 31, 1998, near the end of the second sentence of subsection (e), deleted "to be paid to the county school fund" preceding "penalty," and added the third paragraph.

Session Laws 1999-293, ss. 19 and 20, effective October 1, 1999, rewrote subdivision (b)(1), substituted "Child Support Collection and Disbursement Unit" for "collection and disbursement unit" in subdivisions (b)(2) and (5), and substituted "the State Child Support Collection and Disbursement Unit" for "each clerk of superior court" in subsection (d).

§ 110-136.9. Payment of withheld funds.

In all cases, the State Child Support Collection and Disbursement Unit shall distribute payments received from payors to the appropriate recipient. (1985 (Reg. Sess., 1986), c. 949, s. 2; 1997-443, s. 11A.118(a); 1999-293, s. 21.)

Effect of Amendments. — Session Laws 1999-293, s. 21, effective October 1, 1999, rewrote the section.

§ 110-136.10. Termination of withholding.

A requirement that income be withheld for child support shall promptly terminate as to prospective payments when the payor receives notice from the court or IV-D agency that:

(1) The child support order has expired or become invalid; or
(2) The initiating party, the obligor, and the district court judge agree to termination because there is another adequate means to collect child support or arrearages; or
(3) The whereabouts of the child and obligee are unknown, except that withholding shall not be terminated until all valid arrearages to the State are paid in full. (1985 (Reg. Sess., 1986), c. 949, s. 2.)

§ 110-137. Acceptance of public assistance constitutes assignment of support rights to the State or county.

By accepting public assistance for or on behalf of a dependent child or children, the recipient shall be deemed to have made an assignment to the State or to the county from which such assistance was received of the right to any child support owed for the child or children up to the amount of public assistance paid. The State or county shall be subrogated to the right of the child or children or the person having custody to initiate a support action under this Article and to recover any payments ordered by the court of this or any other state. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 13.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

CASE NOTES

Constitutionality. — The requirement that an Aid to Families with Dependent Children applicant must assign the support payments to the State, which then, in effect, remits the amount collected to the custodial parent as part of the AFDC payment to be used for the benefit of the entire family, does not modify the child's interest in the use of the money so dramatically that it constitutes a taking of the child's property. Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987).

Limitation of Assignment to Amount of Assistance Paid. — There is no conflict between the federal guidelines and the provision of this section which limits the assignment to the amount of public assistance paid. State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

Intervention in Support Action Brought by State. — The language of this section operates to assign to the state or county only the right to reimbursement for those amounts of support money provided through AFDC. Thus grandmother who had cared for child since her birth and had applied for assistance from the AFDC program retained her interest in defendant father's support obligation, and was entitled to intervene in an action for child support brought against defendant by the State. State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 319 N.C. 354, 354 S.E.2d 501 (1987).

Assignee of Right to Child Support Payments May Contest Elimination of Arrearages. — This section clearly provides for assignment of the right to child support payments to the State or county to the extent that they provide support money, and the fact that arrearages accumulated before Social Services rendered aid is of no legal significance; thus, Social Services, as assignee of the right to child support payments, has standing to contest the elimination of arrearages. Tate v. Tate, 95 N.C. App. 774, 384 S.E.2d 48 (1989).

Because mother received Aid to Families with Dependent Children (AFDC) benefits, she partially assigned her right "to any child support owed for the child" to Department of Social Services (DSS). Accordingly, DSS' status as assignee gave it a direct interest in the termination proceeding which will be forever impaired absent its ability to intervene under N.C.R.Civ.P. 24(a)(2). Hill v. Hill, 121 N.C. App. 510, 466 S.E.2d 322 (1996).

Past Public Assistance Debt Owed by Indian. — The exercise of state court jurisdiction over paternity actions, where the mother, the child, and the putative father are all Indians living on the reservation, unduly infringes on tribal self-governance. However, once paternity is established, the state courts have subject matter jurisdiction over causes of action brought by the State pursuant to requirements

of the Aid to Families with Dependent Children program to collect a debt owed to the State for past public assistance and to obtain a judgment for future child support. Jackson County ex rel. Child Support Enforcement Agency ex rel. Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413, rehearing denied, 319 N.C. 412, 354 S.E.2d 713, cert. denied, 484 U.S. 826, 108 S. Ct. 93, 98 L. Ed. 2d 54 (1987).

No Privity Between State and County Support Program. — Where the State brings an action seeking to establish paternity and recover public assistance paid on behalf of a State-administered child support enforcement program, the State is not in privity with a county-administered child support enforcement program. State ex rel. Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996).

In respective actions where county DSS and the State sought to prove that defendant was the father of child and to recover past public assistance paid, the State had no control over the first action, and the interest of the State was not represented in the first action; thus, the state was not in privity with county DSS and the doctrines of res judicata and collateral estoppel did not bar the State's action. State ex rel. Tucker v. Frinzi, 344 N.C. 411, 474 S.E.2d 127 (1996).

Applied in Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 311 N.C. 580, 319 S.E.2d 224 (1984); Cartrette v. Cartrette, 73 N.C. App. 169, 325 S.E.2d 671 (1985).

Cited in Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980); Durham County v. Riggsbee, 56 N.C. App. 744, 289 S.E.2d 579 (1982); Wilkes County ex rel. Child Support Enforcement Agency ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983).

§ 110-138. Duty of county to obtain support.

Whenever a county department of social services receives an application for public assistance on behalf of a dependent child, and it shall appear to the satisfaction of the county department that the child has been abandoned by one or both responsible parents, or that the responsible parent(s) has failed to provide support for the child, the county department shall without delay notify the designated representative who shall take appropriate action under this Article to provide that the parent(s) responsible supports the child. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 14.)

Legal Periodicals. — For survey of 1980 constitutional law, see 59 N.C.L. Rev. 1097 (1981).

For article, "Using Hindsight to Change Child Support Obligations: A Survey of Retroactive Modification and Reimbursement of Child Support in North Carolina," see 10 Campbell L. Rev. 111 (1987).

CASE NOTES

County has the authority and the duty to pursue an action against the responsible parent for the maintenance of the child and recovery of amounts paid by the county for support of the child. The county may bring the action in the name of the mother or in its own name. She is in either case required to cooperate with the county in the trial of the action. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

County is the real party in interest in an action to recover amounts paid by the county for support of a child. The child's mother is not the real party in interest. By accepting public assistance, she assigned her right to child support to the county. Settle ex rel. Sullivan v. Beasley, 309 N.C. 616, 308 S.E.2d 288 (1983).

Quoted in Jackson County ex rel. Child Support Enforcement Agency ex rel. Smoker v. Smoker, 115 N.C. App. 400, 445 S.E.2d 408 (1994).

Cited in Wake County ex rel. Carrington v. Townes, 53 N.C. App. 649, 281 S.E.2d 765 (1981); State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 110-138.1. Duty of judicial officials to assist in obtaining support.

Any party to whom child support has been ordered to be paid, and who has failed to receive the ordered support payments for two consecutive months,

may make application to a magistrate for issuance of criminal process against the responsible parent for violation of G.S. 14-322. If the magistrate determines that the applicant has failed to receive the ordered support for two consecutive months, and that the responsible parent has willfully neglected or refused to make such payments, he shall make a finding of probable cause and issue criminal process for violation of G.S. 14-322. It shall be the duty of the District Attorney to prosecute such charges according to law. It shall be the duty of the Clerk of Superior Court to assist the applicant in making such application to the magistrate for the issuance of criminal process, and to supply such necessary child support records as are in his possession to the magistrate, District Attorney, and the Court. (1981, c. 613, s. 4.)

§ 110-139. Location of absent parents.

(a) The Department of Health and Human Services shall attempt to locate absent parents for the purpose of establishing paternity of and/or securing support for dependent children. The Department is to serve as a registry for the receipt of information which directly relates to the identity or location of absent parents, to assist any governmental agency or department in locating an absent parent, to answer interstate inquiries concerning deserting parents, and to develop guidelines for coordinating activities with any governmental department, board, commission, bureau or agency in providing information necessary for the location of absent parents.

(b) In order to carry out the responsibilities imposed under this Article, the Department may request from any governmental department, board, commission, bureau or agency information and assistance. All State, county and city agencies, officers and employees shall cooperate with the Department in the location of parents who have abandoned and deserted children with all pertinent information relative to the location, income and property of such parents, notwithstanding any provision of law making such information confidential. All nonjudicial records maintained by the Department pertaining to child-support enforcement shall be confidential, and only duly authorized representatives of social service agencies, public officials with child-support enforcement and related duties, and members of legislative committees shall have access to these records.

(c) Notwithstanding any other provision of law making such information confidential, an employer doing business in this State or incorporated under the laws of this State shall provide the Department with the following information upon certification by the Department that the information is needed to locate a parent for the purpose of collecting child support or to enforce an order for child support: full name, social security account number, date of birth, home address, wages, existing or available medical, hospital, and dental insurance coverage, and number of dependents listed for tax purposes.

(d) Notwithstanding any other provision of law making this information confidential, including Chapter 53B of the General Statutes, any utility company, cable television company, or financial institution, including federal, State, commercial, or savings banks, savings and loan associations and cooperative banks, federal or State chartered credit unions, benefit associations, insurance companies, safe deposit companies, money market mutual funds, and investment companies doing business in this State or incorporated under the laws of this State shall provide the Department of Health and Human Services with the following information upon certification by the Department that the information is needed to locate a parent for the purpose of collecting child support or to establish or enforce an order for child support: full name, social security number, address, telephone number, account numbers, and other identifying data for any person who maintains an account at

the utility company, cable television company, or financial institution. A utility company, cable television company, or financial institution that discloses information pursuant to this subsection in good faith reliance upon certification by the Department is not liable for damages resulting from the disclosure.

(e) Subsection (d) of this section shall not apply to telecommunication utilities or providers of electronic communication service to the general public.

(f) There is established the State Child Support Collection and Disbursement Unit. The duties of the Unit shall be the collection and disbursement of payments under support orders for all cases. The Department may administer and operate the Unit or may contract with another State or private entity for the administration and operation of the Unit. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 15; 1987, c. 591; 1991, c. 419, s. 1; 1995, c. 538, s. 4; 1997-433, ss. 8.1, 9.1; 1997-443, s. 11A.118(a); 1998-17, s. 1; 1999-293, s. 22.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Effect of Amendments. — Session Laws 1999-293, s. 22, effective October 1, 1999, rewrote subsection (f).

CASE NOTES

Applied in Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979).

Cited in State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

OPINIONS OF ATTORNEY GENERAL

Public Officials to Furnish Otherwise Confidential Information Concerning Employees. — State, county, and city officials having custody of personnel records of their respective employees (both past and present) must furnish otherwise confidential locational information concerning these employees to the Department of Human Resources when, at the request of a designated local child support enforcement program representative, the Department is fulfilling its obligations under this section to locate responsible parents for purposes of establishing and enforcing their child support obligations as levied by Article 9, Chapter 110. See opinion of Attorney General to Mr. Philip Powell, Personnel Director, N.C. Department of Agriculture, Raleigh, N.C., 48 N.C.A.G. 85 (1979).

§ 110-139.1. Access to federal parent locator service; parental kidnapping and child custody cases.

(a) Except as otherwise provided in this section, the parent locator service of the Department of Health and Human Services shall transmit, upon payment of the fee prescribed by federal law, requests for information as to the whereabouts of any parent or child to the federal parental locator service when such requests are made by judges, clerks of superior court, district attorneys, or United States attorneys, and when the information is to be used to locate the parent or child for the purpose of enforcing State or federal law with respect to:

(1) The unlawful taking or restraint of a child;
(2) Making or enforcing a child custody determination, including visitation orders;
(3) Establishing paternity; or
(4) Establishing, setting or modifying the amount of, or enforcing child support obligations.

The Department shall not disclose any information from or through the parent locator service if there is reasonable evidence of domestic violence or child

abuse and the disclosure of the information could be harmful to the custodial parent or the child of the custodial parent.

(b) For the purpose of this section, custody determination means a judgment, decree, or other order of the court providing for the custody or visitation of a child and includes permanent or temporary orders, and initial orders and modifications.

(c) All nonjudicial records maintained by the Department pertaining to the unlawful taking or restraint of a child or child custody determinations shall be confidential, and only individuals directly connected with the administration of the child support enforcement program and those authorized herein shall have access to these records. (1983, c. 15, s. 1; 1997-433, s. 8.2; 1997-443, s. 11A.118(a); 1998-17, s. 1.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-139.2. Data match system; agreements with financial institutions.

(a) The Department of Health and Human Services and financial institutions doing business in this State shall enter into mutual agreements for the purpose of facilitating the enforcement of child support obligations. The agreements shall provide for the development and operation of a data match system that will enable the financial institutions to provide to the Department on a quarterly basis the information required under G.S. 110-139(d). Financial institutions shall provide the information upon certification by the Department that the person about whom the information is requested is subject to a child support order and the information is necessary to enforce the order. The Department may pay a reasonable fee to the financial institution for conducting the data match required under this section provided that the fee shall not exceed the actual costs incurred by the financial institution to conduct the match.

(b) A financial institution shall not be liable under any State law, including but not limited to Chapter 53B of the General Statutes, for disclosure of information to the State child support agency under this section, and for any other action taken by the financial institution in good faith to comply with this section or with G.S. 110-139.

(c) As used in this subdivision, a financial institution includes federal, State, commercial, or savings banks, savings and loan associations and cooperative banks, federal or State chartered credit unions, benefit associations, insurance companies, safe deposit companies, money market mutual funds, and investment companies doing business in this State or incorporated under the laws of this State. (1997-433, s. 9; 1997-443, s. 11A.122; 1998-17, s. 1.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-139.3. High-volume, automated administrative enforcement in interstate cases (AEI).

Upon request of another state, the Department of Health and Human Services shall use automated data processing to search State databases and

determine if information is available regarding a parent who owes a child support obligation and shall seize identified assets using the same techniques as used in intrastate cases. Any request by another state to enforce support orders shall certify the amount of each obligor's debt and that appropriate due process requirements have been met by the requesting state with respect to each obligor. The Department of Health and Human Services shall likewise transmit to other states requests for assistance in enforcing support orders through high-volume, automated administrative enforcement where appropriate. (1999-293, s. 7.)

Editor's Note. — Session Laws 1999-293, s. 24, made this section effective October 1, 1999.

§ 110-140. Conformity with federal requirements; restriction on options without federal funding.

(a) Nothing in this Article is intended to conflict with any provision of federal law or to result in the loss of federal funds.

(b) Effective July 24, 1997, the Department of Health and Human Services shall not elect any child support distribution option for families receiving cash assistance under the State Plan for the Temporary Assistance for Needy Families (TANF) Block Grant Program for which the federal government does not provide funding to the State to exercise the option. (1975, c. 827, s. 1; 1997-223, s. 1; 1997-443, s. 11A.122.)

Editor's Note. — Session Laws 1997-223, s. 1, was codified as subsection (b) of this section at the direction of the Revision of Statutes.

CASE NOTES

Cited in State ex rel. Pender County Child Support Enforcement Agency ex rel. Crews v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

§ 110-141. Effectuation of intent of Article.

The North Carolina Department of Health and Human Services shall supervise the administration of this program in accordance with federal law and shall cause the provisions of this Article to be effectuated and to secure child support from absent, deserting, abandoning and nonsupporting parents.

Effective July 1, 1986, the entity, whether the board of county commissioners or the Department of Health and Human Services, that is administering, or providing for the administration of, this program in each county on June 30, 1986, shall continue to administer, or provide for the administration of, this program in that county, with one exception. If a county program is being administered by the Department of Health and Human Services on June 30, 1986, and if the board of county commissioners of this county desires on or after that date to assume responsibility for the administration of the program, the board of county commissioners shall notify the Department of Health and Human Services between July 1 and September 1 of the current fiscal year. The obligations of the board of county commissioners to assume responsibility for the administration of the program shall not commence prior to July 1 of the subsequent fiscal year. Until that time, it is the responsibility of the Depart-

ment of Health and Human Services to administer or provide for the administration of the program in the county.

A county may negotiate alternative arrangements to the procedure outlined in G.S. 110-130 for designating a local person or agency to administer the provisions of this Article in that county. (1975, c. 827, s. 1; 1977, 2nd Sess., c. 1186, s. 16; 1979, c. 488; 1983 (Reg. Sess., 1984), c. 1034, s. 76; 1985, c. 244; c. 479, s. 103; 1985 (Reg. Sess., 1986), c. 1014, s. 129; 1997-443, s. 11A.118(a).)

§ 110-142. Definitions; suspension and revocation of occupational, professional, or business licenses of obligors who are delinquent in court-ordered child support, or who are not in compliance with subpoenas issued pursuant to child support or paternity establishment proceedings.

The definitions in G.S. 110-129 and G.S. 147-54.12 apply to this section and G.S. 110-142.1, and G.S. 110-142.2. In addition, to these sections the following definitions apply:

(1) "Applicant" means any person applying for issuance or renewal of a license.

(2) "Board" means any department, division, agency, officer, board, or other unit of State government that issues licenses.

(3) "Certified list" means a list provided by the designated representative to the Department of Health and Human Services that verifies, under penalty of perjury, that the names contained therein are obligors who have been found to be out of compliance with a judgment or order for support in a IV-D case.

(4) "Compliance with an order for support" means that, as set forth in a judgment or order for child support or family support, the obligor is no more than 90 calendar days in arrears in making payments for current support, in making periodic payments on a support arrearage, or in making periodic payments on a reimbursement for public assistance, has obtained a judicial finding that precludes enforcement of the order, or has entered into a payment schedule, including G.S. 110-142.1(h), for the child support arrearage with the approval of the obligee in a IV-D case.

(5) "License" means (i) for the purposes of G.S. 110- 142.1, a license, certificate, permit, registration, or any other authorization issued by a board that allows a person to engage in a business, occupation, or profession or (ii) for the purposes of G.S. 110-142.2, a license to operate a regular or commercial motor vehicle, or to participate in hunting, fishing, or trapping.

(6) "Licensee" means any person holding a license.

(7) "Obligor" means the individual who owes a duty to make child support payments under a court order. (1995, c. 538, s. 1.4; 1997-433, s. 5; 1997-443, s. 11A.118(a); 1998-17, s. 1.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-142.1. IV-D notified suspension, revocation, and issuance of occupational, professional, or business licenses of obligors who are delinquent in court-ordered child support or who are not in compliance with subpoenas issued pursuant to child support or paternity establishment proceedings.

(a) Effective July 1, 1996, the Department of Health and Human Services may notify any board that a person licensed by that board is not in compliance with an order for child support or has been found by the court not to be in compliance with a subpoena issued pursuant to child support or paternity establishment proceedings.

(b) The designated representative shall submit a certified list with the names, social security numbers, and last known address of individuals who are not in compliance with a child support order or with a subpoena issued pursuant to a child support or paternity establishment proceeding. The designated representative shall verify, under penalty of perjury, that the individuals listed are subject to an order for the payment of support and are not in compliance with the order, or have been found by the court to be not in compliance with a subpoena issued pursuant to a child support or paternity establishment proceeding. The verification shall include the name, address, and telephone number of the designated representative who certified the list. An updated certified list shall be submitted to the Department on a monthly basis.

The Department of Health and Human Services, Division of Social Services, Child Support Enforcement Office, shall consolidate the certified lists received from the designated representatives and, within 30 calendar days of receipt, shall furnish each board with a certified list of the individuals, as specified in this section.

(c) Each board shall coordinate with the Department of Health and Human Services, Division of Social Services, Child Support Enforcement Office, in the development of forms and procedures to implement this section.

(d) Promptly after receiving the certified list of individuals from the Department of Health and Human Services, each board shall determine whether its applicant or licensee is an individual on the list. If the applicant or licensee is on the list, the board shall immediately send notice as specified in this subsection to the applicant or licensee of the board's intent to revoke or suspend the licensee's license in 20 days from the date of the notice, or that the board is withholding issuance or renewal of an applicant's license, until the designated representative certifies that the applicant or licensee is entitled to be licensed or reinstated. The notice shall be made personally or by certified mail to the individual's last known mailing address on file with the board.

(e) Unless notified by the designated representative as provided in subsection (h) of this section, the board shall revoke or suspend the individual's license 20 days from the date of the notice to the individual of the board's intent to revoke or suspend the license. In the event that a license is revoked or application is denied pursuant to this section, the board is not required to refund fees paid by the individual.

(f) Notices shall be developed by each board in accordance with guidelines provided by the Department of Health and Human Services and shall be subject to the approval of the Department of Health and Human Services. The notice shall include the address and telephone number of the designated representative who submitted the name on the certified list, and shall emphasize the necessity of obtaining a certification of compliance from the

designated representative or the child support enforcement agency as a condition of issuance, renewal, or reinstatement of the license. The notice shall inform the individual that if a license is revoked or application is denied pursuant to this subsection, the board is not required to refund fees paid by the individual. The Department of Health and Human Services shall also develop a form that the individual shall use to request a review by the designated representative. A copy of this form shall be included with every notice sent pursuant to subsection (d) of this section.

(g) The Department of Health and Human Services shall establish review procedures consistent with this section to allow an individual to have the underlying arrearage and any relevant defenses investigated, to provide an individual information on the process of obtaining a modification of a support order, or, if the circumstances so warrant, to provide an individual assistance in the establishment of a payment schedule on arrears.

(h) If the individual wishes to challenge the submission of the individual's name on the certified list, or if the individual wishes to negotiate a payment schedule, the individual shall within 14 days of the date of notice from the board request a review from the designated representative. The designated representative shall within six days of the date of the request for review notify the appropriate board of the request for review and direct the board to stay any action revoking or suspending the individual's license until further notice from the designated representative. The designated representative shall review the case and inform the individual in writing of the representative's findings and decision upon completion of the review. If the findings so warrant, the designated representative shall immediately send a notice to the appropriate board certifying the individual's compliance with this section. The agreement shall also provide for the maintenance of current support obligations and shall be incorporated into a consent order to be entered by the court. If the individual fails to meet the conditions of this subsection, the designated representative shall notify the appropriate board to immediately revoke or suspend the individual's license. Upon receipt of notice from the designated representative, the board shall immediately revoke or suspend the individual's license.

(i) The designated representative shall notify the individual in writing that the individual may, by filing a motion, request any or all of the following:

(1) Judicial review of the designated representative's decision.

(2) A judicial determination of compliance.

(3) A modification of the support order.

The notice shall also contain the name and address of the court in which the individual shall file the motion and inform the individual that the individual's name shall remain on the certified list unless the judicial review results in a finding by the court that the the individual is in compliance with this section. The notice shall also inform the individual that the individual must comply with all statutes and rules of court regarding motions and notices of hearing and that any motion filed under this section is subject to the limitations of G.S. 50-13.10.

(j) The motion for judicial review of the designated representative's decision shall state the grounds for which review is requested and judicial review shall be limited to those stated grounds. After service of the request for review, the court shall hold an evidentiary hearing at the next regularly scheduled session for the hearing of child support matters in civil district court. The request for judicial review shall be served by the individual upon the designated representative who submitted the individual's name on the certified list within seven calendar days of the filing of the motion.

(k) If the judicial review results in a finding by the court that the individual is no longer in arrears or that the individual's license should be reinstated to

allow the individual an opportunity to comply with a payment schedule on arrears or reimbursement and current support obligations, the designated representative shall immediately send a notice to the appropriate board certifying the individual's compliance with this section. If the judicial review results in a finding that the individual has complied with or is no longer subject to the subpoena that was the basis for the revocation, then the designated representative shall immediately send a notice to the appropriate board certifying the individual's compliance with this section. In the event of an appeal from judicial review, the license revocation shall not be stayed unless the court specifically provides otherwise.

(*l*) The Department of Health and Human Services shall prescribe forms for use by the designated representative. When the individual is no longer in arrears or negotiates an agreement with the designated representative for a payment schedule on arrears or reimbursement the designated representative shall mail to the individual and the appropriate board a notice certifying that the individual is in compliance. The receipt of certification shall serve to notify the individual and the board that, for the purposes of this section, the individual is in compliance with the order for support. When the individual has complied with or is no longer subject to a subpoena issued pursuant to a child support or paternity establishment proceeding, the designated representative shall mail to the individual and the appropriate board a notice certifying that the individual is in compliance. The receipt of certification shall serve to notify the individual and the board that the individual is in compliance with this section.

(m) The Department of Health and Human Services may enter into interagency agreements with the boards necessary to implement this section.

(n) The procedures specified in Articles 3 and 3A of Chapter 150B of the General Statutes, the Administrative Procedure Act, shall not apply to the denial or failure to issue or renew a license pursuant to this section.

(o) Any board receiving an inquiry as to the licensed status of an applicant or licensee who has had a license denied or revoked under this section shall respond only that the license was denied or revoked pursuant to this section. Information collected pursuant to this section shall be confidential and shall not be disclosed except in accordance with the laws of this State.

(p) If any provision of this section or its application to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of this section that can be given effect without the invalid provision or application, and to this end the provisions of this section are severable. (1995, c. 538, s. 1.4; 1997-433, s. 5.1; 1997-443, ss. 11A.118(a), 122; 1998-17, s. 1.)

Editor's Note. — This section was amended by Session Laws 1997-433, s. 5.1, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

§ 110-142.2. Suspension, revocation, restriction of license to operate a motor vehicle or hunting, fishing, or trapping licenses; refusal of registration of motor vehicle.

(a) Effective December 1, 1996, notwithstanding any other provision of law, when an individual is at least 90 days in arrears in making child support payments, or has been found by the court to be not in compliance with a subpoena issued pursuant to child support or paternity establishment proceed-

ings, the child support enforcement agency may apply to the court, pursuant to the regular show cause and contempt provisions of G.S. 50-13.9(d), for an order doing any of the following:

(1) Revoking the individual's regular or commercial license to operate a motor vehicle;
(2) Revoking the individual's hunting, fishing, or trapping licenses;
(3) Directing the Department of Transportation, Division of Motor Vehicles, to refuse, pursuant to G.S. 20-50.4, to register the individual's motor vehicle.

(b) Upon finding that the individual has willfully failed to comply with the child support order or with a subpoena issued pursuant to child support proceedings, and that the obligor is at least 90 days in arrears, or upon a finding that an individual subject to a subpoena issued pursuant to child support or paternity establishment proceedings has failed to comply with the subpoena, the court may enter an order instituting the sanctions as provided in subsection (a) of this section. If an individual is adjudicated to be in civil or criminal contempt for a third or subsequent time for failure to comply with a child support order, the court shall enter an order instituting any one or more of the sanctions, if applicable, as provided in subsection (a) of this section. The court may stay the effectiveness of the sanctions upon conditions requiring the obligor to make full payment of the delinquency over time. Any court-ordered payment plan under this subsection shall require the individual to extinguish the delinquency within a reasonable period of time. In determining the amount to be applied to the delinquency, the court shall consider the amount of the debt and the individual's financial ability to pay. The payment shall not exceed the limits under G.S. 110-136.6(b). The individual shall make an immediate initial payment representing at least five percent (5%) of the total delinquency or five hundred dollars ($500.00), whichever is less. Any stay of an order under this subsection shall also be conditioned upon the obligor's maintenance of current child support. The court may stay the effectiveness of the sanctions against an individual subject to a subpoena issued pursuant to child support or paternity establishment proceedings upon a finding that the individual has complied with or is no longer subject to the subpoena. Upon entry of an order pursuant to this section that is not stayed, the individual shall surrender any licenses revoked by the court's order to the child support enforcement agency and the agency shall forward a report to the appropriate licensing authority within 30 days of the order.

(c) If the individual's regular or commercial drivers license is revoked under this section and the court, after the hearing, makes a finding that a license to operate a motor vehicle is necessary to the individual's livelihood, the court may issue a limited driving privilege, with those terms and conditions applying as the court shall prescribe. An individual whose license has been revoked for reasons not related to this section and whose license remains revoked at the time of the hearing shall not be eligible and may not be issued a limited driving privilege. The court may modify or revoke the limited driving privilege pursuant to G.S. 20-179.3(i).

(d) An individual may file a request with the child support enforcement agency for certification that the individual is no longer delinquent in child support payments upon submission of proof satisfactory to the child support enforcement agency that the individual has paid the delinquent amount in full. An individual subject to a subpoena issued pursuant to a child support or paternity establishment proceeding may file a request with the child support enforcement agency for certification that the individual has complied with or is no longer subject to the subpoena. The child support enforcement agency shall provide a form to be used by the individual for a request for certification. If the child support enforcement agency finds that the individual has met the

requirements for reinstatement under this subsection, then the child support enforcement agency shall certify that the individual is no longer delinquent or that the individual has complied with or is no longer subject to a subpoena issued pursuant to child support or paternity establishment proceedings and shall provide a copy of the certification to the individual.

(e) If licensing privileges are revoked under this section, the individual may petition the district court for a reinstatement of such privileges. The court may order the privileges reinstated conditioned upon full payment of the delinquency over time, or. as applicable, may order the reinstatement if the court finds that the individual has complied with or is no longer subject to the subpoena issued pursuant to paternity establishment proceedings. Any order allowing license reinstatement shall additionally require the obligor's maintenance of current child support. Upon reinstatement under this subsection, the child support enforcement agency shall certify that the individual is no longer delinquent, or, as applicable, that the individual has complied with or is no longer subject to the subpoena issued pursuant to child support or paternity establishment proceedings and shall provide a copy of the certification to the individual, as applicable.

(f) Upon receipt of certification under subsection (d) or (e) of this section, the Division of Motor Vehicles shall reinstate the license to operate a motor vehicle in accordance with G.S. 20-24.1, and remove any restriction of the individual's motor vehicle registration.

(g) Upon receipt of certification under subsection (d) or (e) of this section, the licensing board having jurisdiction over the individual's hunting, fishing, or trapping license shall reinstate the license.

(h) If the court imposes sanctions under subdivision (3) of subsection (a) of this section and the sanctions are stayed upon conditions as provided in subsection (b) of this section, the child support enforcement agency may, without any further application to the court, notify the Division of Motor Vehicles if the individual violates the terms and conditions of the stay. The Division shall then take such action as provided in subdivision (3) of subsection (a) of this section. The Division shall not remove any restriction of the individual's motor vehicle registration, until receipt of certification pursuant to subsection (d) or (e) of this section.

(i) The Department of Health and Human Services, the Administrative Office of the Courts, the Division of Motor Vehicles, and the Department of Environment and Natural Resources shall work together to develop the forms and procedures necessary for the implementation of this process. (1995, c. 538, s. 1.4; 1997-433, s. 5.2; 1997-443, ss. 11A.118(a), 11A.119(a); 1998-17, s. 1; 1999-293, s. 2.)

Editor's Note. — Session Laws 1998-17, s. 1 amended Session Laws 1997-433, s. 11.3 to delete the June 30, 1998 expiration date for all enactments and amendments made by Session Laws 1997-433.

Session Laws 1999-293, s. 24 provides that the mandatory sanctions under G.S. 110-142.2(b), as amended by Session Laws 1999-293, s. 2, apply when an obligor is adjudicated to be in civil or criminal contempt for a third or subsequent time after the act becomes effective.

Effect of Amendments. — Session Laws 1999-293, s. 2, effective October 1, 1999, in subsection (b), added the second sentence, added the fourth through seventh sentences, and, in the eighth sentence, deleted "such" following "Any" and inserted "of an order under this subsection."

§§ 110-143 through 110-146: Reserved for future codification purposes.

Article 10.

Prevention of Child Abuse and Neglect.

§§ 110-147 through 110-150: Repealed by Session Laws 1998, c. 202, s. 5, effective July 1, 1999.

Cross References. — For prevention of abuse and neglect, see now § 7B-1300 et seq.

Chapter 111.

Aid to the Blind.

Article 1.

General Duties of Department of Health and Human Services.

Sec.

111-1 through 111-3. [Repealed.]
111-4. Register of State's blind.
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Article 1.

General Duties of Department of Health and Human Services.

§§ 111-1 through 111-3: Repealed by Session Laws 1973, c. 476, s. 143.

Cross References. — As to certain financial assistance and in-kind goods not being considered in determining assistance paid under Chapters 108A and 111, see § 108A-26. As to the organization of the Commission for the Blind, see §§ 143B-157 through 143B-160. As to rights of handicapped persons generally, see Chapter 168. For the Handicapped Persons Protection Act, see Chapter 168A.

Editor's Note. — Session Laws 1973, c. 476, s. 143(a), provides that whenever the words "North Carolina State Commission for the Blind" are used or appear in any statute or law of this State, the same shall be deleted and the words "Department of Human Resources" or "Department," as appropriate, shall be inserted in lieu thereof, unless otherwise provided for in the Executive Organization Act of 1973, with the exception that in certain specified references the words "North Carolina State Commission for the Blind" shall be deleted and the words "Commission for the Blind" shall be inserted in lieu thereof. In this Chapter as it stood before the 1973 amendments, the North Carolina State Commission for the Blind was variously referred to as the "North Carolina State Commission for the Blind," the "State Commission for the Blind," or simply as the "Commission." In order to carry out the evident intent of the 1973 act, the codifiers have, in the sections set out herein, substituted references to the Department of Human Resources or the Commission for the Blind, as appropriate, for references to the former North Carolina State Commission for the Blind, even where that agency was not referred to by its full title.

§ 111-4. Register of State's blind.

It shall be the duty of the Department of Health and Human Services to cause to be maintained a complete register of the blind in the State of North Carolina, which shall describe the condition, cause of blindness, capacity for education and industrial training of each, with such other facts as may seem to the Department of Health and Human Services to be of value. (1935, c. 53, s. 3; 1973, c. 476, s. 143; 1975, c. 19, s. 35; 1997-443, s. 11A.118(a).)

§ 111-5. Information and aid bureaus.

The Department of Health and Human Services shall maintain or cause to be maintained one or more bureaus of information and industrial aid, the object of which shall be to aid the blind in finding employment and to teach them trades and occupations which may be followed in their own homes, and to assist them in whatever manner may seem advisable to the Department of Health and Human Services in disposing of the products of their home industry. (1935, c. 53, s. 4; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-6. Training schools and workshops; training outside State; sale of products; direct relief; matching of federal funds.

The Department of Health and Human Services may establish one or more training schools and workshops for employment of suitable blind persons and shall be empowered to equip and maintain the same, to pay to employees suitable wages, and to devise means for the sale and distribution of the products thereof, and may cooperate with shops already established. The Department may also pay for lodging, tuition, support and all necessary expenses for blind persons during their training or instructions in any suitable occupation, whether it be in industrial, commercial, or professional or any other establishments, schools or institutions, or through private instruction wherever in the judgment of the Department such instruction or training can be obtained, when in its judgment the training or instruction in question will contribute to the efficiency or self-support of such blind persons. When special educational opportunities cannot be had within the State, they may be arranged for, at the discretion of the Department, outside of the State. The Department may also, whenever it thinks proper, aid individual blind persons or groups of blind persons to become self-supporting by furnishing material or equipment to them, and may also assist them in the sale and distribution of their products. Any portion of the funds appropriated to the Department under the provisions of this Chapter providing for the rehabilitation of the blind and the prevention of blindness may, when the Commission for the Blind deems wise, be given in direct money payments to the needy blind in accordance with the provisions of G.S. 111-13 to 111-26, and whenever possible such funds may be matched by funds provided by the federal Social Security Act. (1935, c. 53, s. 5; 1937, c. 124, s. 16; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-6.1. Rehabilitation center for the adult blind.

In addition to other powers and duties granted it by law, the Department of Health and Human Services is hereby authorized and directed to establish and operate a rehabilitation center for the blind for the purpose of assisting them in their mental, emotional, physical, and economic adjustments to blindness through the application of proper tests, measurements, and intensive training in order that they may develop manual dexterity, obstacle and direction awareness, acceptable work habits, and maximum skills in industrial and commercial processes.

The Commission shall make all rules and regulations necessary for this purpose and the Department is hereby authorized to enter into any agreement or contract; to purchase or lease property, both real and personal, accept grants and gifts of whatever nature, and to do all other things necessary to carry out the intent and purposes of such a rehabilitation center.

The Department of Health and Human Services is hereby authorized to receive grants-in-aid from the federal government for carrying out the provisions of this section, as well as for other related rehabilitation programs for the North Carolina blind, under the provisions of the act of Congress known as the Barden-Rehabilitation Act (Volume 57, United States Statutes at Large, Chapter 190). Visually handicapped persons as defined in G.S. 111-11, who are physically present in North Carolina may enjoy the benefits of this section or any other related rehabilitation benefits under the Barden-Rehabilitation Act. (1945, c. 698; 1951, c. 319, s. 4; 1971, c. 1215, s. 2; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-7. Promotion visits.

The Department of Health and Human Services may ameliorate the condition of the blind by promotion visits among them and teaching them in their homes as the Department of Health and Human Services may deem advisable. (1935, c. 53, s. 6; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-8. Investigations; eye examination and treatment.

It shall be the duty of this [the] Department of Health and Human Services to continue to make inquiries concerning the cause of blindness, to learn what proportion of these cases are preventable and to inaugurate and cooperate in any such measure for the State of North Carolina as may seem wise. The Department of Health and Human Services may arrange for the examination of the eyes of the individual blind and partially blind persons and may secure and pay for medical and surgical treatment for such persons whenever in the judgment of a qualified opthalmologist the eyes of such person may be benefited thereby. (1935, c. 53, s. 7; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-8.1. Certain eye examinations to be reported to Department of Health and Human Services.

Whenever, upon examination at a clinic, hospital, or other institution, or elsewhere by a physician, optometrist or other person examining eyes any person is found to have no vision or vision with glasses which is so defective as to prevent the performance of ordinary activities for which eyesight is essential, the physician, the superintendent of such institution or other person who conducted or was in charge of the examination shall within 30 days report the results of the examination to the Department of Health and Human Services. (1945, c. 72, s. 3; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§§ 111-9, 111-10: Repealed by Session Laws 1973, c. 476, s. 143.

§ 111-11. Definition of visually handicapped person.

For purpose of this Chapter, visually handicapped persons are those persons who are totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential. (1935, c. 53, s. 10; 1939, c. 124; 1971, c. 1215, s. 3.)

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Applicability to Chapter 168. — The restrictive definition of "visually handicapped" in this section should not be applied in a manner which limits the meaning of "visual disability" in § 168-1. The General Assembly did not intend the narrow definition "visually handicapped" in this section to control the meaning of the term "visual disabilities" in § 168-1; rather, the General Assembly intended that the definition in this section would apply only when the specific term "visually handicapped" was used. Burgess v. Joseph Schlitz Brewing Co., 298 N.C. 520, 259 S.E.2d 248 (1979).

Quoted in Burgess v. Joseph Schlitz Brewing Co., 39 N.C. App. 481, 250 S.E.2d 687 (1979).

§ 111-12: Repealed by Session Laws 1973, c. 476, s. 143.

§ 111-12.1. Acceptance of private contributions for particular facilities authorized.

In addition to other powers and duties granted it by law, the Department of Health and Human Services is hereby authorized to accept contributions of funds made by any private individual, agency or organization even though a condition of the contribution may be that the funds be utilized for the establishment of a particular public or private nonprofit workshop, rehabilitation center or other facility established for the purpose of providing training or employment for eligible blind persons. (1965, c. 906, s. 1; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-12.2. Contributions treated as State funds to match federal funds.

The Department of Health and Human Services is further authorized to treat any funds received in accordance with G.S. 111-12.1 as State funds for the purpose of accepting any funds made available under federal law on a matching basis for the establishment of such facilities. (1965, c. 906, s. 2; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-12.3. Rules and regulations as to receiving and expending contributions.

The Department of Health and Human Services shall make all rules and regulations necessary for the purpose of receiving and expending any funds mentioned in G.S. 111-12.1 to 111-12.3 which are consistent with the principle of obtaining maximum federal participation and in accordance with established budget procedures of the North Carolina Department of Administration. (1965, c. 906, s. 3; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-12.4: Repealed by Session Laws 1973, c. 476, s. 143.

§ 111-12.5. Reserve and operating capital fund.

Funds now held by the Bureau of Employment of the North Carolina State Commission for the Blind or its successor organization not exceeding one hundred thousand dollars ($100,000) shall be retained by the Department of Health and Human Services as a reserve and operating capital fund to be expended by the Department of Health and Human Services for its lawful purposes and objectives in accordance with this Chapter. (1967, c. 1214; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-12.6. Disposition of funds deposited with or transferred to State Treasurer.

All funds required under this Article to be deposited with or which have been heretofore transferred to the State Treasurer by the Bureau of Employment of the Department of Health and Human Services, and all future net earnings and accumulations of said Bureau or its successor, other than the one hundred thousand dollars ($100,000) reserve fund herein provided for, from whatever source or sources shall be periodically, but not less frequently than annually, paid over to and retained by the State Treasurer as a separate fund or account.

The funds deposited with the State Treasurer shall be invested and the income from corpus shall inure to the sole benefit of the Department of Health and Human Services. The income and corpus shall be expended for services to and for the benefit of visually handicapped persons in North Carolina upon recommendation of the Commission for the Blind, by and with the approval of the Governor as the Director of the Budget. (1967, c. 1214; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

ARTICLE 2.

Aid to the Needy Blind.

§ 111-13. Administration of assistance; objective standards for personnel; rules and regulations.

The Department of Health and Human Services shall be charged with the supervision of the administration of assistance to the needy blind under this Article, and said Department shall establish objective standards for personnel to be qualified for employment in the administration of this Article, and said Commission for the Blind shall make all rules and regulations as may be necessary for carrying out the provisions of this Article, which rules and regulations shall be binding on the boards of county commissioners and all agencies charged with the duties of administering this Article. (1937, c. 124, s. 2; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

CASE NOTES

Cited in Hughey v. Cloninger, 297 N.C. 86, 253 S.E.2d 898 (1979).

§ 111-14. Application for benefits under Article; investigation and award by county commissioners.

Any person claiming benefit under this Article, shall file with the commissioners of the county in which he or she is residing an application in writing, in duplicate, upon forms prescribed by the Department of Health and Human Services, which application shall be accompanied by a certificate signed by a reputable physician licensed to practice medicine in the State of North Carolina and who is actively engaged in the treatment of diseases of the human eye, or by an optometrist, whichever the individual may select, to the effect that the applicant is blind or that his or her vision with glasses is so defective as to prevent the performance of ordinary activities for which eyesight is essential. Such application may be made on the behalf of any such blind person by the Department of Health and Human Services, or by any other person. The board of county commissioners shall cause an investigation to be made by a qualified person, or persons, designated as their agents for this purpose and shall pass upon the said application without delay, determine the eligibility of the applicant, and allow or disallow the relief sought. In passing upon the application, they may take into consideration the facts set forth in the said application, and any other facts that are deemed necessary, and may at any time, within their discretion, require an additional examination of the applicant's eyes by an opthalmologist designated by the Department of Health and Human Services. When satisfied with the merits of the application, the board of county commissioners shall allow the same and grant to the applicant such relief as may be suitable and proper, according to the rules and standards

established by the Commission for the Blind, not inconsistent with this Article and in accordance with the further provisions hereof. (1937, c. 124, s. 3; 1939, c. 124; 1951, c. 319, s. 1; 1957, c. 674; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For comment on the enactment of this Article and its application, see 15 N.C.L. Rev. 369 (1937).

§ 111-15. Eligibility for relief.

Blind persons having the following qualifications shall be eligible for relief under the provisions of this Article:

(1) Whose vision with glasses is insufficient for use in ordinary occupations for which sight is essential; and

(2) Who are unable to provide for themselves the necessities of life and who have insufficient means for their own support and who have no relative or relatives or other persons in this State able to provide for them who are legally responsible for their maintenance; and

(3) Who, at the time his application is filed, is living in the State of North Carolina voluntarily with the intention of making his home in the State and not for a temporary purpose. [and]

(4) Who are not inmates of any charitable or correctional institution of this State or of any county or city thereof: Provided, that an inmate of such charitable institution may be granted a benefit in order to enable such person to maintain himself or herself outside of an institution; and

(5) Who are not, because of physical or mental condition, in need of continuing institutional care. Provided, that the State agency shall, in determining need, take into consideration any other income and resources of the individual claiming aid to the blind; except that, in making such determination, the State agency shall disregard such earned income as will enable said agency to receive the maximum grants from the federal government for such purpose. (1937, c. 124, s. 4; 1951, c. 319, s. 3; 1961, c. 666, s. 1; 1971, c. 1215, s. 1; 1981, c. 131.)

OPINIONS OF ATTORNEY GENERAL

Amount of Funds Appropriated Does Not Affect Duty of Department and County Board to Accept All Qualified Blind Applicants. — The requirement upon the Department of Human Resources and the boards of county commissioners of the individual counties to accept all duly qualified and otherwise eligible applicants for special assistance to the blind remains the same and is not reduced or limited by the amount of funds appropriated by a county or by the General Assembly for that specific purpose. See opinion of Attorney General to L. Earl Jennings, Jr., Director, Division of Services for the Blind, Dep't of Human Resources, 49 N.C.A.G. 110 (1980).

§ 111-16. Application for aid; notice of award; review.

Promptly after an application for aid is made to the board of county commissioners under this Article the Department of Health and Human Services shall be notified thereof by mail, by said county commissioners, and one of the duplicate applications for aid made before the board of county commissioners shall be transmitted with said notice.

As soon as any award has been made by the board of county commissioners, or any application declined, prompt notice thereof in writing shall be forwarded by mail to the Department of Health and Human Services and to the

applicant, in which shall be fully stated the particulars of the award or the facts of denial.

Within a reasonable time, in accordance with rules and regulations adopted by the Commission for the Blind, after action by the board of county commissioners, the applicant, if dissatisfied therewith, may appeal directly to the Commission for the Blind. Notice of such appeal must be given in writing to the board of county commissioners, and within 30 days after the receipt of such notice the board of county commissioners shall transmit to the Department of Health and Human Services copies of all proceedings and documents, including the award or denial, which may be necessary for the hearing of the said appeal, together with the grounds upon which the action was based.

As soon as may be practicable after the receipt of the said notice of appeal, the Commission for the Blind shall notify the applicant of the time and place where the hearing of such appeal will be had. The members of the Commission for the Blind shall hear the said appeal under such rules and regulations not inconsistent with this Article as it may establish, and shall provide for granting an individual whose claim for aid is denied an opportunity for fair hearing before said Commission for the Blind, and their decision shall be final. Any notice required to be given herein may be given by mail or by personally delivering in writing such notice to the clerk of the board of county commissioners or the executive director of the Department of Health and Human Services, except that notice of the time and place where the hearings of such appeals will be had shall be given by mail or by personal delivery of such notice in writing direct to the applicant.

In all cases where an appeal shall have been taken by the applicant, the Commission for the Blind shall carefully examine such award or decision, as the case may be, and shall in their discretion, approve, increase, allow or disallow any award so made. Immediately thereafter they shall notify the board of county commissioners and the applicant of such action; and if the award made by the board of county commissioners is changed, notice thereof shall be given by mail to the applicant and the board of county commissioners, giving the extent and manner in which any award has been changed.

If, in the absence of any appeal by the applicant, the North Carolina Department of Health and Human Services shall make any determination increasing or decreasing the award allowing or disallowing the same, not inconsistent with the rules and regulations promulgated by the Commission for the Blind, the applicant or board of county commissioners shall have the right, within 10 days from notice thereof, to have such order reviewed by the Commission for the Blind. The procedure in such cases shall be as provided in the section on appeals to the Commission by the applicant. (1937, c. 124, s. 5; 1971, c. 603, s. 1; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-17. Amount and payment of assistance; source of funds.

When the board of county commissioners is satisfied that the applicant is entitled to relief under the provisions of this Article, as provided in G.S. 111-14, they shall order necessary relief to be granted under the rules and regulations prescribed by the Commission for the Blind, to be paid from county, State and federal funds available, said relief to be paid in monthly payments from funds hereinafter mentioned.

At the time of fixing the annual budget for the fiscal year beginning July 1, 1937, and annually thereafter, the board of county commissioners in each county shall, based upon such information as they are able to secure and with such information as may be furnished to them by the Department of Health and Human Services, estimate the number of needy blind persons in such

county who shall be entitled to aid under the provisions of this Article and the total amount of such county's part thereof required to be paid by such county. Each county shall make appropriations for the purposes of this Article in an amount sufficient to cover its share of aid to the blind and may fund them by levy of property taxes pursuant to G.S. 153A-149 and by the allocation of other revenues whose use is not otherwise restricted by law. This provision is mandatory on each county in the State. Any court of competent jurisdiction is authorized by mandamus to enforce the foregoing provisions. No funds shall be allocated to any county by the Department of Health and Human Services until the provisions hereof have been fully complied with by such county.

In case such appropriation is exhausted within the year and is found to be insufficient to meet the county's part of the amount required for aid to the needy blind, such deficiency may be borrowed, if within constitutional limitations, at the lowest rate of interest obtainable, not exceeding six percent (6%), and provision for payment thereof shall be made in the next annual budget and tax levy.

The board of county commissioners in the several counties of the State shall cause to be transmitted to the State Treasurer their share of the total amount of relief granted to the blind applicants. Such remittances shall be made by the several counties in equal monthly installments on the first day of each month, beginning July 1, 1937. The State Treasurer shall deposit said funds and credit same to the account of the Department of Health and Human Services to be employed in carrying out the provisions of this Article.

Within the limitations of the State appropriation, the maximum payment for aid to the blind is to be such as will make possible maximum matching funds by the federal government. (1937, c. 124, s. 6; 1961, c. 666, s. 3; 1973, c. 476, s. 143; c. 803, s. 11; 1997-443, s. 11A.118(a).)

CASE NOTES

Cited in Atlantic C.L.R.R. v. Beaufort County, 224 N.C. 115, 29 S.E.2d 201 (1944).

§ 111-18. Payment of awards.

After an award to a blind person has been made by the board of county commissioners, and approved by the Department of Health and Human Services the Department of Health and Human Services shall thereafter pay to such person to whom such award is made the amount of said award in monthly payments, or in such manner and under such terms as the Department of Health and Human Services shall determine. Such payment shall be drawn upon such funds in the hands of the State Treasurer, at the instance and request and upon a proper voucher signed by the Secretary of Health and Human Services, and shall not be subject to the provisions of the Executive Budget Act as to approval of said expenditure.

It is intended that awards paid to recipients under this Article be for the purpose of assisting in defraying the recipient's day-to-day living expenses. To better achieve this purpose it is hereby provided that no moneys belonging to a recipient of aid to the blind under this Article identifiable as moneys paid pursuant to an aid to the blind award shall be subject to levy under execution, attachment or garnishment. (1937, c. 124, s. 7; 1971, c. 177; c. 603, s. 2; 1973, c. 476, s. 143; 1993, c. 257, s. 8; 1997-443, s. 11A.118(a).)

Legal Periodicals. — For article analyzing North Carolina's exemptions law, see 18 Wake Forest L. Rev. 1025 (1982).

§ 111-18.1. Award and assistance checks payable to decedents.

(a) In the event of the death of a recipient of an award made pursuant to G.S. 111-18 during or after the first day of the month for which the award was authorized to be paid, any check or checks in payment of such award made payable to the deceased recipient and not endorsed prior to the payee's death shall be delivered to the clerk of the superior court and be by him administered under the provisions of G.S. 28A-25-6.

(b) In the event of the death of a recipient of a cash payment service, as defined by regulation of the N. C. Commission for the Blind, which service was rendered as a part of a program of public assistance for the blind or visually handicapped, any check or checks issued for the payment of such service made payable to such recipient, but not endorsed prior to his death, shall be returned to the issuing agency and made void. The issuing agency shall then issue a check payable to the provider of such service for the sum remaining due for this service, not to exceed the amount of said returned and voided check or checks. (1979, c. 762, s. 2.)

§ 111-19. Intercounty transfer of recipients.

Any recipient of aid to the blind under this Article who moves to another county of this State shall be entitled to receive aid to the blind in the county to which he has moved and the board of county commissioners of such county, or its authorized agent, is hereby directed to make the appropriate aid to the blind grant to such recipient subject to the rules and regulations of the Commission for the Blind, beginning with the next payment period after such recipient has established settlement in the county to which he has moved by continuously maintaining a residence therein for a period of 90 days. The county from which a recipient moves shall continue to pay aid to such recipient until such time as the recipient becomes qualified to receive aid from the county to which he has moved. The county from which a recipient has moved shall forthwith transfer all necessary records relating to the recipient to the appropriate board of county commissioners, or its authorized agent, of the county to which the recipient has moved immediately upon the recipient becoming qualified to receive aid from such county. (1937, c. 124, s. 8; 1947, c. 374; 1965, c. 905; 1971, c. 190, ss. 1, 2; 1973, c. 476, s. 143.)

§ 111-20. Awards subject to reopening upon change in condition.

All awards to needy blind persons made under the provisions of this Article shall be made subject to reopening and reconsideration at any time when there has been any change in the circumstances of any needy blind person or for any other reason. The Department of Health and Human Services and the board of county commissioners of each of the counties in which awards have been made shall at all times keep properly informed as to the circumstances and conditions of the persons to whom the awards are made, making reinvestigations annually, or more often, as may be found necessary. The Department of Health and Human Services may at any time present to the proper board of county commissioners any case in which, in their opinion, the changed circumstances of the case should be reconsidered. The board of county commissioners shall reconsider such cases and any and all other cases which, in the opinion of the board of county commissioners, deserve reconsideration. In all such cases notice of the hearing thereon shall be given to the person to whom the award has been made. Any person to whom an award has been made

may apply for a reopening and reconsideration thereof. Upon such hearing, the board of county commissioners may make a new award increasing or decreasing the former award or leaving the same unchanged, or discontinuing the same, as it may find the circumstances of the case to warrant, such changes always to be within the limitations provided by this Article and in accordance with the terms hereof.

Any changes made in such award shall be reported to the Department of Health and Human Services, and shall be subject to the right of appeal and review, as provided in G.S. 111-16. (1937, c. 124, s. 9; 1971, c. 160; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-21. Disqualifications for relief.

No aid to needy blind persons shall be given under the provisions of this Article to any individual for any period with respect to which he is receiving aid under the laws of North Carolina providing Work First Family Assistance and/or relief for the aged, and/or aid for the permanently and totally disabled. (1937, c. 124, s. 10; 1951, c. 319, s. 2; 1997-443, s. 12.29.)

§ 111-22. Beneficiaries not deemed paupers.

No blind person shall be deemed a pauper by reason of receiving relief under this Article. (1937, c. 124, s. 11.)

§ 111-23. Misrepresentation or fraud in obtaining assistance.

Any person who shall obtain, or attempt to obtain, by means of a willful, false statement, or representation, or impersonation, or other fraudulent devices, assistance to which he is not entitled shall be guilty of a Class 2 misdemeanor. The superior court and the recorders' courts shall have concurrent jurisdiction in all prosecutions arising under this Article. (1937, c. 124, s. 12; 1993, c. 539, s. 825; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 111-24. Cooperation with federal departments or agencies; grants from federal government.

The Department of Health and Human Services is hereby empowered, authorized and directed to cooperate with the appropriate federal department or agency charged with the administration of the Social Security Act in any reasonable manner as may be necessary to qualify for federal aid for assistance to the needy blind and in conformity with the provisions of this Article, including the making of such reports in such form and containing such information as the appropriate federal department or agency may from time to time require, and the compliance with such regulations as the appropriate federal department or agency may from time to time find necessary to assure the correctness and verification of such reports.

The Department of Health and Human Services is hereby further empowered and authorized to receive grants-in-aid from the United States government for assistance to the blind and grants made for payment of costs of administering the State plan for aid to the blind, and all such grants so received hereunder shall be paid into the State treasury and credited to the account of the Department of Health and Human Services in carrying out the provisions of the Article. (1937, c. 124, s. 13; 1971, c. 349, s. 1; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-25. Acceptance and use of federal aid.

The Department of Health and Human Services may expend under the provisions of the Executive Budget Act, such grants as shall be made to it for paying the cost of administering this Chapter by the appropriate federal department or agency under the Social Security Act. (1937, c. 124, s. 14; 1971, c. 349, s. 2; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-26. Termination of federal aid.

If for any reason there should be a termination of federal aid as anticipated in this Article, then and in that event this Article shall be ipso facto repealed and rendered null and void: Provided, however, such repeal shall not become effective or be in force unless and until the Governor of the State of North Carolina has issued a proclamation duly attested by the Secretary of the State of North Carolina to the effect that there has been a termination of such federal aid. In the event that this Article should be ipso facto repealed as herein provided, the State funds on hand shall be converted into the general fund of the State for such use as may be authorized by the Director of the Budget, and the county funds accumulated by the provisions of this Article in the respective counties of the State shall be converted into the general fund of such counties for such use as may be authorized by the county commissioners. (1937, c. 124, s. 15½.)

§ 111-27. Department of Health and Human Services to promote employment of needy blind persons; vending stands on public property.

For the purpose of assisting blind persons to become self-supporting, the Department of Health and Human Services is hereby authorized to carry on activities to promote the employment of needy blind persons, including the licensing and establishment of such persons as operators of vending stands in public buildings. The said Department may cooperate with the federal government in the furtherance of the provisions of the act of Congress known as the Randolph-Sheppard Bill (H.R. 4688) providing for the licensing of blind persons to operate vending stands in federal buildings, or any other acts of Congress which may be hereafter enacted.

The board of county commissioners of each county and the commissioners or officials in charge of various State and municipal buildings are hereby authorized and empowered to permit the operation of vending stands by needy blind persons on the premises of any State, county or municipal property under their respective jurisdictions: Provided, that such operators shall be first licensed by the Department of Health and Human Services: Provided further, that in the opinion of the commissions or officials having control and custody of such property, such vending stands may be properly and satisfactorily operated on such premises without undue interference with the use and needs thereof for public purposes. (1939, c. 123; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-27.1. Department of Health and Human Services authorized to conduct certain business operations.

For the purpose of assisting blind persons to become self-supporting the Department of Health and Human Services is hereby authorized to carry on activities to promote the rehabilitation and employment of the blind, including

the operation of various business enterprises suitable for the blind to be employed in or to operate. The Executive Budget Act shall apply to the operation of such enterprises as to all appropriations made by the State to aid in the organization and the establishment of such businesses. Purchases and sales of merchandise or equipment, the payment of rents and wages to blind persons operating such businesses, and other expenses thereof, from funds derived from local subscriptions and from the day-by-day operations shall not be subject to the provisions of law regulating purchases and contracts, or to the deposit and disbursement thereof applicable to State funds but shall be supervised by the Department of Health and Human Services. All of the business operations under this law, however, shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes.

After September 30, 1983, Randolph-Sheppard vendors will no longer be State employees. Blind licensees operating vending facilities under contract with the North Carolina Department of Health and Human Services, Division of Services for the Blind, are independent contractors. (1945, c. 72, s. 2; 1971, c. 1025, s. 1; 1973, c. 476, s. 143; 1983, c. 867, s. 1; 1993, c. 257, s. 9; 1997-443, s. 11A.118(a).)

§ 111-27.2. Blind vending-stand operators; retirement benefits.

The Department of Health and Human Services is authorized and empowered to continue and maintain, in its discretion, any existing retirement system providing retirement benefits for blind vending-stand operators and to expend funds to provide necessary contributions to any existing retirement system for blind vending-stand operators to the extent that the Department determines such retirement system to be in the best interest of the blind vending-stand operators. (1969, c. 1255, s. 4; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-28. Department of Health and Human Services authorized to receive federal, etc., grants for benefit of needy blind; use of information concerning blind persons.

The Department of Health and Human Services is hereby authorized and empowered to receive grants-in-aid from the federal government or any State or federal agency for the purpose of rendering other services to the needy blind and those in danger of becoming blind; and all such grants so made and received shall be paid into the State treasury and credited to the account of the Department of Health and Human Services, to be used in carrying out the provisions of this law.

The Commission for the Blind is hereby further authorized and empowered to make such rules and regulations as may be required by the federal government or State or federal agency as a condition for receiving such federal funds, not inconsistent with the laws of this State.

Whenever the words "Social Security Board" appear in G.S. 111-6, 111-13 to 111-26 the same shall be interpreted to include any agency of the federal government which may be substituted therefor by law.

The Department of Health and Human Services is hereby authorized and empowered to enter into reciprocal agreements with public welfare agencies in other states relative to the provision of assistance and services to residents, nonresidents, or transients, and cooperate with other agencies of the State and

federal governments in the provisions of such assistance and services and in the study of the problems involved.

The Department of Health and Human Services is hereby authorized and empowered to establish and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files, and communications of the Department.

It shall be unlawful, except for purposes directly connected with the administration of aid to the needy blind and in accordance with the rules and regulations of the Department of Health and Human Services, for any person or persons to solicit, disclose, receive, make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of, any list of or name of, or any information concerning, persons applying for or receiving aid to the needy blind, directly or indirectly derived from the records, papers, files, or communications of the Department of Health and Human Services or the board of county commissioners or the county social services department, or acquired in the course of the performance of official duties.

Notwithstanding the above, the Department of Health and Human Services is authorized to release to the North Carolina Department of Motor Vehicles and the North Carolina Department of Revenue the name and medical records of any person listed in the register of the blind in this State maintained under the provisions of G.S. 111-4. All information and documents released to the Department of Motor Vehicles and the Department of Revenue shall be treated by those departments as confidential for their use only and shall not be released by them to any person for commercial or political purposes or for any purpose not directly connected with the administration of Chapters 20 and 105 of the General Statutes of this State. The Department of Health and Human Services may also release to the North Carolina Library for the Blind and Physically Handicapped of the Department of Cultural Resources, the name and address of any person listed in the register of the blind in this State maintained under the provisions of G.S. 111-4. All information released to the North Carolina Library for the Blind and Physically Handicapped shall be treated as confidential for its use only and shall not be released to any person for commercial or political purposes or for any purpose not directly connected with providing information concerning services offered by the North Carolina Library for the Blind and Physically Handicapped. (1939, c. 124; 1941, c. 186; 1969, cc. 871, 982; 1973, c. 476, s. 143; 1989, c. 752, s. 141; 1997-443, s. 11A.118(a).)

§ 111-28.1. Department of Health and Human Services authorized to cooperate with federal government in rehabilitation of blind.

The Department of Health and Human Services is hereby authorized and empowered to make the necessary rules and regulations to cooperate with the federal government in the furtherance of the provisions of the act of Congress known as the Barden-Rehabilitation Act (Volume 57, United States Statutes at Large, Chapter 190) providing for the rehabilitation of the blind. (1945, c. 72, s. 1; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-29. Expenditure of equalizing funds; grants affording maximum federal aid; lending North Carolina reports.

In addition to the powers and duties imposed upon the Department of Health and Human Services, the said Department shall be and hereby is charged with the powers and duties hereinafter enumerated; that is to say:

(1) The Department of Health and Human Services is hereby authorized to expend such funds as are appropriated to it as an equalizing fund for aid to the needy blind for the purpose of equalizing the financial burden of providing relief to the needy blind in the several counties of the State, and equalizing the grants received by the needy blind recipients. Such amount shall be expended and disbursed solely for the use of the needy blind coming within the eligibility provisions outlined in Chapter 124 of the Public Laws of 1937. Said amount shall be distributed to the counties according to the needs therein in conformity with the rules and regulations adopted by the Commission for the Blind, producing as far as possible a just and fair distribution thereof.

(2) The Department of Health and Human Services is hereby authorized to make such grants to the needy blind of the State as will enable said Department to receive the maximum grants from the federal government for such purpose.

(3) The Department of Health and Human Services is hereby authorized to work out plans with the Secretary of State for lending to needy blind lawyers volumes of the North Carolina reports in his custody that are unused or have become damaged. The Secretary of State is hereby authorized to lend such reports to the Department of Health and Human Services for relending to needy blind lawyers. Such reports may be recalled at any time by the Secretary of State upon giving 15 days' written notice to the Department of Health and Human Services which shall remain responsible for said reports until they are returned. The Department shall relend such reports only to blind lawyers, who, after an investigation by the Department, are determined to have no income, or an income insufficient to purchase such reports. (1943, c. 600; 1973, c. 476, s. 143; 1997-443, s. 11A.118(a).)

§ 111-30. Personal representatives for certain recipients of aid to the blind.

If any otherwise qualified applicant for or recipient of aid to the blind is or shall become unable to manage the assistance payments, or otherwise fails so to manage, to the extent that deprivation or hazard to himself or others results, a petition may be filed by a relative of said blind person, or other interested person, or by the Secretary of Health and Human Services before the appropriate court under G.S. 111-31, in the form of a verified written application for the appointment of a personal representative for the purpose of receiving and managing public assistance payments for any such recipient, which application shall allege one or more of the above grounds for the legal appointment of such personal representative.

The court shall summarily order a hearing on the petition and shall cause the applicant or recipient to be notified at least five days in advance of the time and place for the hearing. Findings of fact shall be made by the court without a jury, and if the court shall find that the applicant for or recipient of aid to the blind is unable to manage the assistance payments, or otherwise fails so to manage, to the extent that deprivation or hazard to himself or others results, the court may thereupon enter an order embracing said findings and appointing some responsible person as personal representative of the applicant or recipient for the purposes set forth herein. The personal representative so appointed shall serve with or without bond, in the discretion of the court, and without compensation. He will be responsible for receiving the monthly assistance payment and using the proceeds of such payment for the benefit of

the recipient of aid to the blind. Such personal representative shall be responsible to the court for the faithful discharge of the duties of his trust. The court may consider the recommendation of the Secretary of Health and Human Services in the selection of a suitable person for appointment as personal representative for the limited purposes of G.S. 111-30 to 111-33. The personal representative so appointed may be removed by the court, and the proceeding dismissed, or another suitable personal representative appointed. All costs of court with respect to any such proceedings shall be waived.

From the order of the court appointing or removing such personal representative, an appeal may be had to the judge of superior court who shall hear the matter de novo without a jury. (1945, c. 72, s. 4; 1953, c. 1000; 1961, c. 666, s. 2; 1971, c. 603, s. 3; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a).)

§ 111-31. Courts for purposes of §§ 111-30 to 111-33; records.

For the purposes of G.S. 111-30 to 111-33 the court may be either a domestic relations court established pursuant to Article 13, Chapter 7, General Statutes, or the clerk of the superior court in the county having responsibility for the administration of the particular aid to the blind payments. The court may, for the purposes of G.S. 111-30 to 111-33, direct the Secretary of Health and Human Services to maintain records pertaining to all aspects of any personal representative proceeding, which the court may adopt as the court's record and in lieu of the maintenance of separate records by the court. (1961, c. 666, s. 2; 1971, c. 603, s. 4; 1973, c. 476, s. 138; 1997-443, s. 11A.118(a).)

Editor's Note. — Article 13, Chapter 7, referred to in this section, was repealed by Session Laws 1971, c. 377, s. 32. For present provisions as to courts, see Chapter 7A.

§ 111-32. Findings under § 111-30 not competent as evidence in other proceedings.

The findings of fact under the provisions of G.S. 111-30 shall not be competent as evidence in any case or proceeding dealing with any subject matter other than provided in G.S. 111-30 to 111-33. (1961, c. 666, s. 2.)

§ 111-33. Sections 111-30 to 111-33 are not to affect provisions for payments for minors.

Nothing in G.S. 111-30 to 111-33 is to be construed as affecting that portion of the State plan for aid to the blind which provides that payments for eligible blind minors should be made to the parent, legal guardian, relatives or other persons "in loco parentis" of the blind minor, and that payments may be made to the minor if he is emancipated. (1961, c. 666, s. 2.)

§ 111-34: Repealed by Session Laws 1973, c. 476, s. 143.

§ 111-35. Authority of director of social services.

The respective boards of county commissioners of each county are hereby authorized to empower and confer upon the county director of social services for their respective counties the authority to perform any or all acts or functions which the previous sections of this Article direct or authorize the county boards of commissioners to perform. Any act or function performed by a county director of social services under the authority of this section shall be

reported by him to the respective county board of commissioners for its review, and for alternative action or disposition where deemed appropriate by such board. Provided that the respective boards of county commissioners shall make no alternative or different disposition of a matter which the county director of social services is empowered to act upon which would prejudicially affect the status of any aid to the blind recipient without first affording such recipient reasonable notice and opportunity to be heard. (1971, c. 348, s. 1.)

§§ 111-36 through 111-40: Reserved for future codification purposes.

Article 3.

Operation of Vending Facilities on State Property.

§ 111-41. Preference to visually handicapped persons in operation of vending facilities; responsibility of Department of Health and Human Services.

In order to promote the employment and the self-sufficiency of visually handicapped persons in North Carolina, State agencies shall upon the request of the Department of Health and Human Services give preference to visually handicapped persons in the operation of vending facilities on State property. The Department of Health and Human Services shall encourage and assist the operation of vending facilities by visually handicapped persons. (1973, c. 1280, s. 1; 1997-443, s. 11A.118(a).)

Editor's Note. — Session Laws 1985, c. 730, ss. 1 to 3, provide:

"Sec. 1. Notwithstanding Article III of Chapter 111 of the General Statutes, with the approval of the Department of Cultural Resources, the Friends of Elizabeth II, Incorporated, may operate vending machines on the site grounds of the Elizabeth II.

"Sec. 2. Eighty percent (80%) of the profits from activities authorized by Section 1 of this act shall be used to support the Elizabeth II, the ship's boat, and related activities. The remainder of the profits shall be used for the activities of the Roanoke Voyages and Elizabeth II Commission.

"Sec. 3. This act is effective upon ratification."

The act was ratified July 12, 1985.

§ 111-42. Definitions as used in this Article.

(a) "Regular vending facility" means a vending facility where food preparation or cooking is not done on the State property.

(b) "State agency" means department, commission, agency or instrumentality of the State.

(c) "State property or State building" means building and land owned, leased, or otherwise controlled by the State, exclusive of schools, colleges and universities, the North Carolina State Fair, and the State Legislative Building.

(d) "Vending facility" includes a snack bar, cafeteria, restaurant, cafe, concession stand, vending stand, cart service, or other facilities at which food, drinks, novelties, newspapers, periodicals, confections, souvenirs, tobacco products or related items are regularly sold.

(e) "Visually handicapped" means a person who is totally blind or whose vision with glasses is so defective as to prevent the performance of ordinary activity for which eyesight is essential and who is registered pursuant to G.S. 111-4. (1973, c. 1280, s. 1.)

§ 111-43. Installation of coin-operated vending machines.

In locations where the Department determines that a vending facility may not be operated or should not continue to operate due to insufficient revenues to support a blind vendor or due to the lack of qualified blind applicants, the Department shall have the first opportunity to secure, by negotiation of a contract with one or more licensed commercial vendors, coin-operated vending machines for the location. Profits from coin-operated vending machines secured by the Department shall be used by the Department for the support of programs that enable blind people to live more independently, including medical, rehabilitation, independent living, and educational services offered by the Division of Services for the Blind. (1973, c. 1280, s. 1; 1991, c. 689, s. 221.4(a); 1991 (Reg. Sess., 1992), c. 984, s. 1.)

§ 111-44. Location and services provided by State agency.

If the Department of Health and Human Services shall determine that a location is suitable for the operation of a vending facility by a visually handicapped person, the State agency with authority over the location shall provide proper space, plumbing, lighting, and electrical outlets for the vending facility in the original planning and construction, or in alteration and renovation of present location. The State agency shall provide necessary utilities, janitorial services and garbage disposal for the operation of the vending facility. Space for the vending facilities and service therefor shall be provided without charge. (1973, c. 1280, s. 1; 1997-443, s. 11A.118(a).)

§ 111-45. Duty of State agency to inform Department.

It shall be the duty of the State agencies to inform the Department of existing and prospective locations for vending facilities and coin-operated vending machines and to prescribe regulations (upon request of the Department) to promote the successful operation of the vending facilities of the visually handicapped. (1973, c. 1280, s. 1.)

§ 111-46. Vending facilities operated by those other than visually handicapped persons.

Where vending facilities on State property are operated by those other than the visually handicapped persons on the date of enactment of this Article, the contract of these vending facilities shall not be renewed or extended unless the Secretary of the Department of Health and Human Services is notified thereof and he determines within 30 days of such notification that the vending facilities are not, or cannot become, suited for operation by the visually handicapped. However, if the Secretary of the Department of Health and Human Services within 30 days of the date of such notification fails to provide for the operation of the vending facilities by the visually handicapped, the existing contract may be renewed or extended. (1973, c. 1280, s. 1; 1997-443, s. 11A.118(a).)

§ 111-47. Exclusions.

(a) This Article is not intended to cover food services provided by hospitals or residential institutions as a direct service to patients, inmates, trainees, or otherwise institutionalized persons, nor to cover coin-operated vending machines located in State facilities operated under the authority of G.S. 122C.

(b) This Article shall not prohibit the continued use of coin-operated vending machines currently the property of the Division of Services for the Blind of the

Department of Health and Human Services and now part of the vending-stand program. (1973, c. 1280, s. 1; 1991 (Reg. Sess., 1992), c. 984, s. 2; 1997-443, s. 11A.118(a).)

§ 111-47.1. Food service at North Carolina aquariums.

(a) Notwithstanding Article 3 of Chapter 111 of the General Statutes, the North Carolina Aquariums may operate or contract for the operation of food or vending services at the North Carolina Aquariums. Notwithstanding G.S. 111-43, the net proceeds of revenue generated by food and vending services that are provided at the North Carolina Aquariums and are operated by or whose operation is contracted for by the Division of North Carolina Aquariums shall be credited to the North Carolina Aquariums Fund.

(b) This section shall not be construed to alter any contract for food or vending services at the North Carolina Aquariums that is in force at the time this section becomes law [effective July 1, 1999]. (1999-237, s. 15.17(a), (b).)

Editor's Note. — Session Laws 1999-237, s. 30.5, made this section effective July 1, 1999.

Session Laws 1999-237, s. 15.17(c), provides that "the Revisor of Statutes shall codify this section in Article 3 of Chapter 111 of the General Statutes."

This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1999-2001 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1999-2001 biennium."

Session Laws 1999-237, s. 30.4 contains a severability clause.

ARTICLE 4.

Operation of Highway Vending Facilities on North Carolina Highways.

§ 111-48. Preference to blind persons in operation of highway vending facilities.

In order to provide support for programs for the blind and to further promote employment opportunities for blind persons, the Department of Health and Human Services may operate automatic vending machines on State property on North Carolina highways and shall give preference to blind persons in the operation of these facilities. (1991 (Reg. Sess., 1992), c. 984, s. 3; 1997-443, s. 11A.118(a).)

§ 111-49. Definitions as used in this Article.

(a) "Automatic vending" means a coin, currency, token, ticket, or credit card operated machine that dispenses food, drinks, or sundries.

(b) "Blind vendor" means a blind person, as specified in G.S. 105-249(b), who has been licensed by the Division of Services for the Blind to operate a vending stand in a public building.

(c) "Highway vending facilities" means automatic vending operations located on North Carolina highways in Welcome Centers and rest areas designated by the State. (1991 (Reg. Sess., 1992), c. 984, s. 3.)

§ 111-50. Operations of highway vending.

(a) In locations on North Carolina highways where the Department of Health and Human Services determines that automatic vending is suitable, the Department shall authorize the Division of Services for the Blind to contract with blind vendors in the operation of highway vending facilities. The contracts shall be reviewed and renegotiated by the Division every two years and shall be reviewed by the Transfer and Promotion Committee. The Commission for the Blind shall adopt rules necessary to govern the operations. The highway vending program shall be a part of the Business Enterprises Program operated under the Randolph-Sheppard Act, 20 U.S.C. § 107a.

(b) Profits returned to the Division shall be based upon operator net income and determined as follows:

(1) The Division shall charge seventeen percent (17%) set-aside on operator net income up to two and one-half times the average operator income for the previous State fiscal year.

(2) The Division shall charge fifty percent (50%) set-aside on operator net income between two and one-half and three and one-half times the average operator income for the previous State fiscal year.

(3) The Division shall charge sixty-five percent (65%) set-aside on all operator net income over three and one-half times the average operator income for the previous State fiscal year. (1991 (Reg. Sess., 1992), c. 984, s. 3; 1997-443, s. 11A.118(a).)

§ 111-51. Priority for specific blind vendors.

Blind vendors who were operating highway vending facilities as of July 31, 1991, and who continue to operate those facilities shall be given priority in renegotiating contracts under this Article to continue to operate those same facilities. (1991 (Reg. Sess., 1992), c. 984, s. 3.)

§ 111-52. Profits from Highway Vending Fund.

Profits generated by highway vending locations as of June 30, 1992, and deposited in a special fund in accordance with the Administrative Policies and Procedures Manual of the Office of the State Controller shall be reserved for the construction and maintenance of highway vending facility projects. (1991 (Reg. Sess., 1992), c. 984, s. 3.)

Chapter 112.

Confederate Homes and Pensions.

§§ 112-1 through 112-37: Repealed.

Editor's Note. — Session Laws 1945, c. 699, s. 2, effective December 31, 1944, repealed § 112-17. Session Laws 1973, c. 476, s. 166, effective July 1, 1973, repealed §§ 112-2, 112-4, and 112-6. Session Laws 1981, c. 462, s. 1, effective July 1, 1981, repealed § 112-1 and 112-3. Session Laws 1993, c. 257, s. 10, effective July 1, 1993, repealed §§ 112-5 through 112-37.

Session Laws 1993, c. 539, s. 826, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), would have amended § 112-32, effective October 1, 1994, to designate the offense of speculating in pension claims a Class 1 misdemeanor. However, § 112-32 was repealed by Session Laws 1993, c. 257, s. 10, effective July 1, 1993.

Session Laws 1993, c. 539, s. 827, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), would have amended § 112-36, effective October 1, 1994, to designate the offense of taking fees for acknowledgments by pensioners a Class 3 misdemeanor. However, § 112-36 was repealed by Session Laws 1993, c. 257, s. 10, effective July 1, 1993.

Chapter 113.

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113-28.1. Designated employees commissioned special peace officers by Governor.

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113-28.2. Powers of arrest.
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[Recodified.]

113-28.5 through 113-28.12 [Recodified.]

Article 1C.

Commission on International Cooperation.

[Repealed.]

113-28.13 through 113-28.20. [Repealed.]

Article 1D.

Community Action Partnership Act.

[Recodified.]

113-28.21 through 113-28.26. [Recodified.]

SUBCHAPTER II. STATE FORESTS AND PARKS.

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[Repealed.]

113-44.1, 113-44.2. [Repealed.]

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[Repealed.]

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[Repealed.]

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113-314. Agency to determine time and place of referendum, amount and basis of assessment, etc.; notice of referendum.
113-315. Maximum assessment.
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113-315.38. Warehouses, wharves, etc., on property abutting navigable waters.
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Article 25.

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113-333. Powers and duties of the Commission.
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113-338 through 113-377. [Reserved.]

Article 26.

Marine Fisheries Compact and Commission.

[Transferred.]

113-377.1 through 113-377.7. [Transferred.]

SUBCHAPTER IVA. REPEALS.

Article 26A.

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Article 27.

Oil and Gas Conservation.

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113-389. Definitions.
113-390. Waste prohibited.
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113-392. Protecting pool owners; drilling units in pools; location of wells; shares in pools.
113-393. Development of lands as drilling unit by agreement or order of Department.
113-394. Limitations on production; allocating and prorating "allowables."
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113-396. Wells to be kept under control.
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113-398. Procedure and powers in hearings by Department.
113-399. Suits by Department.
113-400. Assessing costs of hearings.
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113-403. Judicial review.
113-404, 113-405. [Repealed.]
113-406. Effect of pendency of judicial review; stay of proceedings.
113-407. Stay bond.
113-408. Enjoining violation of laws and rules; service of process; application for drilling well to include residence address of applicant.
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113-413. [Repealed.]
113-414. Filing list of renewed leases in office of register of deeds.
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SUBCHAPTER VI. WELL DRILLING.

Article 28.

Drillers Using Power Machinery.

[Repealed.]

113-416 through 113-419. [Repealed.]

SUBCHAPTER I. GENERAL PROVISIONS.

ARTICLE 1.

Powers and Duties of Department of Environment, Health, and Natural Resources Generally.

§ 113-1. Meaning of terms.

In this Article, unless the context otherwise requires, the expression "Department" means the Department of Environment and Natural Resources; "Secretary" means the Secretary of Environment and Natural Resources. (1925, c. 122, s. 3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(47); 1997-443, s. 11A.119(a).)

Local Modification. — Dare: 1989 (Reg. Sess., 1990), c. 837, s. 3; (As to this Chapter) Tyrrell: 1987, c. 131, s. 2; Washington: 1987, c. 131, s. 2.

Cross References. — As to the organization of the Department of Environment and Natural Resources, see §§ 143B-279.1 through 143B-279.5. As to the Environmental Management Commission, see §§ 143B-282 through 143B-285.

Editor's Note. — Session Laws 1989, c. 727, s. 32, substituted "Environment, Health, and Natural Resources" for "Natural Resources and Community Development" in the heading of Article 1 of this Chapter.

Session Laws 1999-237, ss. 15.14(a) to (h) provide:

(a) "The Department of Environment and Natural Resources and North Carolina State University shall jointly establish the North Carolina Water Quality Workgroup. The Workgroup shall work collaboratively with the appropriate divisions of the Department of Environment and Natural Resources and North Carolina State University, the Scientific Advisory Council on Water Resources and Coastal Fisheries Management, the Environmental Management Commission, and the Environmental Review Commission to identify the scientific and State agency databases that can be used to formulate public policy regarding the State's water quality, evaluate those databases to determine the information gaps in those databases, and establish the priorities for obtaining the information lacking in those databases. The Workgroup shall have the following duties:

"(1) To address specifically the ongoing need of evaluation, synthesis, and presentation of current scientific knowledge that can be used to formulate public policy on water quality issues.

"(2) To identify knowledge gaps in the current understanding of water quality problems and fill these gaps with appropriate research projects.

"(3) To maintain a web-based water quality data distribution site.

"(4) To organize and evaluate existing scientific and State agency water quality databases.

"(5) To prioritize recognized knowledge gaps in water quality issues for immediate funding."

(b) "The North Carolina Water Quality Workgroup shall be composed of no more than 15 members. Those members shall be jointly appointed by the Chancellor of North Carolina State University and the Secretary of Environment and Natural Resources. Any person appointed as a member of the Workgroup shall be knowledgeable in one of the following areas:

"(1) Water Quality Assessment, Water Quality Monitoring and Permitting.

"(2) Nutrient Management.

"(3) Water Pollution Control.

"(4) Waste Management.

"(5) Groundwater Resources.

"(6) Stream Hydrology.

"(7) Aquatic Biology.

"(8) Environmental Education and Web-Based Data Dissemination.

(c) "North Carolina State University shall provide meeting facilities for the North Carolina Water Quality Workgroup as requested by the Chair.

(d) "The members of the North Carolina Water Quality Workgroup shall elect a Chair. The Chair shall call meetings of the Workgroup and set the meeting agenda.

(e) "The Chair of the North Carolina Water Quality Workgroup shall report each year by January 30 to the Scientific Advisory Council on Water Resources and Coastal Fisheries Management, to the Environmental Review

Commission, to the Cochairs of the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources, and to the Chancellor of North Carolina State University or the Chancellor's designee on the previous year's activities, findings, and recommendations of the North Carolina Water Quality Workgroup.

(f) "The North Carolina Water Quality Workgroup shall develop a water quality monitoring system to be known as the Rivernet that effectively uses the combined resources of North Carolina State University and State agencies. The Rivernet system shall be designed to implement advances in monitoring technology and information management systems with web-based data dissemination in the waters that are impaired based on the criteria of the State's basinwide water quality management plans. Water quality and nutrient parameters shall be continuously monitored at each station, and the data shall be sent back to a centralized computer server.

"The Rivernet system shall be coordinated with related data collection and monitoring activities of the Department of Environment and Natural Resources, the Water Resources Research Institute, the North Carolina Water Quality Workgroup, and other research efforts pursued by academic institutions or State government entities. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are testing procedure guidelines promulgated by the United States Environmental Protection Agency, the American Public Health Association, the American Water Works Association, or the Water Environment Federation then the testing procedures shall comply with the appropriate guidelines. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are no testing procedure guidelines promulgated by any of the groups cited in this subsection, then the North Carolina Water Quality Workgroup may establish testing procedure guidelines.

"The Rivernet system shall also have the capabilities to trigger alarms and notify the appropriate member of the Workgroup when monitoring stations exceed defined limits indicating a spill or a significant water quality or nutrient measurement event, which then can be comprehensively analyzed.

(g) "For the 1999-2001 biennium, the North Carolina Water Quality Workgroup shall select as a pilot project site an area of impaired waters within one of the State's river basins based on the criteria of the State's basinwide water quality management plans and shall implement a Rivernet monitoring system pilot project in those waters.

(h) "Of the funds appropriated by this act to the Department of Environment and Natural Resources, the sum of one million two hundred thousand dollars ($1,200,000) for the 1999-2000 fiscal year and the sum of seven hundred thousand dollars ($700,000) for the 2000-2001 fiscal year shall be used to implement this section. Those funds shall be allocated as follows:

"(1) $300,000 shall be transferred for the 1999-2000 fiscal year and $300,000 for the 2000-2001 fiscal year to the Board of Governors of the University of North Carolina for North Carolina State University to use for operating costs of the Rivernet monitoring system and pilot project including personnel to maintain the system, archive, and disseminate the data.

"(2) $500,000 for the 1999-2000 fiscal year only shall be transferred to the Board of Governors of the University of North Carolina to be used by North Carolina State University for the purchase of monitoring equipment, installation of the data transfer network, and for installation of the computer hardware and software to archive the data and sustain the web-based data system.

"(3) $400,000 for the 1999-2000 fiscal year and $400,000 for the 2000-2001 fiscal year shall be held in a reserve fund to be administered by the Scientific Advisory Council on Water Resources and Coastal Fisheries Management. Monies in the fund shall be used only for research projects recommended by the North Carolina Water Quality Workgroup. The Workgroup shall consider only new studies that promote collaborative work among the Department of Environment and Natural Resources and any constituent institution of the University of North Carolina to collectively close knowledge policy gaps with regard to the State's water quality and the nutrient levels of impaired waters."

State Government Reorganization. — The Department and Board of Conservation and Development were transferred to the Department of Natural and Economic Resources by former § 143A-117, enacted by Session Laws 1971, c. 864.

§ 113-2: Repealed by Session Laws 1973, c. 1262, s. 28.

§ 113-3. Duties of the Department.

(a) It shall be the duty of the Department, by investigation, recommendation and publication, to aid:

(1) In the promotion of the conservation and development of the natural resources of the State;
(2) In promoting a more profitable use of lands and forests;
(3) Repealed by Session Laws 1977, c. 198, s. 15; c. 771, s. 7;
(4) In coordinating existing scientific investigations and other related agencies in formulating and promoting sound policies of conservation and development; and
(5) Repealed by Session Laws 1977, c. 771, s. 7.

(b) Repealed by Session Laws 1959, c. 779, s. 3. (1925, c. 122, s. 4; 1957, c. 753, s. 3; c. 1424, s. 1; 1959, c. 779, s. 3; 1977, c. 198, s. 15; c. 771, s. 7.)

Cross References. — For the North Carolina Wildlife Resources Law, see § 143-237 et seq. For provisions regarding fish kill response protocols and report, see § 143B-279.7.

CASE NOTES

Cited in North Carolina State Ports Auth. v. First-Citizens Bank & Trust Co., 242 N.C. 416, 88 S.E.2d 109 (1955); In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988).

§§ 113-4 through 113-7: Repealed by Session Laws 1973, c. 1262, s. 28.

§ 113-8. Powers and duties of the Department.

The Department shall make investigations of the natural resources of the State, and take such measures as it may deem best suited to promote the conservation and development of such resources.

It shall have charge of the work of forest maintenance, forest fire prevention, reforestation, and the protection of lands and water supplies by the preservation of forests; it shall also have the care of State forests and parks, and other recreational areas now owned or to be acquired by the State, including the lakes referred to in G.S. 146-7.

It shall make such examination, survey and mapping of the geology, mineralogy and topography of the State, including their industrial and economic utilization, as it may consider necessary; make investigations of water supplies and water powers, prepare and maintain a general inventory of the water resources of the State, and take such measures as it may consider necessary to promote their development.

It shall have the duty of enforcing all laws relating to the conservation of marine and estuarine resources.

The Department may take such other measures as it may deem advisable to obtain and make public a more complete knowledge of the State and its resources, and it is authorized to cooperate with other departments and agencies of the State in obtaining and making public such information.

The Department may acquire such real and personal property as may be found desirable and necessary for the performance of the duties and functions of the Department and pay for same out of any funds appropriated for the Department or available unappropriated revenues of the Department, when such acquisition is approved by the Governor and Council of State. The title to any real estate acquired shall be in the name of the State of North Carolina for the use and benefit of the Department. (1925, c. 122, s. 9; 1927, c. 57; 1947, c. 118; 1957, c. 753, s. 4; c. 1424, s. 2; 1965, c. 957, s. 11; 1973, c. 1262, ss. 28, 86; 1977, c. 198, ss. 16, 17; c. 771, s. 4; 1989, c. 727, s. 33.)

Cross References. — For the North Carolina Wildlife Resources Law, see § 143-237 et seq.

Editor's Note. — Section 146-7, referred to in the second paragraph of this section, was repealed by the revision of Chapter 146 by Session Laws 1959, c. 683, s. 1.

CASE NOTES

Civil Penalty Power as Necessary to Purpose. — N.C. Const., Art. IV, § 3 contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes; civil penalty power was reasonably necessary to the purposes for which the North Carolina Department of Natural Resources and Community Development (NRCD) (now the Department of Environment, Health, and Natural Resources) was established. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

Applied in Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Cited in Williams v. McSwain, 248 N.C. 13, 102 S.E.2d 464 (1958); In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988).

§ 113-8.01. Pollution Prevention Pays Programs.

There is established within the Department a non-regulatory technical assistance program to be known as the Pollution Prevention Pays Program. The purpose of this program is to encourage voluntary waste and pollution reduction efforts through research and by providing information, technical assistance, and matching grants to businesses and industries interested in establishing or enhancing activities to prevent, reduce, or recycle waste. The Pollution Prevention Pays Program shall coordinate its activities with the appropriate regulatory agencies. (1989, c. 168, s. 7; 1993, c. 501, s. 10.)

§ 113-8.1: Repealed by Session Laws 1959, c. 779, s. 3.

§§ 113-9 through 113-13: Repealed by Session Laws 1973, c. 1262, s. 28.

§ 113-14: Recodified as § 143B-435 by Session Laws 1977, c. 198, s. 26.

§ 113-14.1. Promotion of seashore industry and recreation.

(a) Repealed by Session Laws 1973, c. 1262, s. 28.

(b) The following powers are hereby granted to the Secretary and may be delegated to the administrative head of an existing or new division of the Department as herein authorized:

(1) to (3) Repealed by Session Laws 1977, c. 198, s. 18.

(4) Study the development of the seacoast areas and implement policies which will promote the development of the coastal area, with particular emphasis upon the development of the scenic and recreational resources of the seacoast;

(5) Advise and confer with various interested individuals, organizations and State, federal and local agencies which are interested in development of the seacoast area and use its facilities and efforts in planning, developing and carrying out overall programs for the development of the area as a whole;

(6) Act as liaison between agencies of the State, local government, and agencies of the federal government concerned with development of the seacoast region;

(7) Repealed by Session Laws 1973, c. 1262, s. 28;
(8) Make such reports to the Governor as he may request;
(9) File such recommendations or suggestions as it may deem proper with other agencies of the State, local or federal governments.

Provided, however, that the provisions of this section and G.S. 113-14.2 shall not be construed as affecting the authority of the Environmental Management Commission concerning shore-erosion control or prevention, beach protection, or hurricane protection under G.S. 143-355 or any other provision of law. (1969, c. 1143, ss. 2, 3; 1973, c. 1262, s. 28; 1977, c. 198, s. 18; c. 771, s. 4; 1989, c. 727, s. 34.)

Editor's Note. — Section 113-14.2, referred to in the last paragraph of this section, and relating to the former Seashore Advisory Board, was repealed by Session Laws 1971, c. 882, s. 8.

§ 113-14.2: Repealed by Session Laws 1971, c. 882, s. 8.

§ 113-14.3. Publications.

The Department shall publish, from time to time, reports and statements, with illustrations, maps, and other descriptions, which shall adequately set forth the natural and material resources of the State for the purpose of furnishing information to educate the people about the natural and material resources of the State. (1977, c. 771, s. 5; 1989, c. 727, s. 35.)

§ 113-15: Recodified as § 143B-436 by Session Laws 1977, c. 198, s. 26.

§ 113-15.1: Repealed by Session Laws 1969, c. 1145, s. 4.

Cross References. — As to transfer of functions, property, etc., of the Division of Community Planning to the Department of Local Affairs, see § 143-326.

§ 113-15.2: Recodified as § 143B-437 by Session Laws 1977, c. 198, s. 26.

§ 113-16. Cooperation with agencies of the federal government.

The Department is authorized to arrange for and accept such aid and cooperation from the several United States government bureaus and other sources as may assist in completing topographic surveys and in carrying out the other objects of the Department.

The Department is further authorized and directed to cooperate with the Federal Power Commission in carrying out the rules adopted by that Commission; and to act in behalf of the State in carrying out any rules that may be adopted relating to water powers in this State other than those related to making and regulating rates. The provisions of this section are extended to apply to cooperation with authorized agencies of other states. (1925, c. 122, s. 18; 1929, c. 297, s. 2; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 36.)

§ 113-17. Agreements, negotiations and conferences with federal government.

The Department is delegated as the State agency to represent North Carolina in any agreements, negotiations, or conferences with authorized

agencies of adjoining or other states, or agencies of the federal government, relating to the joint administration or control over the surface or underground waters passing or flowing from one state to another under the provisions of this section. (1929, c. 297, s. 1; 1973, c. 476, s. 128; c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 37.)

§ 113-18. Department authorized to receive funds from Federal Power Commission.

All sums payable to the State of North Carolina by the Treasurer of the United States of America under the provisions of section 17 and other sections of the Federal Water Power Act shall be paid to the account of the Department as the authorized agent of the State for receipt of said payments. Such sums shall be used by the Department in prosecuting investigations for the utilization and development of the water resources of the State. (1929, c. 288; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 38.)

§ 113-19. Cooperation with other State departments.

The Department is authorized to cooperate with the North Carolina Utilities Commission in investigating the waterpowers in the State, and to furnish the Utilities Commission such information as is possible regarding the location of the waterpower sites, developed waterpowers, and such other information as may be desired in regard to waterpower in the State; the Department shall also cooperate as far as possible with the Department of Labor, the State Department of Agriculture and Consumer Services, and other departments and institutions of the State in collecting information in regard to the resources of the State and in preparing the same for publication in such manner as may best advance the welfare and improvement of the State. (1925, c. 122, s. 16; 1927, c. 57, s. 1; 1931, c. 312; 1933, c. 134, s. 8; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 39; 1997-261, s. 109.)

§ 113-20. Cooperation with counties and municipal corporations.

The Department is authorized to cooperate with the counties of the State in any surveys to ascertain the natural resources of the county; and with the governing bodies of cities and towns, with boards of trade and other like civic organizations, in examining and locating water supplies and in advising and recommending plans for other municipal improvements and enterprises. Such cooperation is to be conducted upon such terms as the Department may direct. (1925, c. 122, s. 17; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 40.)

Legal Periodicals. — For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

§ 113-21. Cooperation of counties with State in making water resource survey.

The board of county commissioners of any county of North Carolina is authorized and empowered, in their discretion, to cooperate with the Department or other association, organization, or corporation in making surveys of any of the natural resources of their county, and to appropriate and pay out of the funds under their control such proportional part of the cost of such survey as they may deem proper and just. (1921, c. 208; 1925, c. 122, s. 4; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 41.)

§ 113-22. Control of State forests.

The Department and Secretary shall have charge of all State forests, and measures for forest fire prevention. (1925, c. 122, s. 22; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 42.)

§ 113-23. Control of Mount Mitchell Park and other parks in the North Carolina State Parks System.

The Department shall have the control and management of Mount Mitchell Park and of any other parks which have been or may be acquired by the State as part of the North Carolina State Parks System. (1925, c. 122, s. 23; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 43.)

Cross References. — For further provisions relating to Mount Mitchell Park, see §§ 100-11 through 100-15.

§ 113-24: Repealed by Session Laws 1979, c. 830, s. 5.

Cross References. — For present provisions as to conservation of wildlife resources, see Subchapter IV of this Chapter, § 113-127 et seq.

§ 113-25. Notice to Department before beginning business of manufacturing products from mineral resources of State.

Every person, firm or corporation engaging in the manufacture or production of any product from any natural resources, classified as mineral products, shall before beginning such operation, or if already engaged in such business, within 90 days after March 9, 1927, notify the Department of its intention to begin or continue such business, and also notify said Department of the product or products it intends to produce.

Every person, firm or corporation now engaged or hereafter engaging in the manufacture or production of any product from any natural resources of the State classified as mineral products, shall notify the Department when such person, firm or corporation shall discontinue such manufacture or production.

Any person, firm or corporation failing to comply with the provisions of this section shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be fined not more than twenty-five dollars ($25.00) and not less than five dollars ($5.00), in the discretion of the court. (1927, c. 258; 1993, c. 539, s. 828; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-26: Repealed by Session Laws 1959, c. 683, s. 6.

§ 113-26.1. Bureau of Mines; mineral museum.

The Governor and the Council of State are hereby authorized, in their discretion and at such times as the development of the mineral resources and the expansion of mining operations in the State justify and make reasonably necessary, to create and establish as a part of the Department a Bureau of Mines, or a mineral museum in cooperation with the National Park Service, to be located in the western part of the State, with a view to rendering such aid and assistance to mining developments in this State as may be helpful in this expanding industry, and to allocate from the Contingency and Emergency

Fund such funds as may reasonably be necessary for the establishment and operation of such Bureau of Mines or mineral museum.

The Department may adopt rules governing the operation of a Bureau of Mines or mineral museum established under this section. (1943, c. 612; 1953, c. 1104, ss. 1-3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1987, c. 827, s. 89; 1989, c. 727, s. 44.)

§ 113-27: Repealed by Session Laws 1959, c. 779, s. 3.

§ 113-28. Reimbursement of government for expense of emergency conservation work.

When and if, upon the sale of State lands or its products, the Secretary determines that the State has derived a direct profit as a result of work on the land sold, or on land the products of which are sold, done or to be done, under a project carried on pursuant to an act of Congress entitled, "An act for the relief of unemployment through the performance of useful public work, and for other purposes" approved March 31, 1933, one half of such profit from such sale of land, or one half the proceeds of the sale of such products, or such lesser amount as may be sufficient, shall be applied to or toward reimbursing the United States government for moneys expended by it under such act, for the work so done, to the extent and at the rate of one dollar ($1.00) per man per day, for the time spent in such work, but not exceeding in the aggregate three dollars ($3.00) per acre. The Secretary shall fix and determine the amount of such profit or proceeds. Such one-half part of such proceeds or profits, as the case may be, shall be retained by the Department, or paid over to it by any other authorized agency making the sale, to be so retained by such Department until the account of the United States government, with respect to such sale, becomes liquidated. Upon completion of the sale, the Department is hereby authorized to settle with the proper federal authority an account fixing the amount due the United States government and to pay over to it the amount so fixed. The unexpended remainder, if any, of such one-half part of such profit or proceeds shall then be paid over or applied by said Department as now authorized and directed by law. This section shall not be construed to authorize the sale of State lands or products, but applies only to a sale now or hereafter authorized by other provisions of law. This section is enacted to procure a continuance of the emergency conservation work within the State, under such act of Congress. (1935, c. 115; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 45.)

Article 1A.

Special Peace Officers.

§ 113-28.1. Designated employees commissioned special peace officers by Governor.

Upon application by the Secretary of Environment and Natural Resources, the Governor is hereby authorized and empowered to commission as special peace officers such of the employees of the Department of Environment and Natural Resources as the Secretary may designate for the purpose of enforcing the laws and rules enacted or adopted for the protection, preservation and government of State parks, lakes, reservations and other lands or waters under the control or supervision of the Department of Environment and

Natural Resources. (1947, c. 577; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 783, s. 5; 1989, c. 727, s. 46; 1997-443, s. 11A.119(a).)

§ 113-28.2. Powers of arrest.

Any employee of the Department of Environment and Natural Resources commissioned as a special peace officer shall have the right to arrest with warrant any person violating any law or rule on or relating to the State parks, lakes, reservations and other lands or waters under the control or supervision of the Department of Environment and Natural Resources, and shall have the power to pursue and arrest without warrant any person violating in his presence any law or rule on or relating to said parks, lakes, reservations and other lands or waters under the control or supervision of the Department of Environment and Natural Resources. (1947, c. 577; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 47; 1997-443, s. 11A.119(a).)

§ 113-28.3: Repealed by Session Laws 1989, c. 485, s. 1.

§ 113-28.4. Oaths required.

Before any employee of the Department of Environment and Natural Resources commissioned as a special peace officer shall exercise any power of arrest under this Article he shall take the oaths required of public officers before an officer authorized to administer oaths. (1947, c. 577; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(48); 1997-443, s. 11A.119(a).)

Article 1B.

Aviation.

§§ 113-28.5 through 113-28.12: Recodified as §§ 63-65 to 63-72 by Session Laws 1979, c. 148, s. 5.

Article 1C.

Commission on International Cooperation.

§§ 113-28.13 through 113-28.20: Repealed by Session Laws 1973, c. 1262, s. 86.

Editor's Note. — Former sections 113-28.17 through 113-28.20 had been reserved for future codification purposes.

ARTICLE 1D.

Community Action Partnership Act.

§§ 113-28.21 through 113-28.26: Recodified as §§ 108B-21 to 108B-26 by Session Laws 1989 (Reg. Sess., 1990), c. 1004, s. 34(c).

SUBCHAPTER II. STATE FORESTS AND PARKS.

ARTICLE 2.

Acquisition and Control of State Forests and Parks.

§ 113-29. Policy and plan to be inaugurated by Department of Environment and Natural Resources.

(a) In this Article, unless the context requires otherwise, "Department" means the Department of Environment and Natural Resources; and "Secretary" means the Secretary of Environment and Natural Resources.

(b) The Department of Environment and Natural Resources shall inaugurate the following policy and plan looking to the cooperation with private and public forest owners in this State insofar as funds may be available through legislative appropriation, gifts of money or land, or such cooperation with landowners and public agencies as may be available:

(1) The extension of the forest fire prevention organization to all counties in the State needing such protection.

(2) To cooperate with federal and other public agencies in the restoration of forest growth on land unwisely cleared and subsequently neglected.

(3) To furnish trained and experienced experts in forest management, to inspect private forestlands and to advise with forest landowners with a view to the general observance of recognized and practical rules of growing, cutting and marketing timber. The services of such trained experts of the Department must naturally be restricted to those landowners who agree to carry out so far as possible the recommendations of said Department.

(4) To prepare and distribute printed and other material for the use of teachers and club leaders and to provide instruction to schools and clubs and other groups of citizens in order to train the younger generation in the principles of wise use of our forest resources.

(5) To acquire small areas of suitable land in the different regions of the State on which to establish small, model forests which shall be developed and used by the said Department as State demonstration forests for experiment and demonstration in forest management. (1939, c. 317, s. 1; 1969, c. 342, s. 1; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1987, c. 827, s. 90; 1989, c. 727, s. 49; 1991 (Reg. Sess., 1992), c. 890, s. 2; 1997-443, s. 11A.119(a).)

Legal Periodicals. — For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Declaratory Judgment Premature. — None of the plaintiffs seeking a declaratory judgment that Article 2 of this Chapter and Article 3 of Chapter 113A are unconstitutional and praying that defendants be permanently enjoined from adopting a "Master Plan" for the Eno River State Park had as yet been directly and adversely affected by the statutes they sought to challenge, and the plaintiffs failed to show the existence of a genuine controversy cognizable under the Declaratory Judgment Act, where no condemnation proceeding affecting any lands of the plaintiffs had as yet been instituted, and all that had occurred was that employees of the Division of Parks and Recreation had made initial alternative planning proposals for a State park which contemplated ultimate acquisition of certain lands of the plaintiffs for park purposes. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

§ 113-29.1. Growing of timber on unused State lands authorized.

The Department of Administration may allocate to the Department, for management as a State forest, any vacant and unappropriated lands, any marshlands or swamplands, and any other lands title to which is vested in the State or in any State agency or institution, where such lands are not being otherwise used and are not suitable for cultivation. Lands under the supervision of the Wildlife Resources Commission and designated and in use as wildlife management areas, refuges, or fishing access areas and lands used as research stations shall not be subject to the provisions of this section. The Department shall plant timber-producing trees on all lands allocated to it for that purpose by the Department of Administration. The Secretary may contract with the appropriate prison authorities for the furnishing, upon such conditions as may be agreed upon from time to time between such prison authorities and the Secretary, of prison labor for use in the planting, cutting, and removal of timber from State forests which are under the management of the Department. (1957, c. 584, s. 1; 1969, c. 342, s. 2; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 50.)

Local Modification. — Granville County: 1983 (Reg. Sess., 1984), c. 1027.

§ 113-30. Use of lands acquired by counties through tax foreclosures as demonstration forests.

The boards of county commissioners of the various counties of North Carolina are herewith authorized to turn over to the said Department title to such tax-delinquent lands as may have been acquired by said counties under tax sale and as in the judgment of the Secretary may be suitable for the purposes named in G.S. 113-29, subdivision (5). (1939, c. 317, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 51.)

§ 113-31. Procedure for acquisition of delinquent tax lands from counties.

In the carrying out of the provisions of G.S. 113-30, the several boards of county commissioners shall furnish forthwith on written request of the Department a complete list of all properties acquired by the county under tax sale and which have remained unredeemed for a period of two years or more. On receipt of this list the Secretary shall have the lands examined and if any one or more of these properties is in his judgment suitable for the purposes set forth in G.S. 113-30, request shall be made to the county commissioners for the

acquisition of such land by the Department at a price not to exceed the actual amount of taxes due without penalties. On receipt of this request the county commissioners shall make permanent transfer of such tract or tracts of land to the Department through fee-simple deed or other legal transfer, said deed to be approved by the Attorney General of North Carolina, and shall then receive payment from the Department as above outlined. (1939, c. 317, s. 3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 52.)

§ 113-32. Purchase of lands for use as demonstration forests.

Where no suitable tax-delinquent lands are available and in the judgment of the Department the establishment of a demonstration forest is advisable, the Department may purchase sufficient land for the establishment of such a demonstration forest at a fair and agreed-upon price, the deed for such land to be subject to approval of the Attorney General, but nothing in G.S. 113-29 to 113-33 shall allow the Department to acquire land under the right of eminent domain. (1939, c. 317, s. 4; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 53.)

§ 113-33. Forest management appropriation.

Necessary funds for carrying out the provisions of G.S. 113-29 and 113-30 to 113-33 shall be set up in the regular budget as an item entitled "forest management." (1939, c. 317, s. 5.)

§ 113-34. Power to acquire lands as State forests, parks, etc.; donations or leases by United States; leases for recreational purposes; rules governing public use.

(a) The Governor of the State is authorized upon recommendation of the Department to accept gifts of land to the State, the same to be held, protected, and administered by said Department as State forests, and to be used so as to demonstrate the practical utility of timber culture and water conservation, and as refuges for game. Such gifts must be absolute except in such cases as where the mineral interest on the land has previously been sold. The Department shall have the power to purchase lands in the name of the State, suitable chiefly for the production of timber, as State forests, for experimental, demonstration, educational, park, and protection purposes, using for such purposes any special appropriations or funds available. The Department shall also have the power to acquire by condemnation under the provisions of Chapter 40, such areas of land in different sections of the State as may in the opinion of the Department be necessary for the purpose of establishing and/or developing State forests, State parks and other areas and developments essential to the effective operation of the State forestry and State park activities with which the Department has been or may be entrusted. Such condemnation proceedings shall be instituted and prosecuted in the name of the State of North Carolina, and any property so acquired shall be administered, developed and used for experiment and demonstration in forest management, for public recreation and for such other purposes authorized or required by law: Provided, that before any action or proceeding under this section can be exercised, the approval of the Governor and Council of State shall be obtained and filed with the clerk of the superior court in the county or counties where such property may be situate, and until such approval is

obtained, the rights and powers conferred by this section shall not be exercised. The Attorney General of the State is directed to see that all deeds to the State for land mentioned in this section are properly executed before the gift is accepted or payment of the purchase money is made.

(b) The Department is further authorized and empowered to accept as gifts to the State of North Carolina such forest and submarginal farmland acquired by said federal government as may be suitable for the purpose of creating and maintaining State-controlled forests, game refuges, public shooting grounds, State parks, State lakes, and other recreational areas, or to enter into longtime leases with the federal government for such areas and administer them with such funds as may be secured from their administration in the best interest of longtime public use, supplemented by such necessary appropriations as may be made by the General Assembly. The Department is further empowered to segregate State hunting and fishing licenses, use permits, and concessions and other proper revenue secured through the administration of such forests, game refuges, public shooting grounds, State parks, State lakes, and other recreational areas to be deposited in the State treasury to the credit of the Department to be used for the administration of these areas.

(c) The Department, with the approval of the Governor and Council of State, is further authorized and empowered to enter into leases of lands and waters for State parks, State lakes and recreational purposes; and the Department may construct, operate and maintain on said lands and waters suitable public service facilities and conveniences and may charge and collect reasonable fees for

(1) The erection, maintenance and use of docks, piers and such other structures as may be permitted in or on said waters under its own rules;

(2) Fishing privileges in said waters, provided that such privileges shall be extended only to holders of bona fide North Carolina fishing licenses, and provided further that all State fishing laws and rules are complied with.

(d) The Department may make reasonable rules for the operation and use of boats or other craft on the surface of the said waters but shall not be authorized to charge or collect fees for such operation or use.

(e) The Department may make reasonable rules for the regulation of the use by the public of said lands and waters and of public service facilities and conveniences constructed thereon, and said rules shall have the force and effect of law and any violation of such rules shall constitute a Class 3 misdemeanor.

(f) The authority herein granted is in addition to other authority now held and exercised by the Department. (1915, c. 253, s. 1; C.S., s. 6124; 1925, c. 122, s. 22; 1935, c. 226; 1941, c. 118, s. 1; 1951, c. 443; 1953, c. 1109; 1957, c. 988, s. 2; 1965, c. 1008, s. 1; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1987, c. 827, s. 91; 1989, c. 727, s. 54; 1993, c. 539, s. 829; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Swain: 1951, c. 443.

Editor's Note. — Chapter 40, referred to in this section, was repealed by Session Laws 1981, c. 919, s. 1. See now Chapter 40A.

CASE NOTES

Deed Conveying Revolutionary War Battle Site to State for Specific Purposes Held to Be Absolute. — See Roten v. State, 8 N.C. App. 643, 175 S.E.2d 384 (1970).

Cited in Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

§ 113-35. State timber may be sold by Department of Environment and Natural Resources; forest nurseries; control over parks, etc.; operation of public service facilities; concessions to private concerns.

(a) Timber and other products of such State forestlands may be sold, cut and removed under rules of the Department. The Department shall have authority to establish and operate forest tree nurseries and forest tree seed orchards. Forest tree seedlings and seed from these nurseries and seed orchards may be sold to landowners of the State for purposes of forestation under rules of the Department. When the Secretary determines that a surplus of seedlings or seed exists, this surplus may be sold, and such sale shall be in conformity with the following priority of sale: first, to agencies of the federal government for planting in the State of North Carolina; second, to commercial nurseries and nurserymen within this State; and third, without distinction, to federal agencies, to other states, and to recognized research organizations for planting either within or outside of this State. The Department shall make reasonable rules for the regulation of the use by the public of such and all State forests, State parks, State lakes, game refuges and public shooting grounds under its charge, which rules, after having been posted in conspicuous places on and adjacent to such properties of the State and at the courthouse of the county or counties in which such properties are situated shall have the force and effect of law and any violation of such rules shall constitute a Class 3 misdemeanor.

(a1) The Department may adopt rules under which the Secretary may issue a special-use permit authorizing the use of pyrotechnics in State parks in connection with public exhibitions. The rules shall require that experts supervise the use of pyrotechnics and that written authorization for the use of pyrotechnics be obtained from the board of commissioners of the county in which the pyrotechnics are to be used, as provided in G.S. 14-410. The Secretary may impose any conditions on a permit that the Secretary determines to be necessary to protect public health, safety, and welfare. These conditions include, but are not limited to, a requirement that the permittee execute an indemnification agreement with the Department and obtain general liability insurance covering personal injury and property damage that may result from the use of pyrotechnics with policy limits as determined by the Secretary.

(b) The Department may construct and operate within the State forests, State parks, State lakes and any other areas under its charge suitable public service facilities and conveniences, and may charge and collect reasonable fees for the use of same; it may also charge and collect reasonable fees for:

(1) The erection, maintenance and use of docks, piers and such other structures as may be permitted in or on State lakes under its own rules;

(2) Hunting privileges on State forests and fishing privileges in State forests, State parks and State lakes, provided that such privileges shall be extended only to holders of bona fide North Carolina hunting and fishing licenses, and provided further that all State game and fish laws are complied with.

(c) The Department may make reasonable rules for the operation and use of boats or other craft on the surface of the said waters but shall not be authorized to charge or collect fees for such operation or use.

(d) The Department may also grant to private individuals or companies concessions for operation of public service facilities for such periods and upon such conditions as the Department shall deem to be in the public interest. The Department may make reasonable rules for the regulation of the use by the

public of the public service facilities and conveniences herein authorized, which rules shall have the force and effect of law, and any violation of such rules shall constitute a Class 3 misdemeanor. (1931, c. 111; 1947, c. 697; 1965, c. 1008, s. 2; 1969, c. 343; 1973, c. 547; c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1987, c. 827, s. 92; 1989, c. 727, s. 55; 1993, c. 539, ss. 830, 831; 1994, Ex. Sess., c. 24, s. 14(c); 1997-258, s. 2; 1997-443, s. 11A.119(a).)

Editor's Note. — Session Laws 1997-258, s. 3, provides: "This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. The Department of Environment and Natural Resources may adopt temporary rules to implement the provisions of G.S. 113-35(a1), as enacted by Section 2 of this act."

CASE NOTES

Applied in Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

Cited in Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984).

§ 113-35.1. Uniforms for seasonal park employees.

The Department shall design and adopt a distinguishing uniform vest for seasonal park employees. This vest shall be designed in one size to fit all seasonal employees. The Department shall furnish each seasonal employee with a uniform vest. The seasonal employee shall be required to wear the vest during working hours and shall be required to return the vest at the end of the season or upon termination of employment. (1987, c. 738, s. 152; 1989, c. 727, s. 56.)

§ 113-36. Applications of proceeds from sale of products.

(a) Application of Proceeds Generally. — Except as provided in this section, all money received from the sale of wood, timber, minerals, or other products from the State forests shall be paid into the State treasury and to the credit of the Department; and such money shall be expended in carrying out the purposes of this Article and of forestry in general, under the direction of the Secretary.

(b) Tree Cone and Seed Purchase Fund. — A percentage of the money obtained from the sale of seedlings and remaining unobligated at the end of a fiscal year, shall be placed in a special, continuing and nonreverting Tree Cone and Seed Purchase Fund under the control and direction of the Secretary. The percentage of the sales placed in the fund shall not exceed ten percent (10%). At the beginning of each fiscal year, the Secretary shall select the percentage for the upcoming fiscal year depending upon the anticipated costs of tree cones and seeds which the department must purchase. Money in this fund shall not be allowed to accumulate in excess of the amount needed to purchase a four-year supply of tree cones and seed, and shall be used for no purpose other than the purchase of tree cones and seeds.

(c) Forest Seedling Nursery Program Fund. — The Forest Seedling Nursery Program Fund is created within the Department of Environment and Natural Resources, Division of Forest Resources, as a special revenue fund. Except as provided in subsection (b) of this section, this Fund shall consist of receipts from the sale of seed and seedlings as authorized in G.S. 113-35 and any gifts, bequests, or grants for the benefit of this Fund. No General Fund appropriations shall be credited to this Fund. Any balance remaining in this Fund at the end of any fiscal year shall not revert. The Department may use this Fund only to develop, improve, repair, maintain, operate, or otherwise invest in the Forest Seedling Nursery Program.

(d) Bladen Lakes State Forest Fund. — The Bladen Lakes State Forest Fund is created within the Department of Environment and Natural Resources, Division of Forest Resources, as a special revenue fund. This Fund shall consist of receipts from the sale of forest products from Bladen Lakes State Forest as authorized in G.S. 113-35 and any gifts, bequests, or grants for the benefit of this Fund. No General Fund appropriations shall be credited to this Fund. Any balance remaining in this Fund at the end of any fiscal year shall not revert. The Department may use this Fund only to develop, improve, repair, maintain, operate, or otherwise invest in the Bladen Lakes State Forest. (1915, c. 253, s. 2; C.S., s. 6125; 1925, c. 122, s. 22; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1981, c. 351, s. 1; 1989, c. 727, s. 57; 1999-237, s. 15.)

Editor's Note. — Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — Session Laws 1999-237, s. 15, effective July 1, 1999, deleted "subsection (b) of" preceding "this section" in subsection (a); and added subsections (c) and (d).

§ 113-37. Legislative authority necessary for payment.

Nothing in this Article shall operate or be construed as authority for the payment of any money out of the State treasury for the purchase of lands or for other purposes unless by appropriation for said purpose by the General Assembly. (1915, c. 253, s. 2½; C.S., s. 6126.)

§ 113-38. Distribution of funds from sale of forestlands.

All funds paid by the National Forest Commission, by authority of act of Congress, approved May 23, 1908 (35 Stat., 260), for the Counties of Avery, Buncombe, Burke, Craven, Haywood, Henderson, Hyde, Jackson, Macon, Montgomery, Swain, Transylvania, Watauga, and Yancey, shall be paid to the proper county officers, and said funds shall, when received, be placed in the account of the general county funds: Provided, however, that in Buncombe County said funds shall be entirely for the use and benefit of the school district or districts in which said national forestlands shall be located.

All funds which may hereafter come into the hands of the State Treasurer from like sources shall be likewise distributed. (Ex. Sess. 1920, c. 6; 1921, c. 179, s. 17; C.S., s. 6126(a); 1933, c. 537, s. 1; 1939, c. 152; 1943, c. 527; 1957, c. 694; 1959, c. 245.)

§ 113-39. License fees for hunting and fishing on government-owned property unaffected.

No wording in G.S. 113-307.1(a), or any other North Carolina statute or law, or special act, shall be construed to abrogate the vested rights of the State of North Carolina to collect fees for license for hunting and fishing on any government-owned land or in any government-owned stream in North Carolina including the license for county, State or nonresident hunters or fishermen; or upon any lands or in any streams hereafter acquired by the federal government within the boundaries of the State of North Carolina. The lands and streams within the boundaries of the Great Smoky Mountains National Park to be excepted from this section. (1933, c. 537, s. 2; 1979, c. 830, s. 6.)

§ 113-40. Donations of property for forestry or park purposes; agreements with federal government or agencies for acquisition.

The Department is hereby authorized and empowered to accept gifts, donations or contributions of land suitable for forestry or park purposes and to enter into agreements with the federal government or other agencies for acquiring by lease, purchase or otherwise such lands as in the judgment of the Department are desirable for State forests or State parks. (1935, c. 430, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 58.)

§ 113-41. Expenditure of funds for development, etc.; disposition of products from lands; rules.

When lands are acquired or leased under G.S. 113-40, the Department is hereby authorized to make expenditures from any funds not otherwise obligated, for the management, development and utilization of such areas; to sell or otherwise dispose of products from such lands, and to make such rules as may be necessary to carry out the purposes of G.S. 113-40 to 113-44. (1935, c. 430, s. 2; 1987, c. 827, s. 93.)

§ 113-42. Disposition of revenues received from lands acquired.

All revenues derived from lands now owned or later acquired under the provisions of G.S. 113-40 to 113-44 shall be set aside for the use of the Department in acquisition, management, development and use of such lands until all obligations incurred have been paid in full. Thereafter, fifty percent (50%) of all net profits accruing from the administration of such lands shall be applicable for such purposes as the General Assembly may prescribe, and fifty percent (50%) shall be paid into the school fund to be used in the county or counties in which lands are located. (1935, c. 430, s. 3.)

§ 113-43. State not obligated for debts created hereunder.

Obligations for the acquisition of land incurred by the Department under the authority of G.S. 113-40 to 113-44 shall be paid solely and exclusively from revenues derived from such lands and shall not impose any liability upon the general credit and taxing power of the State. (1935, c. 430, s. 4.)

§ 113-44. Disposition of lands acquired.

The Department shall have full power and authority to sell, exchange or lease lands under its jurisdiction when in its judgment it is advantageous to the State to do so in the highest orderly development and management of State forests and State parks: Provided, however, said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into. (1935, c. 430, s. 5.)

Article 2A.

Forestry Advisory Committee.

§§ 113-44.1, 113-44.2: Repealed by Session Laws 1973, c. 1262, s. 28.

Cross References. — As to the Forestry Council, see §§ 143B-308 through 143B-310.

ARTICLE 2B.

Forestry Study Act.

§§ 113-44.3 through 113-44.6: Repealed by Session Laws 1995 (Reg. Sess., 1996), c. 653, s. 4.

ARTICLE 2C.

State Parks Act.

§ 113-44.7. Short title.

This Article shall be known as the State Parks Act. (1987, c. 243, s. 1.)

§ 113-44.8. Declaration of policy and purpose.

(a) The State of North Carolina offers unique archaeologic, geologic, biological, scenic, and recreational resources. These resources are part of the heritage of the people of this State. The heritage of a people should be preserved and managed by those people for their use and for the use of their visitors and descendants.

(b) The General Assembly finds it appropriate to establish the State Parks System. This system shall consist of parks which include representative examples of the resources sought to be preserved by this Article, together with such surrounding lands as may be appropriate. Park lands are to be used by the people of this State and their visitors in order to promote understanding of and pride in the natural heritage of this State.

(c) The tax dollars of the people of the State should be expended in an efficient and effective manner for the purpose of assuring that the State Parks System is adequate to accomplish the goals as defined in this Article.

(d) The purpose of this Article is to establish methods and principles for the planned acquisition, development, and operation of State parks. (1987, c. 243, s. 1.)

§ 113-44.9. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Park" means any tract of land or body of water comprising part of the State Parks System under this Article, including existing State parks, State natural areas, State recreation areas, State trails, State rivers, and State lakes.

(3) "Plan" means State Parks System Plan.

(4) "Secretary" means the Secretary of Environment and Natural Resources.

(5) "State Parks System" or "system" mean all those lands and waters which comprise the parks system of the State as established under this Article. (1987, c. 243, s. 1; 1989, c. 727, s. 218(50); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113-44.10. Powers of the Secretary.

The Secretary shall implement the provisions of this Article and shall be responsible for the administration of the State Parks System. (1987, c. 243, s. 1.)

§ 113-44.11. Preparation of a System Plan.

(a) The Secretary shall prepare and adopt a State Parks System Plan by December 31, 1988. The Plan, at a minimum, shall:

(1) Outline a method whereby the mission and purposes of the State Parks System as defined in G.S. 113-44.8 can be achieved in a reasonable, timely, and cost-effective manner;

(2) Evaluate existing parks against these standards to determine their statewide significance;

(3) Identify duplications and deficiencies in the current State Parks System and make recommendations for correction;

(4) Describe the resources of the existing State Parks System and their current uses, identify conflicts created by those uses, and propose solutions to them; and

(5) Describe anticipated trends in usage of the State Parks System, detail what impacts these trends may have on the State Parks System, and recommend means and methods to accommodate those trends successfully.

(b) The Plan shall be developed with full public participation, including a series of public meetings held on adequate notice under rules which shall be adopted by the Secretary. The purpose of the public meetings and other public participation shall be to obtain from the public:

(1) Views and information on the needs of the public for recreational resources in the State Parks System;

(2) Views and information on the manner in which these needs should be addressed;

(3) Review of the draft plan prepared by the Secretary before he adopts the Plan.

(c) The Secretary shall revise the Plan at intervals not exceeding five years. Revisions to the Plan shall be made consistent with and under the rules providing public participation in adoption of the Plan. (1987, c. 243, s. 1.)

§ 113-44.12. Classification of parks resources.

After adopting the Plan, the Secretary shall identify and classify the major resources of each of the parks in the State Parks System, in order to establish the major purpose or purposes of each of the parks, consistent with the Plan and the purposes of this Article. (1987, c. 243, s. 1.)

§ 113-44.13. General management plans.

Every park classified pursuant to G.S. 113-44.12 shall have a general management plan. The plan shall include a statement of purpose for the park based upon its relationship to the System Plan and its classification. An analysis of the major resources and facilities on hand to achieve those purposes shall be completed along with a statement of management direction. The general management plan shall be revised as necessary to comply with the System Plan and to achieve the purposes of this Article. (1987, c. 243, s. 1.)

§ 113-44.14. Additions to and deletions from the State Parks System.

(a) If, in the course of implementing G.S. 113-44.12 the Secretary determines that the major purposes of a park are not consistent with the purposes of this Article and the Plan, the Secretary may propose to the General Assembly the deletion of that park from the State Parks System. On a majority vote of each house of the General Assembly, the General Assembly may remove the park from the State Parks System. No other agency or governmental body of the State shall have the power to remove a park or any part from the State Parks System.

(b) New parks shall be added to the State Parks System by the Department after authorization by the General Assembly. Each additional park shall be authorized only by an act of the General Assembly. Additions shall be consistent with and shall address the needs of the State Parks System as described in the Plan. All additions shall be accompanied by adequate authorization and appropriations for land acquisition, development, and operations. (1987, c. 243, s. 1.)

Editor's Note. — Session Laws 1999-459, s. 3, pursuant to the requirements of G.S. 113-44.14 applicable to the deletion of land from the State Parks System, provides for the deletion from the State Parks System of all segments and the entire width of the Falls Lake State Trail located within game lands managed by the Wildlife Resources Commission. This land is shown on a map entitled "Lands to be Deleted from Falls Lake State Recreation Area", dated 5 March 1999 and filed in the State Property Office. The State's leased interest in this land is reallocated to the Wildlife Resources Commission, and the Wildlife Resources Commission is to manage this land.

Session Laws 1999-459, s. 4 contains a severability clause.

§ 113-44.15. Parks and Recreation Trust Fund.

(a) There is established a Parks and Recreation Trust Fund in the State Treasurer's Office. The Trust Fund shall be a nonreverting special revenue fund consisting of gifts and grants to the Trust Fund, monies credited to the Trust Fund pursuant to G.S. 105-228.30(b), and other monies appropriated to the Trust Fund by the General Assembly.

(b) Funds in the Trust Fund are annually appropriated to the North Carolina Parks and Recreation Authority and, unless otherwise specified by the General Assembly or the terms or conditions of a gift or grant, shall be allocated and used as follows:

(1) Sixty-five percent (65%) for the State Parks System for capital projects, repairs and renovations of park facilities, and land acquisition.

(2) Thirty percent (30%) to provide matching funds to local governmental units on a dollar-for-dollar basis for local park and recreation purposes. These funds shall be allocated by the North Carolina Parks and Recreation Authority based on criteria patterned after the Open Project Selection Process established for the Land and Water Conservation Fund administered by the National Park Service of the United States Department of the Interior.

(3) Five percent (5%) for the Coastal and Estuarine Water Beach Access Program.

In allocating funds in the Trust Fund under this subsection, the North Carolina Parks and Recreation Authority shall consider geographic distribution across the State to the extent practicable. Of the funds appropriated to the North Carolina Parks and Recreation Authority from the Trust Fund each year, no more than three percent (3%) may be used by the Department for

operating expenses associated with managing capital improvements projects, acquiring land, and administration of local grants programs.

(c) The North Carolina Parks and Recreation Authority shall report no later than October 1 of each year to the Joint Legislative Commission on Governmental Operations, the House and Senate Appropriations Subcommittees on Natural and Economic Resources, the Fiscal Research Division, and the Environmental Review Commission on allocations from the Trust Fund from the prior fiscal year. The Authority also shall provide a progress report no later than March 15 of each year to the same recipients on the activities of and the expenditures from the Trust Fund for the current fiscal year. (1993 (Reg. Sess., 1994), c. 772, s. 1; 1995, c. 456, s. 2; 1995 (Reg. Sess., 1996), c. 646, s. 20; 1998-212, ss. 14.6(a), 14.7.)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 14.6(c), provides: "Notwithstanding G.S. 113-44.15(c) as rewritten by subsection (a) of this section, the report due no later than October 1, 1998, shall instead be made no later than December 1, 1998".

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, added the present first sentence in the last paragraph of subsection (b); and rewrote subsection (c).

Article 3.

Private Lands Designated as State Forests.

§§ 113-45 through 113-50: Repealed by Session Laws 1975, c. 253.

Article 4.

Protection and Development of Forests; Fire Control.

§ 113-51. Powers of Department of Environment and Natural Resources.

(a) The Department of Environment and Natural Resources may take such action as it may deem necessary to provide for the prevention and control of forest fires in any and all parts of this State, and it is hereby authorized to enter into an agreement with the Secretary of Agriculture of the United States for the protection of the forested watersheds of streams in this State.

(b) In this Article, unless the context requires otherwise:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Secretary" means the Secretary of Environment and Natural Resources. (1915, c. 243, s. 1; C.S., s. 6133; 1925, c. 122, s. 22; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 60; 1997-443, s. 11A.119(a).)

§ 113-52. Forest rangers.

The Secretary may appoint one county forest ranger and one or more deputy forest rangers in each county of the State in which, after careful investigation,

the amount of forestland and the risks from forest fires shall, in his judgment, warrant the establishment of a forest fire organization. (1915, c. 243, s. 2; C.S., s. 6134; 1925, c. 106, s. 1; c. 122, s. 22; 1927, c. 150, s. 1; 1935, c. 178, s. 1; 1951, c. 575; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 61.)

§ 113-53: Repealed by Session Laws 1973, c. 1262, s. 28.

§ 113-53.1. Forest laws defined.

The forest laws consist of:

(1) G.S. 14-136 to G.S. 14-140;
(2) Articles 2, 4, 4A, 4C, and 6A of this Chapter;
(3) G.S. 77-13 and G.S. 77-14;
(4) Other statutes enacted for the protection of forests and woodlands from fire, insects, or disease and concerning obstruction of streams and ditches in forests and woodlands; and
(5) Regulations and ordinances adopted under the authority of the above statutes. (1983, c. 327, s. 1.)

Cross References. — As to nuisance liability of agricultural and forestry operations, see Article 57 of Chapter 106, § 106-700 et seq.

Editor's Note. — Sections 14-138, 14-139 and 14-140, referred to in subdivision (1) above, have been repealed.

§ 113-54. Duties of forest rangers; payment of expenses by State and counties.

Forest rangers shall have charge of measures for controlling forest fires, protection of forests from pests and diseases, and the development and improvement of the forests for maximum production of forest products; shall post along highways and in other conspicuous places copies of the forest fire laws and warnings against fires, which shall be supplied by the Secretary; shall patrol and man lookout towers and other points during dry and dangerous seasons under the direction of the Secretary; and shall perform such other acts and duties as shall be considered necessary by the Secretary in the protection, development and improvement of the forested area of each of the counties within the State. No county may be held liable for any part of the expenses thus incurred unless specifically authorized by the board of county commissioners under prior written agreement with the Secretary; appropriations for meeting the county's share of such expenses so authorized by the board of county commissioners shall be provided annually in the county budget. For each county in which financial participation by the county is authorized, the Secretary shall keep or cause to be kept an itemized account of all expenses thus incurred and shall send such accounts periodically to the board of county commissioners of said county; upon approval by the board of the correctness of such accounts, the county commissioners shall issue or cause to be issued a warrant on the county treasury for the payment of the county's share of such expenditures, said payment to be made within one month after receipt of such statement from the Secretary. Appropriations made by a county for the purposes set out in Articles 4, 4A, 4C and 6A of this Chapter in the cooperative forest protection, development and improvement work are not to replace State and federal funds which may be available to the Secretary for the work in said county, but are to serve as a supplement thereto. Funds appropriated to the Department for a fiscal year for the purposes set out in Articles 4, 4A, 4C and 6A of this Chapter shall not be expended in a county unless that county shall contribute at least twenty-five percent (25%) of the total cost of the forestry program. (1915, c. 243, s. 4; C.S., s. 6136; 1925, c. 106,

s. 1; 1927, c. 150, s. 3; 1935, c. 178, s. 2; 1943, c. 660; 1947, c. 56, s. 1; 1951, c. 575; 1961, c. 833, s. 17; 1963, c. 312, s. 1; 1973, c. 1262, s. 86; 1975, c. 620, s. 1; 1977, c. 771, s. 4; 1983, c. 327, s. 2; 1989, c. 727, s. 62; 1991 (Reg. Sess., 1992), c. 1039, s. 23.)

Local Modification. — Cumberland: 1943, c. 660.

§ 113-55. Powers of forest rangers to prevent and extinguish fires; authority to issue citations and warning tickets.

(a) Forest rangers shall prevent and extinguish forest fires and shall have control and direction of all persons and equipment while engaged in the extinguishing of forest fires. During a season of drought, the Secretary or his designate may establish a fire patrol in any district, and in case of fire in or threatening any forest or woodland, the forest ranger shall attend forthwith and use all necessary means to confine and extinguish such fire. The forest ranger or deputy forest ranger may summon any resident between the ages of 18 and 45 years, inclusive, to assist in extinguishing fires and may require the use of crawler tractors and other property needed for such purposes; any person so summoned and who is physically able who refuses or neglects to assist or to allow the use of equipment and such other property required shall be guilty of a Class 3 misdemeanor and upon conviction shall only be subject to a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00). No action for trespass shall lie against any forest ranger, deputy forest ranger, or person summoned by him for crossing lands, backfiring, burning out or performing his duties as a forest ranger or deputy forest ranger.

(b) Forest rangers are authorized to issue and serve citations under the terms of G.S. 15A-302 and warning tickets under the terms of G.S. 113-55.2 for offenses under the forest laws. This subsection may not be interpreted to confer the power of arrest on forest rangers, and does not make them criminal justice officers within the meaning of G.S. 17C-2. (1915, c. 243, s. 6; C.S., s. 6137; 1925, c. 106, ss. 1, 2; c. 240; 1927, c. 150, s. 4; 1951, c. 575; 1963, c. 312, s. 2; 1973, c. 108, s. 65; c. 1262, s. 86; 1975, c. 620, s. 2; 1977, c. 771, s. 4; 1983, c. 327, s. 3; 1989, c. 727, s. 63; 1993, c. 539, s. 832; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Workers' Compensation Act Applicable to Person Appointed by Ranger to Assist. — A forest ranger of a county is given authority by this section to appoint persons between certain ages to assist him in fighting forest fires with pain of penalty upon refusal, and a person so appointed is entitled to receive a small hourly compensation for the services so rendered, and one so appointed is an employee of the State within the meaning of the Workers' Compensation Act, and is entitled to compensation thereunder for an injury received in the course of and arising out of his duties imposed by such appointment. Moore v. State, 200 N.C. 300, 156 S.E. 806 (1931).

Cited in Tomlinson v. Town of Norwood, 208 N.C. 716, 182 S.E. 659 (1935).

§ 113-55.1. Powers of forest law-enforcement officers.

The Secretary is authorized to appoint as many forest law-enforcement officers as he deems necessary to carry out the forest law-enforcement responsibilities of the Department. Forest law-enforcement officers shall have all the powers and the duties of a forest ranger enumerated in G.S. 113-54 and

113-55. Forest law-enforcement officers shall, in addition to their other duties, have the powers of peace officers to enforce the forest laws. Any forest law-enforcement officer may arrest, without warrant, any person or persons committing any crime in his presence or whom such officer has probable cause for believing has committed a crime in his presence and bring such person or persons forthwith before a district court or other officer having jurisdiction. Forest law-enforcement officers shall also have authority to obtain and serve warrants including warrants for violation of any duly promulgated rule of the Department. (1975, c. 620, s. 3; 1977, c. 771, s. 4; 1983, c. 327, s. 5; 1989, c. 727, s. 64.)

§ 113-55.2. Warning tickets for violations of the forest laws.

(a) To encourage the cooperation of the public in achieving the objectives of the forest laws, the Secretary may provide for the issuance of warning tickets instead of the initiation of criminal prosecution by forest rangers and forest law-enforcement officers. Issuance of the warning tickets shall be in accordance with criteria administratively promulgated by the Secretary within the requirements of this section. These criteria are exempt from Article 2 of Chapter 150B of the General Statutes but shall be filed in accordance with Article 5 of that Chapter.

(b) No warning ticket may be issued unless all of the following conditions are met:

(1) The forest ranger or the forest law-enforcement officer must be convinced that the offense was not committed intentionally.

(2) The offense is not one, or a type of offense, for which the Secretary has prohibited the issuance of warning tickets.

(3) At the time of the violation it was not reasonably foreseeable that the conduct of the offender could result in any significant destruction of forests or woodlands or constitute a hazard to the public.

(c) A warning ticket may not be issued if the offender has previously been charged with, or issued a warning ticket for, the same or a similar offense within the preceding three years. A list of persons who have been issued warning tickets under this section within the preceding three years shall be maintained and periodically updated by the Secretary.

(d) This section does not entitle any person who has committed an offense to the right to be issued a warning ticket, and the issuance of a warning ticket does not prohibit the later initiation of criminal prosecution for the same offense for which the warning ticket was issued. (1983, c. 327, s. 6; 1987, c. 827, s. 6.)

§ 113-56. Compensation of forest rangers.

Forest rangers shall receive compensation from the Department at a reasonable rate to be fixed by said Department for the time actually engaged in the performance of their duties; and reasonable expenses for equipment, transportation, or food supplies incurred in the performance of their duties, according to an itemized statement to be rendered the Secretary every month, and approved by him. Forest rangers shall render to the Secretary a statement of the services rendered by the men employed by them or their deputy rangers, as provided in this Article, within one month of the date of service, which bill shall show in detail the amount and character of the service performed, the exact duration thereof, the name of each person employed, and any other information required by the Secretary. If said bill be duly approved by the Secretary, it shall be paid by direction of the Department out of any funds

provided for that purpose. (1915, c. 243, s. 7; C.S., s. 6138; 1924, c. 60; 1925, c. 106, ss. 1, 3; c. 122, s. 22; 1947, c. 56, s. 2; 1951, c. 575; 1963, c. 312, s. 3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 65.)

§ 113-56.1. Overtime compensation for forest fire fighting.

The Department shall, within funds appropriated to the Department, provide overtime compensation to the professional employees of the Forest Resources Division involved in fighting forest fires. (1983, c. 761, s. 119; 1989, c. 727, s. 66.)

§ 113-57. Woodland defined.

For the purposes of this Article, woodland is taken to include all forest areas, both timber and cutover land, and all second-growth stands on areas that have at one time been cultivated. (1915, c. 243, s. 11; C.S., s. 6139.)

§ 113-58. Misdemeanor to destroy posted forestry notice.

Any person who shall maliciously or willfully destroy, deface, remove, or disfigure any sign, poster, or warning notice, posted by order of the Secretary, under the provisions of this Article, or any other act which may be passed for the purpose of protecting and developing the forests in this State, shall be guilty of a Class 3 misdemeanor. (1915, c. 243, s. 5; C.S., s. 6140; 1963, c. 312, s. 4; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 67; 1993, c. 539, s. 833; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-59. Cooperation between counties and State in forest protection and development.

The board of county commissioners of any county is hereby authorized and empowered to cooperate with the Department in the protection, reforestation, and promotion of forest management of their own forests within their respective counties, and to appropriate and pay out of the funds under their control such amount as is provided in G.S. 113-54. (1921, c. 26; C.S., s. 6140(a); 1925, c. 122, s. 22; 1945, c. 635; 1963, c. 312, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 68.)

§ 113-60. Instructions on forest preservation and development.

(a) It shall be the duty of all district, county, township rangers, and all deputy rangers provided for in this Chapter to distribute in all of the public schools and high schools of the county in which they are serving as such fire rangers all such tracts, books, periodicals and other literature that may, from time to time, be sent out to such rangers by the State and federal forestry agencies touching or dealing with forest preservation, development, and forest management.

(b) It shall be the duty of the various rangers herein mentioned under the direction of the Secretary, and the duty of the teachers of the various schools, both public and high schools, to keep posted at some conspicuous place in the various classrooms of the school buildings such appropriate bulletins and posters as may be sent out from the forestry agencies herein named for that purpose and keep the same constantly before their pupils; and said teachers and rangers shall prepare lectures or talks to be made to the pupils of the various schools on the subject of forest fires, their origin and their destructive

effect on the plant life and tree life of the forests of the State, the development and scientific management of the forests of the State, and shall be prepared to give practical instruction to their pupils from time to time and as often as they shall find it possible so to do. (1925, c. 61, s. 3; 1951, c. 575; 1963, c. 312, s. 6; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 69.)

§ 113-60.1. Authority of Governor to close forests and woodlands to hunting, fishing and trapping.

During periods of protracted drought or when other hazardous fire conditions threaten forest and water resources and appear to require extraordinary precautions, the Governor of the State, upon the joint recommendation of the Secretary and the Executive Director of the North Carolina Wildlife Resources Commission, may by official proclamation:

(1) Close any or all of the woodlands and inland waters of the State to hunting, fishing and trapping for the period of the emergency.

(2) Forbid for the period of the emergency the building of campfires and the burning of brush, grass or other debris within 500 feet of any woodland in any county, counties, or parts thereof.

(3) Close for the period of the emergency any or all of the woodlands of the State to such other persons and activities as he deems proper under the circumstances, except to the owners or tenants of such property and their agents and employees, or persons holding written permission from any owner or his recognized agent to enter thereon for any lawful purpose other than hunting, fishing or trapping. (1953, c. 305; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 70.)

§ 113-60.2. Publication of proclamation; annulment thereof.

Such proclamation shall become effective 24 hours after certified time of issue, and shall be published in such newspapers and posted in such places and in such manner as the Governor may direct. It shall be annulled in the same manner by another proclamation by the Governor when he is satisfied, upon joint recommendation of the Secretary and the Executive Director of the North Carolina Wildlife Resources Commission, that the period of the emergency has passed. (1953, c. 305; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 71.)

§ 113-60.3. Violation of proclamation a misdemeanor.

Any person, firm or corporation who enters upon any woodlands or inland waters of the State for the purpose of hunting, fishing or trapping, or who builds a campfire or burns brush, grass or other debris within 500 feet of any woodland, after a proclamation has been issued by the Governor forbidding such activities, or who violates any other provisions of the Governor's proclamation with regard to permissible activities in closed woodlands shall be guilty of a Class 1 misdemeanor. (1953, c. 305; 1993, c. 539, s. 834; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 4A.

Protection of Forest Against Insect Infestation and Disease.

§ 113-60.4. Purpose and intent.

(a) The purpose of this Article is to place within the Department of Environment and Natural Resources, the authority and responsibility for

investigating insect infestations and disease infections which affect stands of forest trees, the devising of control measures for interested landowners and others, and taking measures to control, suppress, or eradicate outbreaks of forest insect pests and tree diseases.

(b) In this Article, unless the context requires otherwise, the expression "Department" means the Department of Environment and Natural Resources: "Secretary" means the Secretary of Environment and Natural Resources. (1953, c. 910; 1969, c. 342, s. 3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 72; 1997-443, s. 11A.119(a).)

§ 113-60.5. Authority of the Department.

The authority and responsibility for carrying out the purpose, intent and provisions of this Article are hereby delegated to the Department. The administration of the provisions of this Article shall be under the general supervision of the Secretary. The provisions of this Article shall not abrogate or change any power or authority as may be vested in the North Carolina Department of Agriculture and Consumer Services under existing statutes. (1953, c. 910; 1969, c. 342, s. 3; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 73; 1997-261, s. 109.)

§ 113-60.6. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Control zone" means an area of potential or actual infestation or infection, boundaries of which are fixed and clearly described in a manner to definitely identify the zone.

(2) "Forestland" means land on which forest trees occur.

(3) "Forest trees" means only those trees which are a part and constitute a stand of potential immature or mature commercial timber trees, provided that the term "forest trees" shall be deemed to include shade trees of any species around houses, along highways, and within cities and towns, if the same constitute insect and disease menaces to nearby timber trees or timber stands.

(4) "Infection" means attack by any disease affecting forest trees which is declared by the Secretary to be dangerously injurious thereto.

(5) "Infestation" means attack by means of any insect, which is by the Secretary declared to be dangerously injurious to forest trees. (1953, c. 910; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, ss. 74, 75.)

§ 113-60.7. Action against insects and diseases.

Whenever the Secretary, or his agent, determines that there exists an infestation of forest insect pests or an infection of forest tree diseases, injurious or potentially injurious to the timber or forest trees within the State of North Carolina, and that said infestation or infection is of such a character as to be a menace to the timber or forest growth of the State, the Secretary shall declare the existence of a zone of infestation or infection and shall declare and fix boundaries so as to definitely describe and identify said zone of infestation or infection, and the Secretary or his agent shall give notice in writing by mail or otherwise to each forest landowner within the designated control zone advising him of the nature of the infestation or infection, the recommended control measures, and offer him technical advice on methods of carrying out controls. (1953, c. 910; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 76.)

§ 113-60.8. Authority of Secretary and his agents to go upon private land within control zones.

The Secretary or his agents shall have the power to go upon the land within any zone of infestation or infection and take measures to control, suppress or eradicate the insect, infestation or disease infection. If any person refuses to allow the Secretary or his agents to go upon his land, or if any person refuses to adopt adequate means to control or eradicate the insect, infestation or disease infection, the Secretary may apply to the superior court of the county in which the land is located for an injunction or other appropriate remedy to restrain the landowner from interfering with the Secretary or his agents in entering the control zone and adopting measures to control, suppress or eradicate the insect infestation or disease infection, provided the cost of court or control thereof shall not be a liability against the forest landowner nor constitute a lien upon the real property of such infested area. (1953, c. 910; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 77.)

§ 113-60.9. Cooperative agreements.

In order to more effectively carry out the purposes of this Article, the Department is hereby authorized to enter into cooperative agreement with the federal government and other public and private agencies, and with the owners of forestland. (1953, c. 910; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 78.)

§ 113-60.10. Annulment of control zone.

Whenever the Secretary determines that the forest insect or disease control work within a designated control zone is no longer necessary or feasible, then the Secretary shall declare the zone of infestation or infection no longer pertinent to the purposes of this Article and such zone will then no longer be recognized. (1953, c. 910; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 79.)

Article 4B.

Southeastern Interstate Forest Fire Protection Compact.

§ 113-60.11. Execution of Compact authorized; terms of Compact.

The legislature on behalf of this State is hereby authorized to execute a Compact, in substantially the following form, with any one or more of the states of Alabama, Florida, Georgia, Kentucky, Mississippi, South Carolina, Tennessee, Virginia, and West Virginia, and the legislature hereby signifies in advance its approval and ratification of such Compact:

Southeastern Interstate Forest Fire Protection Compact

Article I.

The purpose of this Compact is to promote effective prevention and control of forest fires in the Southeastern region of the United States by the development of integrated forest fire plans, by the maintenance of adequate forest fire-fighting services by the member states, by providing for mutual aid

in fighting forest fires among the compacting states of the region and with states which are party to other regional forest fire protection compacts or agreements, and for more adequate forest protection.

Article II.

This Compact shall become operative immediately as to those states ratifying it whenever any two or more of the states of Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia, which are contiguous have ratified it and Congress has given consent thereto. Any state not mentioned in this Article which is contiguous with any member state may become a party to this Compact, subject to approval by the legislature of each of the member states.

Article III.

In each state, the state forester or officer holding the equivalent position who is responsible for forest fire control shall act as compact administrator for that state and shall consult with like officials of the other member states and shall implement cooperation between such states in forest fire prevention and control.

The compact administrators of the member states shall coordinate the services of the member states and provide administrative integration in carrying out the purposes of this Compact.

There shall be established an advisory committee of legislators, forestry commission representatives, and forestry or forest products industries representatives which shall meet from time to time with the compact administrators. Each member state shall name one member of the Senate and one member of the House of Representatives who shall be designated by that state's commission on interstate cooperation, or if said commission cannot constitutionally designate the said members, they shall be designated in accordance with laws of that state; and the governor of each member state shall appoint two representatives, one of whom shall be associated with forestry or forest products industries to comprise the membership of the advisory committee. Action shall be taken by a majority of the compacting states, and each state shall be entitled to one vote.

The compact administrators shall formulate and, in accordance with need, from time to time, revise a regional forest fire plan for the member states.

It shall be the duty of each member state to formulate and put in effect a forest fire plan for that state and take such measures as may be necessary to integrate such forest fire plan with the regional forest fire plan formulated by the compact administrators.

Article IV.

Whenever the state forest fire control agency of a member state requests aid from the state forest fire control agency of any other member state in combating, controlling or preventing forest fires, it shall be the duty of the state forest fire control agency of that state to render all possible aid to the requesting agency which is consonant with the maintenance of protection at home.

Article V.

Whenever the forces of any member state are rendering outside aid pursuant to the request of another member state under this Compact, the employees of

such state shall, under the direction of the officers of the state to which they are rendering aid, have the same powers (except the power of arrest), duties, rights, privileges and immunities as comparable employees of the state to which they are rendering aid.

No member state or its officers or employees rendering outside aid pursuant to this Compact shall be liable on account of any act or omission on the part of such forces while so engaged, on account of the maintenance, or use of any equipment or supplies in connection therewith: Provided, that nothing herein shall be construed as relieving any person from liability for his own negligent act or omission, or as imposing liability for such negligent act or omission upon any state.

All liability, except as otherwise provided hereinafter, that may arise either under the laws of the requesting state or under the laws of the aiding state or under the laws of a third state on account of or in connection with a request for aid, shall be assumed and borne by the requesting state.

Any member state rendering outside aid pursuant to this Compact shall be reimbursed by the member state receiving such aid for any loss or damage to, or expense incurred in the operation of any equipment answering a request for aid, and for the cost of all materials, transportation, wages, salaries, and subsistence of employees and maintenance of equipment incurred in connection with such request: Provided, that nothing herein contained shall prevent any assisting member state from assuming such loss, damage, expense or other cost or from loaning such equipment or from donating such service to the receiving member state without charge or cost.

Each member state shall provide for the payment of compensation and death benefits to injured employees and the representatives of deceased employees in case employees sustain injuries or are killed while rendering outside aid pursuant to this Compact, in the same manner and on the same terms as if the injury or death were sustained within such state.

For the purposes of this Compact the term employee shall include any volunteer or auxiliary legally included within the forest fire fighting forces of the aiding state under the laws thereof.

The compact administrators shall formulate procedures for claims and reimbursement under the provisions of this Article, in accordance with the laws of the member states.

Article VI.

Ratification of this Compact shall not be construed to affect any existing statute so as to authorize or permit curtailment or diminution of the forest fire fighting forces, equipment, services or facilities of any member state.

Nothing in this Compact shall be construed to limit or restrict the powers of any state ratifying the same to provide for the prevention, control and extinguishment of forest fires, or to prohibit the enactment or enforcement of state laws, rules or regulations intended to aid in such prevention, control and extinguishment in such state.

Nothing in this Compact shall be construed to affect any existing or future cooperative relationship or arrangement between any federal agency and a member state or states.

Article VII.

The compact administrators may request the United States Forest Service to act as a research and coordinating agency of the Southeastern Interstate Forest Fire Protection Compact in cooperation with the appropriate agencies in each state, and the United States Forest Service may accept responsibility

for preparing and presenting to the compact administrators its recommendations with respect to the regional fire plan. Representatives of any federal agency engaged in forest fire prevention and control may attend meetings of the compact administrators.

ARTICLE VIII.

The provisions of Articles IV and V of this Compact which relate to mutual aid in combating, controlling or preventing forest fires shall be operative as between any state party to this Compact and any other state which is party to a regional forest fire protection compact in another region: Provided, that the legislature of such other state shall have given its assent to such mutual aid provisions of this Compact.

ARTICLE IX.

The Compact shall continue in force and remain binding on each state ratifying it until the legislature or the governor of such state, as the laws of such state shall provide, takes action to withdraw therefrom. Such action shall not be effective until six months after notice thereof has been sent by the chief executive of the state desiring to withdraw to the chief executives of all states then parties to the Compact. (1955, c. 803, s. 1.)

§ 113-60.12. When Compact to become effective; authority of Governor.

When the legislature shall have executed said Compact on behalf of this State and shall have caused a verified copy thereof to be filed with the State Secretary, and when said Compact shall have been ratified by one or more of the states named in G.S. 113-60.11, then said Compact shall become operative and effective as between this State and such other state or states. The Governor is hereby authorized and directed to take such action as may be necessary to complete the exchange of official documents as between this State and any other state ratifying said Compact. (1955, c. 803, s. 2.)

§ 113-60.13. Assent of legislature to mutual aid provisions of other compacts.

The legislature of this State hereby gives its assent to the mutual aid provisions of Articles IV and V of the South Central Interstate Forest Fire Protection Compact in accordance with Article VIII of that Compact relating to interregional mutual aid; and the legislature of this State also hereby gives its assent to the mutual aid provisions of Articles IV and V of the Middle Atlantic Interstate Forest Fire Protection Compact in accordance with Article VIII of that Compact relating to interregional mutual aid. (1955, c. 803, s. 3.)

§ 113-60.14. Compact Administrator; North Carolina members of advisory committee.

The Secretary of Environment and Natural Resources is hereby designated as Compact Administrator for this State and shall consult with like officials of the other member states and shall implement cooperation between such states in forest fire prevention and control.

At some time before the adjournment of each regular session of the General Assembly, the Governor shall choose one person from the membership of the

House of Representatives, and shall choose one person from the membership of the Senate, who shall serve on the advisory committee of the Southeastern Interstate Forest Fire Protection Compact as provided for in Article III of said Compact. At the time of the selection of the House and Senate members of such advisory committee, the Governor shall choose one alternate member from the House of Representatives and one from the Senate who shall serve on such advisory committee in case of the death, absence or disability of the regular members so chosen. (1955, c. 803, s. 4; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(51); 1997-443, s. 11A.119(a).)

§ 113-60.15. Agreements with noncompact states.

The Department of Environment and Natural Resources is hereby authorized to enter into written agreements with the State forest fire control agency of any other state or any province of Canada which is party to a regional forest fire protection compact. The provisions of any written agreement entered into pursuant to this Article shall be substantially in the form of the authority heretofore granted under the provisions of this Article, Southeastern Interstate Forest Fire Protection Compact. (1971, c. 1171; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 218(52); 1997-443, s. 11A.119(a).)

§§ 113-60.16 through 113-60.20: Reserved for future codification purposes.

Article 4C.

Regulation of Open Fires.

§ 113-60.21. Purpose and findings.

The purpose of this Article is to regulate certain open burning in order to protect the public from the hazards of forest fires and air pollution and to adapt such regulation to the needs and circumstances of the different areas of North Carolina. The General Assembly finds that open burning in proximity to woodlands must be regulated in all counties to protect against forest fires and air pollution. The General Assembly further finds that in certain counties a high percentage of the land area contains organic soils or forest types which may pose greater problems of forest fire and air pollution controls, and that in counties in which a great amount of land-clearing operations is taking place on these organic soils or these forest types, additional control of open burning is required. The counties subject to the need for additional control are classified as high hazard counties for purpose of this Article. (1981, c. 1100, s. 2; 1981 (Reg. Sess., 1982), c. 1385, s. 1.)

§ 113-60.22. Definitions.

As used in this Article:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Forest ranger" means the county forest ranger or deputy forest ranger designated under G.S. 113-52.

(3) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency.

(4) "Woodland" means woodland as defined in G.S. 113-57. (1981, c. 1100, s. 2; 1989, c. 727, s. 218(53); 1991 (Reg. Sess., 1992), c. 890, s. 3; 1997-443, s. 11A.119(a).)

§ 113-60.23. High hazard counties; permits required; standards.

(a) The provisions of this section apply only to the counties of Beaufort, Bladen, Camden, Carteret, Chowan, Craven, Currituck, Dare, Duplin, Gates, Hyde, Jones, Onslow, Pamlico, Pasquotank, Perquimans, Tyrrell, and Washington which are classified as high hazard counties in accordance with G.S. 113-60.21.

(b) It is unlawful for any person to willfully start or cause to be started any fire in any woodland under the protection of the Department or within 500 feet of any such woodland without first having obtained a permit from the Department. Permits for starting fires may be obtained from forest rangers or other agents authorized by the county forest ranger to issue such permits in the county in which the fire is to be started. Such permits shall be issued by the ranger or other agent unless permits for the area in question have been prohibited or cancelled in accordance with G.S. 113-60.25 or 113-60.27.

(c) It is unlawful for any person to willfully burn any debris, stumps, brush or other flammable materials resulting from ground clearing activities and involving more than five contiguous acres, regardless of the proximity of the burning to woodland and on which such materials are placed in piles or windrows without first having obtained a special permit from the Department. Areas less than five acres in size will require a regular permit in accordance with G.S. 113-60.23(b).

(1) Prevailing winds at the time of ignition must be away from any city, town, development, major highway, or other populated area, the ambient air of which may be significantly affected by smoke, fly ash, or other air contaminates from the burning.

(2) The location of the burning must be at least 1,000 feet from any dwelling or structure located in a predominately residential area other than a dwelling or structure located on the property on which the burning is conducted unless permission is granted by the occupants.

(3) The amount of dirt or organic soil on or in the material to be burned must be minimized and the material arranged in a way suitable to facilitate rapid burning.

(4) Burning may not be initiated when it is determined by a forest ranger, based on information supplied by a competent authority that stagnant air conditions or inversions exist or that such conditions may occur during the duration of the burn.

(5) Heavy oils, asphaltic material, or items containing natural or synthetic rubber may not be used to ignite the material to be burned or to promote the burning of such material.

(6) Initial burning may be commenced only between the hours of 9:00 A.M. and 3:00 P.M. and no combustible material may be added to the fire between 3:00 P.M. on one day and 9:00 A.M. on the following day, except that when favorable meteorological conditions exist, any forest ranger authorized to issue the permit may authorize in writing a deviation from the restrictions. (1981, c. 1100, s. 2; 1981 (Reg. Sess., 1982), c. 1165; c. 1385, s. 2.)

§ 113-60.24. Open burning in non-high hazard counties; permits required; standards.

(a) The provisions of this section apply only to the counties not designated as high hazard counties in G.S. 113-60.23(a).

(b) It shall be unlawful for any person to start or cause to be started any fire or ignite any material in any woodland under the protection of the Department or within 500 feet of any such woodland during the hours starting at midnight and ending at 4:00 P.M. without first obtaining a permit from the Department. Permits may be obtained from forest rangers or other agents authorized by the forest ranger to issue such permits in the county in which the fire is to be started. Such permits shall be issued by the ranger or other agent unless permits for the area in question have been prohibited or cancelled under G.S. 113-60.25 or 113-60.27. (1981, c. 1100, s. 2.)

§ 113-60.25. Open burning prohibited statewide.

During periods of hazardous forest fire conditions or during air pollution episodes declared pursuant to Article 21B of Chapter 143 of the General Statutes, the secretary is authorized to prohibit all open burning regardless of whether a permit is required under G.S. 113-60.23 or 113-60.24. The secretary shall issue a press release containing relevant details of the prohibition to news media serving the area affected. (1981, c. 1100, s. 2.)

§ 113-60.26. Permit conditions.

Permits issued under this Article shall be issued in the name of the person undertaking the burning and shall specify the specific area in which the burning is to occur, the type and amount of material to be burned, the duration of the permit, and such other factors as are necessary to identify the burning which is allowed under the permit. (1981, c. 1100, s. 2.)

§ 113-60.27. Permit suspension and cancellation.

Upon a determination that hazardous forest fire conditions exist the secretary is authorized to cancel any permit issued under this Article and suspend the issuance of any new permits. Upon a determination by the Environmental Management Commission or its agent that open burning permitted under this Article is causing significant contravention of ambient air quality standards or that an air pollution episode exists pursuant to Article 21B of Chapter 143 of the General Statutes, the secretary shall cancel any permits issued under authority of this Article and shall suspend the issuance of any new permits. (1981, c. 1100, s. 2.)

§ 113-60.28. Control of existing fires.

(a) If a fire is set without a permit required by G.S. 113-60.23, 113-60.24 or 113-60.25 and is set in an area in which permits are prohibited or cancelled at the time the fire is set, the person responsible for setting the fire or causing the fire to be set shall immediately extinguish the fire or take such other action as directed by any forest ranger authorized to issue permits under G.S. 113-60.23(c). In the event that the person responsible does not immediately undertake efforts to extinguish the fire or take such other action as directed by the forest ranger, the Department may enter the property and take reasonable steps to extinguish or control the fire and the person responsible for setting the fire shall reimburse the Department for the expenses incurred by the Depart-

ment. A showing that a fire is associated with land-clearing activities is prima facie evidence that the person undertaking the land clearing is responsible for setting the fire or causing the fire to be set.

(b) If a fire requiring a permit under G.S. 113-60.23(c) is set without a permit and a forest ranger authorized to issue such permits determines that a permit would not have been issued for the fire at the time it was set, the person responsible for setting the fire or causing the fire to be set shall immediately take such action as the forest ranger directs to extinguish or control the fire. In the event the person responsible does not immediately undertake efforts to extinguish the fire or take such other action as directed by the forest ranger, the Department may enter the property and take reasonable steps to extinguish or control the fire and the person responsible for setting the fire shall reimburse the Department for the expenses incurred by the Department. A showing that a fire is associated with land-clearing activities is prima facie evidence that the person undertaking the land clearing is responsible for setting the fire or causing the fire to be set.

(c) If a fire is set in accordance with a permit but the burning is taking place contrary to the conditions of the permit, any forest ranger with authority to issue permits in the area in question may order the permittee in writing to undertake the steps necessary to comply with the conditions of his permit. If the permittee is not making a reasonable effort to comply with the order, the forest ranger may enter the property and take reasonable steps to extinguish or control the fire and the permittee shall reimburse the Department for the expenses incurred by the Department. (1981, c. 1100, s. 2.)

§ 113-60.29. Penalties.

Any person violating the provisions of this Article or of any permit issued under the authority of this Article shall be guilty of a Class 3 misdemeanor. The penalties imposed by this section shall be separate and apart and not in lieu of any civil or criminal penalties which may be imposed by G.S. 143-215.114A or G.S. 143-215.114B. The penalties imposed are also in addition to any liability the violator incurs as a result of actions taken by the Department under G.S. 113-60.28. (1981, c. 1100, s. 2; 1989 (Reg. Sess., 1990), c. 1045, s. 11; 1993, c. 539, s. 835; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-60.30. Effect on other laws.

This Article shall not be construed as affecting or abridging the lawful authority of local governments to pass ordinances relating to open burning within their boundaries. Nothing in this Article shall relieve any person from compliance with the provisions of Article 21B of Chapter 143 of the General Statutes and regulations adopted thereunder. In the event that permits are required for open burning associated with land clearing under the authority of Article 21B of Chapter 143 of the General Statutes, the authority to issue such permits shall be delegated to forest rangers who are authorized to issue permits under G.S. 113-60.23(c). (1981, c. 1100, s. 2.)

§ 113-60.31. Exempt fires; no permit fees.

(a) This Article shall not apply to any fires started, or caused to be started, within 100 feet of an occupied dwelling house if such fire shall be confined (i) within an enclosure from which burning material may not escape or (ii) within a protected area upon which a watch is being maintained and which is provided with adequate fire protection equipment.

(b) No charge shall be made for the granting of any permit required by this Article. (1981, c. 1100, s. 2.)

Article 4D.

Fire Fighters on Standby Duty.

§ 113-60.32. Definitions.

As used in this Article:

(1) "Fire fighter" means an employee of the Forest Resources Division of the Department of Environment and Natural Resources who engages in fire suppression duties.

(2) "Fire suppression duties" means involvement in on-site fire suppression, participation in Project Fire Team while it is mobilized, Operations Room duty during on-going fires or when required by high readiness plans, mop-up activities to secure fire sites, scouting and detecting forest fires, performance of standby duty, and any other activity that directly contributes to the detection, response to, and control of fires. (1985, c. 757, s. 160(a); 1989, c. 727, s. 218(54); 1997-443, s. 11A.119(a).)

§ 113-60.33. Standby duty.

(a) Standby duty is time during which a fire fighter is required to remain within 25 miles of his duty station and be available to return to the duty station on call. The Department shall provide each fire fighter on standby duty with an electronic paging device that makes the wearer accessible to his duty station.

(b) Notwithstanding subsection (a) of this section, for at least two out of 14 consecutive days that a fire fighter is on duty, the Department of Environment and Natural Resources shall permit the fire fighter to be more than 25 miles from his duty station so long as the fire fighter gives the Department of Environment and Natural Resources a telephone number where he can be reached; each month, the days the fire fighter is permitted to be more than 25 miles from his duty station shall include one full weekend. On the days the fire fighter is permitted to be more than 25 miles from his duty station, the Department of Environment and Natural Resources may call him only when there is a bona fide emergency. (1985, c. 757, s. 160(a); 1989, c. 727, s. 218(55); 1997-443, s. 11A.119(a).)

§§ 113-60.34 through 113-60.39: Reserved for future codification purposes.

Article 4E.

North Carolina Prescribed Burning Act.

§ 113-60.40. Legislative findings.

The General Assembly finds that prescribed burning of forestlands is a management tool that is beneficial to North Carolina's public safety, forest and wildlife resources, environment, and economy. The General Assembly finds that the following are benefits that result from prescribed burning of forestlands:

(1) Prescribed burning reduces the naturally occurring buildup of vegetative fuels on forestlands, thereby reducing the risk and severity of wildfires and lessening the loss of life and property.

(2) The State's ever-increasing population is resulting in urban development directly adjacent to fire-prone forestlands, referred to as a woodland-urban interface area. The use of prescribed burning in these woodland-urban interface areas substantially reduces the risk of wildfires that cause damage.

(3) Many of North Carolina's natural ecosystems require periodic fire for their survival. Prescribed burning is essential to the perpetuation, restoration, and management of many plant and animal communities. Prescribed burning benefits game, nongame, and endangered wildlife species by increasing the growth and yield of plants that provide forage and an area for escape and brooding and that satisfy other habitat needs.

(4) Forestlands are economic, biological, and aesthetic resources of statewide significance. In addition to reducing the frequency and severity of wildfires, prescribed burning of forestlands helps to prepare sites for replanting and natural seeding, to control insects and diseases, and to increase productivity.

(5) Prescribed burning enhances the resources on public use lands, such as State and national forests, wildlife refuges, nature preserves, and game lands. Prescribed burning enhances private lands that are managed for wildlife refuges, nature preserves, and game lands. Prescribed burning enhances private lands that are managed for wildlife, recreation, and other purposes.

As North Carolina's population grows, pressures resulting from liability issues and smoke complaints discourage or limit prescribed burning so that these numerous benefits to forestlands often are not attainable. By recognizing the benefits of prescribed burning and by adopting requirements governing prescribed burning, the General Assembly helps to educate the public, avoid misunderstandings, and reduce complaints about this valuable management tool. (1999-121, s. 1.)

Editor's Note. — Session Laws 1999-121, s. 2, made this Article effective January 1, 2000.

§ 113-60.41. Definitions.

As used in this Article:

(1) "Certified prescribed burner" means an individual who has successfully completed a certification program approved by the Division of Forest Resources of the Department of Environment and Natural Resources.

(2) "Prescribed burning" means the planned and controlled application of fire to naturally occurring vegetative fuels under safe weather and safe environmental and other conditions, while following appropriate precautionary measures that will confine the fire to a predetermined area and accomplish the intended management objectives.

(3) "Prescription" means a written plan prepared by a certified prescribed burner for starting, controlling, and extinguishing a prescribed burning. (1999-121, s. 1.)

§ 113-60.42. Immunity from liability.

(a) Any prescribed burning conducted in compliance with G.S. 113-60.43 is in the public interest and does not constitute a public or private nuisance.

(b) A landowner or the landowner's agent who conducts a prescribed burning in compliance with G.S. 113-60.43 shall not be liable in any civil action for any damage or injury caused by or resulting from smoke.

(c) Notwithstanding subsections (a) and (b), this section does not apply when a nuisance or damage results from a negligently or improperly conducted prescribed burning. (1999-121, s. 1.)

§ 113-60.43. Prescribed burning.

(a) Prior to conducting a prescribed burning, the landowner shall obtain a prescription for the prescribed burning prepared by a certified prescribed burner and filed with the Division of Forest Resources, Department of Environment and Natural Resources. A copy of the prescription shall be provided to the landowner. A copy of this prescription shall be in the possession of the responsible burner on site throughout the duration of the prescribed burning. The prescription shall include:

(1) The landowner's name and address.
(2) A description of the area to be burned.
(3) A map of the area to be burned.
(4) An estimate in tons of the fuel located on the area.
(5) The objectives of the prescribed burning.
(6) A list of the acceptable weather conditions and parameters for the prescribed burning sufficient to minimize the likelihood of smoke damage and fire escaping onto adjacent areas.
(7) The name of the certified prescribed burner responsible for conducting the prescribed burning.
(8) A summary of the methods that are adequate for the particular circumstances involved to be used to start, control, and extinguish the prescribed burning.
(9) Provision for reasonable notice of the prescribed burning to be provided to nearby homes and businesses to avoid effects on health and property.

(b) The prescribed burning shall be conducted by a certified prescribed burner in accordance with a prescription that satisfies subsection (a) of this section. The certified prescribed burner shall be present on the site and shall be in charge of the burning throughout the period of the burning. A landowner may conduct a prescribed burning without being a certified prescribed burner if the landowner is burning a tract of forestland of 50 acres or less owned by that landowner and is following all conditions established in a prescription prepared by a certified prescribed burner.

(c) Prior to conducting a prescribed burning, the landowner or the landowner's agent shall obtain an open-burning permit under Article 4C of this Chapter from the Division of Forest Resources, Department of Environment and Natural Resources. This open-burning permit must remain in effect throughout the period of the prescribed burning. The prescribed burning shall be conducted in compliance with all the following:

(1) The terms and conditions of the open-burning permit under Article 4C of this Chapter.
(2) The State's air pollution control statutes under Article 21 and Article 21B of Chapter 143 of the General Statutes and any rules adopted pursuant to these statutes.
(3) Any applicable local ordinances relating to open burning.
(4) The voluntary smoke management guidelines adopted by the Division of Forest Resources, Department of Environment and Natural Resources.
(5) Any rules adopted by the Division of Forest Resources, Department of Environment and Natural Resources, to implement this Article. (1999-121, s. 1.)

§ 113-60.44. Adoption of rules.

The Division of Forest Resources, Department of Environment and Natural Resources, may adopt rules that govern prescribed burning under this Article. (1999-121, s. 1.)

§ 113-60.45. Exemption.

This Article does not apply when the Secretary of Environment and Natural Resources has cancelled burning permits pursuant to G.S. 113-60.27 or prohibited all open burning pursuant to G.S. 113-60.25. (1999-121, s. 1.)

Article 5.

Corporations for Protection and Development of Forests.

§ 113-61. Private limited dividend corporations may be formed.

(a) In this Article, unless the context requires otherwise, "Department" means the Department of Environment and Natural Resources; and "Secretary" means the Secretary of Environment and Natural Resources.

(b) Three or more persons, who associate themselves by an agreement in writing for the purpose, may become a private limited dividend corporation to finance and carry out projects for the protection and development of forests and for such other related purposes as the Secretary shall approve, subject to all the duties, restrictions and liabilities, and possessing all the rights, powers, and privileges, of corporations organized under the general corporation laws of the State of North Carolina, except where such provisions are in conflict with this Article. (1933, c. 178, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 80; 1991 (Reg. Sess., 1992), c. 890, s. 4; 1997-443, s. 11A.119(a).)

Cross References. — As to corporations generally, see § 55-1-01 et seq.

§ 113-62. Manner of organizing.

A corporation formed under this Article shall be organized and incorporated in the manner provided for organization of corporations under the general corporation laws of the State of North Carolina, except where such provisions are in conflict with this Article. The certificate of organization of any such corporation shall contain a statement that it is organized under the provisions of this Article and that it consents to be and shall be at all times subject to the rules and supervision of the Secretary, and shall set forth as or among its purposes the protection and development of forests and the purchase, acquisition, sale, conveyance and other dealing in the same and the products therefrom, subject to the rules from time to time imposed by the Secretary. (1933, c. 178, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 81.)

§ 113-63. Directors.

There shall not be less than three directors, one of whom shall always be a person designated by the Secretary, which one need not be a stockholder. (1933, c. 178, s. 3; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 82.)

§ 113-64. Duties of supervision by Secretary of Environment and Natural Resources.

Corporations formed under this Article shall be regulated by the Secretary in the manner provided in this Article. Traveling and other expenses incurred by him in the discharge of the duties imposed upon him by this Article shall be charged to, and paid by, the particular corporation or corporations on account of which such expenses are incurred. His general expenses incurred in the discharge of such duties which cannot be fairly charged to any particular corporation or corporations shall be charged to, and paid by, all the corporations then organized and existing under this Article pro rata according to their respective stock capitalizations. The Secretary shall:

(1) Adopt rules to implement this Article and to protect and develop forests subject to its jurisdiction.

(2) Order all corporations organized under this Article to do such acts as may be necessary to comply with the provisions of law and the rules adopted by the Secretary, or to refrain from doing any acts in violation thereof.

(3) Keep informed as to the general condition of all such corporations, their capitalization and the manner in which their property is permitted, operated or managed with respect to their compliance with all provisions of law and orders of the Secretary.

(4) Require every such corporation to file with the Secretary annual reports and, if the Secretary shall consider it advisable, other periodic and special reports, setting forth such information as to its affairs as the Secretary may require. (1933, c. 178, s. 4; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 827, s. 94; 1989, c. 727, s. 83; 1997-443, s. 11A.119(a).)

§ 113-65. Powers of Secretary.

The Secretary may:

(1) Examine at any time all books, contracts, records, documents and papers of any such corporation.

(2) In his discretion prescribe uniform methods and forms of keeping accounts, records and books to be observed by such corporation, and prescribe by order accounts in which particular outlays and receipts are to be entered, charged or credited. The Secretary shall not, however, have authority to require any revaluation of the real property or other fixed assets of such corporations, but he shall allow proper charges for the depletion of timber due to cutting or destruction.

(3) Enforce the provisions of this Article, a rule implementing this Article, or an order issued under this Article by filing a petition for a writ of mandamus or application for an injunction in the superior court of the county in which the respondent corporation has its principal place of business. The final judgment in any such proceeding shall either dismiss the proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief. (1933, c. 178, s. 5; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 827, s. 95; 1989, c. 727, s. 84.)

§ 113-66. Provision for appeal by corporations to Governor.

If any corporation organized under this Article is dissatisfied with or aggrieved at any rule or order imposed upon it by the Secretary, or any

valuation or appraisal of any of its property made by the Secretary, or any failure of or refusal by the Secretary to approve of or consent to any action which it can take only with such approval or consent, it may appeal to the Governor by filing with him a claim of appeal upon which the decision of the Governor shall be final. Such determination, if other than a dismissal of the appeal, shall be set forth by the Governor in a written mandate to the Secretary, who shall abide thereby and take such actions as the same may direct. (1933, c. 178, s. 6; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 85.)

§ 113-67. Limitations as to dividends.

The shares of stock of corporations organized under this Article shall have a par value and, except as provided in G.S. 113-69 in respect to distributions in kind upon dissolution, no dividend shall be paid thereon at a rate in excess of six per centum (6%) per annum on stock having a preference as to dividends, or eight per centum (8%) per annum on stock not having a preference as to dividends, except that any such dividends may be cumulative without interest. (1933, c. 178, s. 7.)

§ 113-68. Issuance of securities restricted.

No such corporation shall issue stock, bonds or other securities except for money, timberlands, or interests therein, located in the State of North Carolina or other property, actually received, or services rendered, for its use and its lawful purposes. Timberlands, or interests therein, and other property or services so accepted therefor, shall be upon a valuation approved by the Secretary. (1933, c. 178, s. 8; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 86.)

§ 113-69. Limitation on bounties to stockholders.

Stockholders shall at no time receive or accept from any such corporation in repayment of their investment in its stock any sums in excess of the par value of the stock together with cumulative dividends at the rate set forth in G.S. 113-67 except that nothing in this section contained shall be construed to prohibit the distribution of the assets of such corporation in kind to its stockholders upon dissolution thereof. (1933, c. 178, s. 9.)

§ 113-70. Earnings above dividend requirements payable to State.

Any earnings of such corporation in excess of the amounts necessary to pay dividends to stockholders at the rate set forth in G.S. 113-67 shall be paid over to the State of North Carolina prior to the dissolution of such corporation. Net income or net losses (determined in such manner as the Secretary shall consider properly to show such income or losses) from the sale of the capital assets of such corporation, whether such sale be upon dissolution or otherwise, shall be considered in determining the earnings of such corporation for the purposes of this section. In determining such earnings unrealized appreciation or depreciation of real estate or other fixed assets shall not be considered. (1933, c. 178, s. 10; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 87.)

§ 113-71. Dissolution of corporation.

Any such corporation may be dissolved at any time in the manner provided by and under the provisions of the general corporation laws of the State of

North Carolina, except that the court shall dismiss any petition for dissolution of any such corporation filed within 20 years of the date of its organization unless the same is accompanied by a certificate of the Secretary consenting to such dissolution. (1933, c. 178, s. 11; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 88.)

§ 113-72. Cutting and sale of timber.

Any such corporation may cut and sell the timber on its land or permit the cutting thereof, but all such cuttings shall be in accordance with the rules, restrictions and limitations imposed by the Secretary, who shall impose such rules, restrictions and limitations with respect thereto as may reasonably conform to the accepted custom and usage of good forestry and forest economy, taking into consideration the situation, nature and condition of the tract so cut or to be cut, and the financial needs of such corporation from time to time. (1933, c. 178, s. 12; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 89.)

§ 113-73. Corporation may not sell or convey without consent of Secretary, or pay higher interest rate than 6%.

No such corporation shall:

(1) Sell, assign or convey any real property owned by it or any right, title or interest therein, except upon notice to the Secretary of the terms of such sale, transfer or assignment, and unless the Secretary shall consent thereto, and if the Secretary shall require it, unless the purchaser thereof shall agree that such real estate shall remain subject to the rules and supervision of the Secretary for such period as the latter may require;

(2) Pay interest returns on its mortgage indebtedness at a higher rate than six per centum (6%) per annum without the consent of the Secretary;

(3) Mortgage any real property without first having obtained the consent of the Secretary. (1933, c. 178, s. 13; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 90.)

§ 113-74. Power to borrow money limited.

Any such corporation formed under this Article may, subject to the approval of the Secretary, borrow funds and secure their payment thereof by note or notes and mortgage or by the issue of bonds under a trust indenture. The notes or bonds so issued and secured and the mortgage or trust indenture relating thereto may contain such clauses and provisions as shall be approved by the Secretary, including the right to enter into possession in case of default; but the operations of the mortgagee or receiver entering in such event or of the purchaser of the property upon foreclosure shall be subject to the rules of the Secretary for such period as the mortgage or trust indenture may specify. (1933, c. 178, s. 14; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 91.)

§ 113-75. Secretary to approve development of forests.

No project for the protection and development of forests proposed by any such corporation shall be undertaken without the approval of the Secretary, and such approval shall not be given unless:

(1) The Secretary shall have received a statement duly executed and acknowledged on behalf of the corporation proposing such project, in

such adequate detail as the Secretary shall require of the activities to be included in the project, such statement to set forth the proposals as to

a. Fire prevention and protection,
b. Protection against insects and tree diseases,
c. Protection against damage by livestock and game,
d. Means, methods and rate of, and restrictions upon, cutting and other utilization of the forests, and
e. Planting and spacing of trees.

(2) There shall be submitted to the Secretary a financial plan satisfactory to him setting forth in detail the amount of money needed to carry out the entire project, and how such sums are to be allocated, with adequate assurances to the Secretary as to where such funds are to be secured.

(3) The Secretary shall be satisfied that the project gives reasonable assurance of the operation of the forests involved on a sustained-yield basis except insofar as the Secretary shall consider the same impracticable.

(4) The corporation proposing such project shall agree that the project shall at all times be subject to the supervision and inspection of the Secretary, and that it will at all times comply with such rules concerning the project as the Secretary shall from time to time impose. (1933, c. 178, s. 15; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 92.)

§ 113-76. Application of corporate income.

The gross annual income of any such corporation, whether received from sales of timber, timber operations, stumpage permits or other sources, shall be applied as follows: first, to the payment of all fixed charges, and all operating and maintenance charges and expenses including taxes, assessments, insurance, amortization charges in amounts approved by the Secretary to amortize mortgage or other indebtedness and reserves essential to operation; second, to surplus, and/or to the payment of dividends not exceeding the maximum fixed by this Article; third, the balance, if any, in reduction of debts. (1933, c. 178, s. 16; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 93.)

§ 113-77. Reorganization of corporations.

Reorganization of corporations organized under this Article shall be subject to the supervision of the Secretary and no such reorganization shall be had without the authorization of the Secretary. (1933, c. 178, s. 17; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 94.)

§§ 113-77.1 through 113-77.5: Reserved for future codification purposes.

Article 5A.

Natural Heritage Trust Program.

§ 113-77.6. Definitions.

As used in this Article:

(1) "Appraised value" means the price estimated in terms of money at

which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the uses to which the property is adapted and for which it is capable of being used.

(2) "Fund" means the Natural Heritage Trust Fund created pursuant to this Article.

(3) "Land" and "lands" mean real property and any interest in, easement in, or restriction on real property.

(4) "Secretary" means the Secretary of Environment and Natural Resources.

(5) "Trustees" means the trustees of the Natural Heritage Trust Fund. (1987, c. 871, s. 1; 1989, c. 86, s. 1; c. 727, s. 218(56); 1993 (Reg. Sess., 1994), c. 772, s. 3; 1997-443, s. 11A.119(a).)

§ 113-77.7. Natural Heritage Trust Fund.

(a) There is established a Natural Heritage Trust Fund in the State Treasurer's office that shall be used to finance the Natural Heritage Trust Program authorized by this Article.

(b) The State Treasurer shall hold the Fund separate and apart from all other moneys, funds, and accounts. Investment earnings credited to the assets of the Fund shall become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year shall be carried forward in the Fund for the next succeeding fiscal year. Payments from the Fund shall be made on the warrant of the Chairman of the Board of Trustees.

(c) When the State acquires land pursuant to this Article, the Trustees may direct a request to the State Treasurer to set aside an amount from the Fund not to exceed twenty percent (20%) of the appraised value of the land acquired, or the land affected if less than a fee interest was acquired, to be placed in a special stewardship account in the Fund. The special stewardship account shall be a nonlapsing account, and income derived from investment of the account shall be credited to the account. The special stewardship account shall be used for the management of land acquired pursuant to this Article under the direction of the Trustees. (1987, c. 871, s. 1; 1989, c. 86, s. 1; 1993 (Reg. Sess., 1994), c. 772, s. 3; 1997-366, s. 1.)

§ 113-77.8. Natural Heritage Trust Fund Board of Trustees.

(a) Expenditures from the Fund shall be authorized by a nine-member Board of Trustees. Three members shall be appointed by the Governor, three by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and three by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. Persons appointed shall be knowledgeable in the acquisition and management of natural areas. Each appointing officer shall designate one of his initial appointments to serve a two-year term, one to serve a four-year term, and one to serve a six-year term. Thereafter, all appointments shall be for six years, subject to reappointment. All initial appointments shall be made on or before January 1, 1988. The Governor shall appoint one Trustee to serve as Chairman of the Board. The Secretary shall provide the Trustees with staff support and meeting facilities using expenditures from the Fund. The office of Trustee is declared to be an office that may be held concurrently with any other executive or appointive

office, under the authority of Article VI, Section 9, of the North Carolina Constitution.

(b) The Trustees shall meet at least once each year and may hold special meetings at the call of the Chairman or a majority of the members.

(c) The Trustees shall receive the per diem allowed for other members of boards and commissions of the State as fixed in the Biennial Appropriations Act, and, in addition, the Trustees shall receive subsistence and travel expenses as fixed by statute for such purposes. Travel and subsistence expenses shall be allowed while going to or from any place of meeting or when on official business. Per diem payments shall include necessary time spent in traveling to and from their places of residence to any meeting place or while traveling on official business. Per diem, subsistence, and travel expenses of the Trustees shall be paid from the Fund. (1987, c. 871, s. 1; 1989, c. 86, s. 1; 1993 (Reg. Sess., 1994), c. 772, s. 3; 1995, c. 490, s. 37(a).)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

§ 113-77.9. Acquisition of lands with funds from the Natural Heritage Trust Fund.

(a) From time to time, but at least once each year, the Secretary, the Chairman of the North Carolina Wildlife Resources Commission, the Commissioner of Agriculture, and the Secretary of Cultural Resources may propose to the Trustees lands to be acquired with funds from the Fund. For each tract or interest proposed, the Secretary, the Chairman of the North Carolina Wildlife Resources Commission, the Commissioner of Agriculture, and the Secretary of Cultural Resources shall provide the Trustees with the following information:

(1) The value of the land for recreation, forestry, fish and wildlife habitat, and wilderness purposes, and its consistency with the plan developed pursuant to the State Parks Act, the State's comprehensive plan for outdoor recreation, parks, natural areas development, and wildlife management goals and objectives.

(2) Any rare or endangered species on or near the land.

(3) Whether the land contains a relatively undisturbed and outstanding example of a native North Carolina ecological community that is now uncommon.

(4) Whether the land contains a major river or tributary, watershed, wetland, significant littoral, estuarine, or aquatic site, or important geologic feature.

(5) The extent to which the land represents a type of landscape, natural feature, or natural area that is not currently in the State's inventory of parks and natural areas.

(6) Other sources of funds that may be available to assist in acquiring the land.

(7) The State department or division that will be responsible for managing the land.

(8) What assurances exist that the land will not be used for purposes other than those for which it is being acquired.

(9) Whether the site or structure is of such historical significance as to be essential to the development of a balanced State program of historic properties.

(b) The Trustees may authorize expenditures from the Fund to acquire:

(1) Land that represents the ecological diversity of North Carolina, including natural features such as riverine, montane, coastal, and

geologic systems and other natural areas to ensure their preservation and conservation for recreational, scientific, educational, cultural, and aesthetic purposes.

(2) Land as additions to the system of parks, State trails, aesthetic forests, fish and wildlife management areas, wild and scenic rivers, and natural areas for the beneficial use and enjoyment of the public.

(3) Subject to the limitations of subsection (b2) of this section, land that contributes to the development of a balanced State program of historic properties.

(b1) In authorizing expenditures from the Fund to acquire land pursuant to this Article, the first priority shall be the protection of land with outstanding natural or cultural heritage values. Land with outstanding natural heritage values is land that is identified by the North Carolina Natural Heritage Program as having State or national significance. Land with outstanding cultural heritage values is land that is identified, inventoried, or evaluated by the Department of Cultural Resources. The Trustees shall be guided by any priorities established by the Secretary, the Chairman of the Wildlife Resources Commission, the Commissioner of Agriculture, and the Secretary of Cultural Resources in their proposals made pursuant to subsection (a) of this section.

(b2) The Trustees may authorize expenditure of up to twenty-five percent (25%) of the funds credited to the Fund pursuant to G.S. 105-228.30 during the preceding fiscal year to acquire land under subdivision (3) of subsection (b) of this section. No other funds in the Fund may be used for expenditures to acquire land under subdivision (3) of subsection (b) of this section.

(c) The Trustees may authorize expenditures from the Fund to pay for the inventory of natural areas conducted under the Natural Heritage Program established pursuant to the Nature Preserves Act, Article 9A of Chapter 113A of the General Statutes. The Trustees may also authorize expenditures from the Fund to pay for conservation and protection planning and for informational programs for owners of natural areas, as defined in G.S. 113A-164.3.

(d) The Department of Administration may, pursuant to G.S. 143-341, acquire by purchase, gift, or devise all lands selected by the Trustees for acquisition pursuant to this Article. Title to any land acquired pursuant to this Article shall be vested in the State. A State agency with management responsibility for land acquired pursuant to this Article may enter into a management agreement or lease with a county, city, town, or private nonprofit organization qualified under G.S. 105-151.12 and G.S. 105-130.34 and certified under section 501(c) (3) of the Internal Revenue Code to aid in managing the land. A management agreement or lease shall be executed by the Department of Administration pursuant to G.S. 143-341.

(d1) In any county in which real property was purchased pursuant to subsection (d) of this section as additions to the fish and wildlife management areas and where less than twenty-five percent (25%) of the land area is privately owned at the time of purchase, that county and any other local taxing unit shall be annually reimbursed, for a period of 20 years, from funds available to the North Carolina Wildlife Resources Commission in an amount equal to the amount of ad valorem taxes that would have been paid to the taxing unit if the property had remained subject to taxation.

(e) The Secretary shall maintain and revise twice each year a list of acquisitions made pursuant to this Article. The list shall include the acreage of each tract, the county in which the tract is located, the amount paid from the Fund to acquire the tract, and the State department or division responsible for managing the tract. The Secretary shall furnish a copy of the list to each Trustee, the Joint Legislative Commission on Governmental Operations, the House and Senate Appropriations Subcommittees on Natural and Economic Resources, the Fiscal Research Division, and the Environmental Review Commission within 30 days after each revision.

(f) No provision of this Article shall be construed to eliminate hunting and fishing, as regulated by the laws of the State of North Carolina, upon properties purchased pursuant to this Article. (1987, c. 871, s. 1; 1989, c. 86, s. 1; 1991, c. 689, s. 339; 1991 (Reg. Sess., 1992), c. 1044, s. 66; 1993 (Reg. Sess., 1994), c. 772, s. 3; 1997-366, s. 2; 1998-212, s. 14.6(b).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, in subsection (e), in the first sentence, substituted "maintain and revise twice each year" for "maintain and annually revise," and in the second sentence, substituted "the Joint Legislative Commission on Governmental Operations ... within 30 days" for "and to each House of the General Assembly."

Article 6.

Fishing Generally.

§ 113-78: Repealed by Session Laws 1979, c. 830, s. 1.

§§ 113-79 through 113-81: Repealed by Session Laws 1947, c. 422, ss. 1, 9.

Article 6A.

Forestry Services and Advice for Owners and Operators of Forestland.

§ 113-81.1. Authority to render scientific forestry services.

(a) In this Article, unless the context requires otherwise:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Secretary" means the Secretary of Environment and Natural Resources.

(b) The Department is hereby authorized to designate, upon request, forest trees of forest landowners and forest operators for sale or removal, by blazing or otherwise, and to measure or estimate the volume of same under the terms and conditions hereinafter provided. The Department is also authorized to cooperate with landowners of the State and with counties, municipalities and State agencies by making available forestry services consisting of specialized equipment and operators, or by renting such equipment, and to perform such labor and services as may be necessary to carry out approved forestry practices, including site preparation, forest planting, prescribed burning, and other appropriate forestry practices. For such services or rentals, a reasonable fee representing the Secretary's estimate of not less than the costs of such services or rentals shall be charged, provided however, when the Secretary deems it in the public interest, said services may be provided without charge, for the purpose of encouraging the use of approved scientific forestry practice on the private or other forestlands within the State, or for the purpose of providing practical demonstrations of said practices. Receipts from these activities and rentals shall be credited to the budget of the Department for the

furtherance of these activities. (1947, c. 384, s. 1; 1969, c. 342, s. 3; c. 344; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 95; 1997-443, s. 11A.119(a).)

§ 113-81.2. Services under direction of Secretary; compensation; when services without charge.

(a) The administration of the provisions of this Article shall be under the direction of the Secretary. The Secretary, or his authorized agent, upon receipt of a request from a forest landowner or operator for technical forestry assistance or service, may designate forest trees for removal for lumber, veneer, poles, piling, pulpwood, cordwood, ties, or other forest products by blazing, spotting with paint or otherwise designating in an approved manner; he may measure or estimate the commercial volume contained in the trees designated; he may furnish the landowner or operator with a statement of the volume of the trees so designated and estimated; he may assist in finding a suitable market for the products so designated, and he may offer general forestry advice concerning the management of the forest.

(b) For such designating, measuring or estimating services the Secretary may make a charge, on behalf of the Department, in an amount not to exceed five percent (5%) of the sale price or fair market value of the stumpage so designated and measured or estimated. Upon receipt from the Secretary of a statement of such charges, the landowner or operator or his agent shall make payment to the Secretary within 30 days.

(c) In those cases where the Secretary deems it desirable to so designate and measure or estimate trees without charge, such services shall be given for the purpose of encouraging the use of approved scientific forestry principles on the private or other forestlands within the State, and to establish practical demonstrations of said principles. (1947, c. 384, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 96.)

§ 113-81.3. Deposit of receipts with State treasury.

All moneys paid to the Secretary for services rendered under the provisions of this Article shall be deposited into the State treasury to the credit of the Department. (1947, c. 384, s. 3; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 97.)

SUBCHAPTER IIA. DISTRIBUTION AND SALE OF HUNTING, FISHING AND TRAPPING LICENSES.

ARTICLE 6B.

License Agents.

§§ 113-81.4 through 113-81.13: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present provisions as to license agents, see § 113-270.1.

Editor's Note. — Subchapter II-A was redesignated as subchapter IIA pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer program database.

SUBCHAPTER III. GAME LAWS.

ARTICLE 7.

North Carolina Game Law of 1935.

§§ 113-82 through 113-99: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 113-99.1: Recodified as § 113-270.2A.

§§ 113-100 through 113-109: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§§ 113-109.1 through 113-109.5: Reserved for future codification purposes.

ARTICLE 7A.

Safe Distances for Hunting Migratory Wild Waterfowl.

§§ 113-109.6 through 113-109.8: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

ARTICLE 8.

Fox-Hunting Regulations.

§ 113-110: Repealed by Session Laws 1945, c. 217.

§§ 113-110.1 through 113-112: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

ARTICLE 9.

Federal Regulations on Federal Lands.

§§ 113-113 through 113-113.5: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present provisions as to legislative assent to specific federal acts, see § 113-307.1.

Editor's Note. — Former sections 113-113.1 through 113-113.5 had been reserved for future codification purposes.

ARTICLE 9A.

Regulation of Trapping.

§§ 113-113.6 through 113-113.19: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

Editor's Note. — Former sections 113-113.15 through 113-113.19 had been reserved for future codification purposes.

ARTICLE 9B.

Regulation of Beaver Taking.

§§ 113-113.20 through 113-113.23: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

ARTICLE 10.

Regulation of Fur Dealers; Licenses.

§§ 113-114 through 113-120: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

Article 10A.

Trespassing upon "Posted" Property to Hunt, Fish or Trap.

§§ 113-120.1 through 113-120.4: Transferred to §§ 14-159.6 to 14-159.9 by Session Laws 1979, c. 830, s. 11.

Article 10B.

Liability of Landowners to Authorized Users.

§§ 113-120.5 through 113-120.7: Repealed by Session Laws 1980, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

Article 11.

Miscellaneous Provisions.

§§ 113-121 through 113-126.1: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For present game laws, see Subchapter IV of this Chapter, § 113-127 et seq. For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§ 113-126.2: Not set out.

Editor's Note. — This section, as amended by § 113-133.1, became applicable to less than 10 counties, and by virtue of its strictly local application it has not been set out.

SUBCHAPTER IV. CONSERVATION OF MARINE AND ESTUARINE AND WILDLIFE RESOURCES.

Article 12.

General Definitions.

§ 113-127. Application of Article.

Unless the context clearly requires otherwise, the definitions in this Article apply throughout this Subchapter. (1965, c. 957, s. 2.)

§ 113-128. Definitions relating to agencies and their powers.

The following definitions and their cognates apply to powers and administration of agencies charged with the conservation of marine and estuarine and wildlife resources:

(1), (2) Repealed by Session Laws 1979, c. 830, s. 1.

(3) Department. — The Department of Environment and Natural Resources.

(4) Executive Director. — Executive Director, North Carolina Wildlife Resources Commission.

(4a) Fisheries Director. — Director, North Carolina Division of Marine Fisheries of the Department of Environment and Natural Resources who shall be qualified for the office by education or experience.

(5) Inspector. — Marine fisheries inspector.

(5a) Marine Fisheries Commission. — The Marine Fisheries Commission of the Department as established by Part 5D of Article 7 of Chapter 143B of the General Statutes.

(5b) Marine Fisheries Inspector. — An employee of the Department, other than a wildlife protector, sworn in as an officer and assigned duties which include exercise of law enforcement powers under this Subchapter. All references in statutes, regulations, contracts, and other legal and official documents to commercial fisheries inspectors and to commercial and sports fisheries inspectors apply to marine fisheries inspectors.

(6) Notice; Notify. — Where it is required that notice be given an agency of a situation within a given number of days, this places the burden on the person giving notice to make sure that the information is received in writing by a responsible member of the agency within the time limit.

(7) Protector. — Wildlife protector.

(8) Secretary. — Secretary of Environment and Natural Resources.

(9) Wildlife Protector. — An employee of the North Carolina Wildlife Resources Commission sworn in as an officer and assigned to duties which include exercise of law-enforcement powers.

(10) Wildlife Resources Commission. — The North Carolina Wildlife Resources Commission as established by Article 24 of Chapter 143 of the General Statutes and Part 3 of Article 7 of Chapter 143B of the General Statutes. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1977, c. 512, s. 5; c. 771, s. 4; 1979, c. 388, s. 1; c. 830, s. 1; 1987, c. 641, s. 4; 1989, c. 727, s. 218(57); 1997-443, s. 11A.119(a); 1998-225, s. 1.1.)

Cross References. — As to the organization of the Department of Environment and Natural Resources, see §§ 143B-279.1 through 143B-279.5. As to the Wildlife Resources Commission, see § 143B-281.1.

Effect of Amendments. — The 1998 amendment, effective retroactively to September 1, 1997, in subdivision (5a), substituted "Part 5D" for "Part 5A."

§ 113-129. Definitions relating to resources.

The following definitions and their cognates apply in the description of the various marine and estuarine and wildlife resources:

(1) Repealed by Session Laws 1979, c. 830, s. 1.

(1a) Animals. — Wild animals, except when the context clearly indicates a contrary interpretation.

(1b) Big Game. — Bear, wild boar, wild turkey, and deer, not to include fallow deer or red deer raised for production and sale under G.S. 106-549.97.

(1c) Birds. — Wild birds, except when the context clearly indicates a contrary interpretation.

(1d) Boating and Fishing Access Area. — An area of land providing access to public waters and which is owned, leased, controlled, or managed by the Wildlife Resources Commission.

(1e) Bushel. — A dry measure containing 2,150.42 cubic inches.

(2) Coastal Fisheries. — Any and every aspect of cultivating, taking, possessing, transporting, processing, selling, utilizing, and disposing of fish taken in coastal fishing waters, whatever the manner or purpose of taking, except for the regulation of inland game fish in coastal fishing waters which is vested in the Wildlife Resources Commission; and all such dealings with fish, wherever taken or found, by a person primarily concerned with fish taken in coastal fishing waters so as to be placed under the administrative supervision of the Department. Provided, that the Department is given no authority over the taking of fish in inland fishing waters. Except as provisions in this Subchapter or in regulations of the Marine Fisheries Commission authorized under this Subchapter may make such reference inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fisheries apply to coastal fisheries.

(3) Coastal Fishing. — All fishing in coastal fishing waters. Except as provisions in this Subchapter or in regulations of the Marine Fisheries Commission authorized under this Subchapter may make such references inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fishing apply to coastal fishing.

(4) Coastal Fishing Waters. — The Atlantic Ocean; the various coastal sounds; and estuarine waters up to the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Marine Fisheries Commission and the Wildlife Resources Commission. Except as provisions in this Subchapter or changes in the agreement between the Marine Fisheries Commission and the Wildlife Resources Commission may make such reference inapplicable, all references in statutes, regulations, contracts, and other legal or official documents to commercial fishing waters apply to coastal fishing waters.

(5) Crustaceans. — Crustacea, specifically including crabs, lobster, and shrimp.

(6) Fisheries Resources. — Marine and estuarine resources and such wildlife resources as relate to fish.

(7) Fish; Fishes. — All marine mammals; all shellfish; all crustaceans; and all other fishes.

(7a) Fur-bearing Animals. — Beaver, mink, muskrat, nutria, otter, skunk, and weasel; bobcat, opossum, and raccoon when lawfully taken with traps.

(7b) Game. — Game animals and game birds.

(7c) Game Animals. — Bear, fox, rabbit, squirrel, wild boar, and deer, not to include fallow deer or red deer raised for production and sale under G.S. 106-549.97; bobcat, opossum, and raccoon except when trapped in accordance with provisions relating to fur-bearing animals.

(7d) Game Birds. — Migratory game birds and upland game birds.

(8) Game Fish. — Inland game fish and such other game fish in coastal fishing waters as may be regulated by the Department.

(8a) Game Lands. — Lands owned, leased, controlled, or cooperatively managed by the Wildlife Resources Commission for public hunting, trapping, or fishing.

(9) Inland Fishing Waters. — All inland waters except private ponds; and all waters connecting with or tributary to coastal sounds or the ocean extending inland or upstream from:

a. The dividing line between coastal fishing waters and inland fishing waters agreed upon by the Marine Fisheries Commission and the Wildlife Resources Commission; or

b. North Carolina's boundary with another state.

(10) Inland Game Fish. — Those species of freshwater fish, wherever found, and migratory saltwater fish, when found in inland fishing waters, as to which there is an important element of sport in taking and which are denominated as game fish in the regulations of the Wildlife Resources Commission. No species of fish of commercial importance not classified as a game fish in commercial fishing waters as of January 1, 1965, may be classified as an inland game fish in coastal fishing waters without the concurrence of the Marine Fisheries Commission.

(10a) Joint Fishing Waters. — Those coastal fishing waters in which are found a significant number of freshwater fish, as agreed upon by the Marine Fisheries Commission and the Wildlife Resources Commission in accordance with G.S. 113-132(e).

(11) Marine and Estuarine Resources. — All fish, except inland game fish, found in the Atlantic Ocean and in coastal fishing waters; all fisheries based upon such fish; all uncultivated or undomesticated plant and animal life, other than wildlife resources, inhabiting or dependent upon coastal fishing waters; and the entire ecology supporting such fish, fisheries, and plant and animal life.

(11a) Migratory Birds. — All birds, whether or not raised in captivity, included in the terms of conventions between the United States and any foreign country for the protection of migratory birds and the Migratory Bird Treaty Act, as defined and listed in Part 10 of Title 50 of the Code of Federal Regulations.

(11b) Migratory Game Birds. — Those migratory birds for which open seasons are prescribed by the United States Department of the Interior and belonging to the following families:

a. Anatidae (wild ducks, geese, brant, and swans);

b. Columbidae (wild doves and pigeons);

c. Gruidae (little brown cranes);

d. Rallidae (rails, coots, and gallinules); and

e. Scolopacidae (woodcock and snipe).

The Wildlife Resources Commission is authorized to modify this definition from time to time by regulations only as necessary to keep it in conformity with governing federal laws and regulations pertaining to migratory game birds.

(11c) Migratory Waterfowl; Waterfowl. — Those migratory birds for which open seasons are prescribed by the United States Department of the Interior and belonging to the Family Anatidae (wild ducks, geese, brant, and swans).

(11d) Nongame Animals. — All wild animals except game and fur-bearing animals.

(11e) Nongame Birds. — All wild birds except game birds.

(12) Nongame Fish. — All fish found in inland fishing waters other than inland game fish.

(12a) Optimal yield. — The amount of fish that:

a. Will provide the greatest overall benefit to the State, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;

b. Is prescribed on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and

c. In the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in the fishery.

(12b) Overfishing or overfished. — A rate or level of fishing mortality that jeopardizes the capacity of a fishery to produce the maximum sustainable yield on a continuing basis.

(13) Private Pond. — A body of water arising within and lying wholly upon a single tract of privately owned land, from which fish cannot escape and into which fish cannot enter from public fishing waters at any time, except that all publicly owned ponds and lakes are classified as public fishing waters. In addition, the private owners of abutting tracts of land on which a pond not exceeding 10 acres is or has been established may by written agreement cooperate to maintain that pond as a private pond if it otherwise meets the requirements of this definition. If a copy of the agreement has been filed with the Wildlife Resources Commission and the pond in fact meets the requirements of this definition, it attains the status of private pond either 60 days after the agreement has been filed or upon the Commission's approving it as private, whichever occurs first.

(13a) Public Fishing Waters; Public Waters. — Coastal fishing waters, inland fishing waters, or both.

(13b) Public Hunting Grounds. — Privately owned lands open to the public for hunting under the terms of a cooperative agreement between the owner and the Wildlife Resources Commission.

(13c) Raptor. — A migratory bird of prey authorized under federal law and regulations for the taking of quarry by falconry.

(14) Shellfish. — Mollusca, specifically including oysters, clams, mussels, and scallops.

(14a) [Reserved.]

(14b) Upland Game Birds. — Grouse, pheasant, quail, and wild turkey.

(15) Wild Animals. — Game animals; fur-bearing animals; and all other wild mammals except marine mammals found in coastal fishing waters. In addition, this definition includes members of the following groups which are on the federal list of endangered or threatened species: wild amphibians, wild reptiles except sea turtles inhabiting and depending upon coastal fishing waters, and wild invertebrates except invertebrates declared to be pests under the Structural Pest Control Act of North Carolina of 1955 or the North Carolina Pesticide Law of 1971. Nothing in this definition is intended to abrogate G.S. 113-132(c), confer jurisdiction upon the Wildlife Resources Commission as to any subject exclusively regulated by any other agency, or to authorize the Wildlife Resources Commission by its regulations to supersede valid provision of law or regulation administered by any other agency.

(15a) Wild Birds. — Migratory game birds; upland game birds; and all undomesticated feathered vertebrates. The Wildlife Resources Commission may by regulation list specific birds or classes of birds excluded from the definition of wild birds based upon the need for protection or regulation in the interests of conservation of wildlife resources.

(16) Wildlife. — Wild animals; wild birds; all fish found in inland fishing waters; and inland game fish. Unless the context clearly requires otherwise, the definitions of wildlife, wildlife resources, wild animals, wild birds, fish, and the like are deemed to include species normally wild, or indistinguishable from wild species, which are raised or kept in captivity. Nothing in this definition is intended to abrogate the exclusive authority given the Department of Agriculture and Consumer Services to regulate the production and sale of pen-raised quail for food purposes.

(16a) Wildlife Refuge. — An area of land or waters owned, leased, controlled, or cooperatively managed by the Wildlife Resources Commission which is closed to the taking of some or all species of wildlife.

(17) Wildlife Resources. — All wild birds; all wild mammals other than marine mammals found in coastal fishing waters; all fish found in inland fishing waters, including migratory saltwater fish; all inland game fish; all uncultivated or undomesticated plant and animal life inhabiting or depending upon inland fishing waters; waterfowl food plants wherever found, except that to the extent such plants in coastal fishing waters affect the conservation of marine and estuarine resources the Department is given concurrent jurisdiction as to such plants; all undomesticated terrestrial creatures; and the entire ecology supporting such birds, mammals, fish, plant and animal life, and creatures. (1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285; 1987, c. 641, ss. 5, 6; 1991, c. 317, ss. 2, 3; c. 761, ss. 38, 39; 1993, c. 515, s. 6; 1997-142, ss. 2, 3; 1997-261, s. 80; 1997-400, s. 3.5; 1999-339, ss. 1-3.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

Effect of Amendments. — Session Laws 1997-400, s. 3, effective July 1, 1998, added subdivisions (12a) and (12b).

Session Laws 1999-339, ss. 1 to 3, effective July 1, 1999, added subdivision (11c), defining "migratory waterfowl; waterfowl"; and redesignated former subdivisions (11c) and (11d), defining "nongame animals" and "nongame birds," as present subdivisions (11d) and (11e), respectively.

CASE NOTES

Whether a body of water is a "private pond" was not relevant to a prosecution for trespass upon posted property under former § 113-120.1, there being no requirement that a pond must be a "private pond" in order to post the notices and signs described in former § 113-120.2. State v. Manning, 3 N.C. App. 451, 165 S.E.2d 13 (1969).

§ 113-130. Definitions relating to activities of public.

The following definitions and their cognates apply to activities of the public in regard to marine and estuarine and wildlife resources:

(1) Repealed by Session Laws 1979, c. 830, s. 1.

(1a) Falconry. — The sport of taking quarry by means of a trained raptor.

(1b) Individual. — A human being.

(1c) Landholder. — Any individual, resident or nonresident, owning land in this State or, when he is the one principally engaged in cultivating the land, leasing land in this State for agricultural purposes.

(2) Owner; Ownership. — As for personal property, refers to persons having beneficial ownership and not to those holding legal title for security; as for real property, refers to persons having the present right of control, possession, and enjoyment, whether as life tenant, fee holder, beneficiary of a trust, or otherwise. Provided, that this definition does not include lessees of property except where the lease arrangement is a security device to facilitate what is in substance a sale of the property to the lessee.

(3) Person. — Any individual; or any partnership, firm, association, corporation, or other group of individuals capable of suing or being sued as an entity.

(4) Resident. — In the case of:

a. Individuals. — One who at the time in question has resided in North Carolina for the preceding six months or has been domiciled in North Carolina for the preceding 60 days. When domicile in the State for a period of 60 days up to six months is the basis for establishing residence, the individual must sign a certificate on a form supplied by the Department or the Wildlife Resources Commission, as the case may be, stating the necessary facts and the intent to establish domicile here.

b. Corporations. — A corporation which is chartered under the laws of North Carolina and has its principal office within the State.

c. Partnerships. — A partnership in which all partners are residents of North Carolina and which has its principal office in the State.

d. Other Associations and Groups Fitting the Definition of Person. — An association or group principally composed of individual residents of North Carolina, with its principal office, if any, in the State, and organized for a purpose that contemplates more involvement or contact with this State than any other state.

e. Military Personnel and Their Dependents. — A member of the armed forces of the United States stationed at a military facility in North Carolina, his spouse, and any dependent under 18 years of age residing with him are deemed residents of the State, of the county in which they live, and also, if different, of any county in which the military facility is located.

(4a) To Buy; Purchase. — Includes a purchase or exchange of property, or an offer or attempt to purchase or exchange, for money or any other valuable consideration.

(5) To Fish. — To take fish.

(5a) To Hunt. — To take wild animals or wild birds.

(6) To Sell; Sale. — Includes a sale or exchange of property, or an offer or attempt to sell or exchange — for money or any other valuable consideration.

(7) To Take. — All operations during, immediately preparatory, and immediately subsequent to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any fisheries resources or wildlife resources.

(7a) To Trap. — To take wild animals or wild birds by trapping.

(8) Vessel. — Every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water. (1965, c. 957, s. 2; 1971, c. 705, s. 3; 1973, c. 1262, s. 18; 1979, c. 830, s. 1.)

CASE NOTES

Term "Owner" Does Not Include Lessee. — In a prosecution under former § 113-120.1 for a trespass by fishing on properly posted lands and waters of a private club without the written consent of the owner or his agent, defendants' motion for nonsuit should have been allowed where the State's evidence disclosed that the private club was the lessee of the land under and around the lake upon which defendants were fishing, a lessee not being included within the term "owner" as used in this section, and there being no showing that defendants were fishing without the written consent of the actual owner, or that the owner consented to their arrest, or that the private club was the agent of the owner for these purposes. State v. Manning, 3 N.C. App. 451, 165 S.E.2d 13 (1969).

ARTICLE 13.

Jurisdiction of Conservation Agencies.

§ 113-131. Resources belong to public; stewardship of conservation agencies; grant and delegation of powers; injunctive relief.

(a) The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole. The Department and the Wildlife Resources Commission are charged with stewardship of these resources.

(b) The following powers are hereby granted to the Department and the Wildlife Resources Commission and may be delegated to the Fisheries Director and the Executive Director:

(1) Comment on and object to permit applications submitted to State agencies which may affect the public trust resources in the land and water areas subject to their respective management duties so as to conserve and protect the public trust rights in such land and water areas;

(2) Investigate alleged encroachments upon, usurpations of, or other actions in violation of the public trust rights of the people of the State; and

(3) Initiate contested case proceedings under Chapter 150B for review of permit decisions by State agencies which will adversely affect the public trust rights of the people of the State or initiate civil actions to remove or restrain any unlawful or unauthorized encroachment upon, usurpation of, or any other violation of the public trust rights of the people of the State or legal rights of access to such public trust areas.

(c) Whenever there exists reasonable cause to believe that any person or other legal entity has unlawfully encroached upon, usurped, or otherwise violated the public trust rights of the people of the State or legal rights of access to such public trust areas, a civil action may be instituted by the responsible agency for injunctive relief to restrain the violation and for a mandatory preliminary injunction to restore the resources to an undisturbed condition. The action shall be brought in the superior court of the county in which the violation occurred. The institution of an action for injunctive relief under this section shall not relieve any party to such proceeding from any civil or criminal penalty otherwise prescribed for the violation.

(d) The Attorney General shall act as the attorney for the agencies and shall initiate actions in the name of and at the request of the Department or the Wildlife Resources Commission.

(e) In this section, the term "public trust resources" means land and water areas, both public and private, subject to public trust rights as that term is defined in G.S. 1-45.1. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1987, c. 641, s. 14.)

Legal Periodicals. — For a note on the State's interest in wild animals, see 2 Campbell L. Rev. 151 (1980).

CASE NOTES

Applied in In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

OPINIONS OF ATTORNEY GENERAL

As to North Carolina prohibition of the dumping of waste materials such as bags of medical refuse, especially that which may be hazardous or infectious, into the Atlantic Ocean, as to the authority of North Carolina with respect to dumping beyond three miles in the ocean which results in wastes entering state waters or being deposited on the State shores, and as to the extent state law applies to such events and what departments are responsible for enforcing such laws. See opinion of Attorney General to Mr. Robert B. Jordan, III, Lieutenant Governor, 58 N.C.A.G. 57 (1988).

§ 113-132. Jurisdiction of fisheries agencies.

(a) The Marine Fisheries Commission has jurisdiction over the conservation of marine and estuarine resources. Except as may be otherwise provided by law, it has jurisdiction over all activities connected with the conservation and regulation of marine and estuarine resources, including the regulation of aquaculture facilities as defined in G.S. 106-758 which cultivate or rear marine and estuarine resources.

(b) The Wildlife Resources Commission has jurisdiction over the conservation of wildlife resources. Except as may be otherwise provided by law, it has jurisdiction over all activities connected with the conservation and regulation of wildlife resources.

(c) Notwithstanding the provisions of this Article, this Subchapter does not give the Marine Fisheries Commission or the Wildlife Resources Commission jurisdiction over matters clearly within the jurisdiction vested in the Department of Agriculture and Consumer Services, the North Carolina Pesticide Board, the Commission for Health Services, the Environmental Management Commission, or other division of the Department regulating air or water pollution.

(d) To the extent that the grant of jurisdiction to the Marine Fisheries Commission and the Wildlife Resources Commission may overlap, the Marine Fisheries Commission and the Wildlife Resources Commission are granted concurrent jurisdiction. In cases of conflict between actions taken or regulations promulgated by either agency, as respects the activities of the other, pursuant to the dominant purpose of such jurisdiction, the Marine Fisheries Commission and the Wildlife Resources Commission are empowered to make agreements concerning the harmonious settlement of such conflict in the best interests of the conservation of the marine and estuarine and wildlife resources of the State. In the event the Marine Fisheries Commission and the Wildlife Resources Commission cannot agree, the Governor is empowered to resolve the differences.

(e) Those coastal fishing waters in which are found a significant number of freshwater fish, as agreed upon by the Marine Fisheries Commission and the Wildlife Resources Commission, may be denominated joint fishing waters. These waters are deemed coastal fishing waters from the standpoint of laws and regulations administered by the Department and are deemed inland fishing waters from the standpoint of laws and regulations administered by the

Wildlife Resources Commission. The Marine Fisheries Commission and the Wildlife Resources Commission may make joint regulations governing the responsibilities of each agency and modifying the applicability of licensing and other regulatory provisions as may be necessary for rational and compatible management of the marine and estuarine and wildlife resources in joint fishing waters.

(f) The granting of jurisdiction in this section pertains to the power of agencies to enact regulations and ordinances. Nothing in this section or in G.S. 113-138 is designed to prohibit law-enforcement officers who would otherwise have jurisdiction from making arrests or in any manner enforcing the provisions of this Subchapter. (1965, c. 957, s. 2; 1973, c. 476, s. 128; c. 1262, ss. 18, 28, 38; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1987, c. 641, s. 5; 1989, c. 281, s. 3; 1997-261, s. 109.)

CASE NOTES

Applied in In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

§ 113-133. Abolition of local coastal fishing laws.

The enjoyment of the marine and estuarine resources of the State belongs to the people of the State as a whole and is not properly the subject of local regulation. As the Department is charged with administering the governing statutes and adopting rules in a manner to reconcile as equitably as may be the various competing interests of the people as regards these resources, considering the interests of those whose livelihood depends upon full and wise use of renewable and nonrenewable resources and also the interests of the many whose approach is recreational, all special, local, and private acts and ordinances regulating the conservation of marine and estuarine resources are repealed. Nothing in this section is intended to invalidate local legislation or local ordinances which exercise valid powers over subjects other than the conservation of marine and estuarine resources, even though an incidental effect may consist of an overlapping or conflict of jurisdiction as to some particular provision not essential to the conservation objectives set out in this Subchapter. (1965, c. 957, s. 2; 1987, c. 827, s. 96.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 627, s. 2, purported to amend subsection (e) of this section by deleting "Currituck: Session Laws 1959, Chapter 545" from the list of local acts; however, as the amendment was intended to be made to G.S. 113-133.1, it has not been set out.

OPINIONS OF ATTORNEY GENERAL

Regulation and Control of Marine and Estuarine Resources Is Exclusively Within the State of North Carolina, and Local Regulations or Ordinances Are Not Authorized. — See opinion of Attorney General to Mr. Clifton L. Moore, Jr., 41 N.C.A.G. 642 (1971).

§ 113-133.1. Limitations upon local regulation of wildlife resources; certain local acts retained.

(a) The enjoyment of the wildlife resources of the State belongs to all of the people of the State.

(b) The Wildlife Resources Commission is charged with administering the governing statutes in a manner to serve as equitably as may be the various competing interests of the people regarding wildlife resources, considering the interests of those whose livelihood depends upon full and wise use of renewable resources and the interests of the many whose approach is recreational. Thus, except as provided in subsection (e), all special, local, and private acts and ordinances enacted prior to the ratification date of the act creating this section regulating the conservation of wildlife resources are repealed. Nothing in this section is intended to invalidate local legislation or local ordinances which exercise valid powers over subjects other than the conservation of wildlife resources, even though an incidental effect may consist of an overlapping or conflict of jurisdiction as to some particular provision not essential to the conservation objectives set out in this Subchapter. In particular, this section does not repeal local acts which restrict hunting primarily for the purpose of protecting travelers on the highway, landowners, or other persons who may be endangered or affected by hunters' weapons or ammunition or whose property may be damaged.

(c) This Subchapter is intended to express State policy relating to the conservation of wildlife resources. Nothing in this section is intended to repeal or prevent the enactment of any city or county ordinance otherwise validly authorized which has only a minor and incidental impact on the conservation of marine and estuarine and wildlife resources. This section does not repeal G.S. 153A-127, G.S. 153A-131, G.S. 160A-182, G.S. 160A-187, and G.S. 160A-188, nor any local act establishing bird sanctuaries, except that local authorities operating bird sanctuaries may not regulate the taking of game or otherwise abrogate valid laws and regulations pertaining to the conservation of wildlife resources.

(d) Nothing in this Subchapter is intended to repeal or abridge the regulatory authority of the Game Commission of Currituck County or the Dare County Game and Wildlife Commission.

(e) **(See editor's note)** Because of strong community interest expressed in their retention, the local acts or portions of local acts listed in this section are not repealed. The following local acts are retained to the extent they apply to the county for which listed:

Alleghany: Session Laws 1951, Chapter 665; Session Laws 1977, Chapter 526; Session Laws 1979, Chapter 556.

Anson: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 286.

Ashe: Former G.S. 113-111; Session Laws 1951, Chapter 665.

Avery: Former G.S. 113-122.

Beaufort: Session Laws 1947, Chapter 466, as amended by Session Laws 1979, Chapter 219; Session Laws 1957, Chapter 1364; Session Laws 1971, Chapter 173.

Bertie: Session Laws 1955, Chapter 1376; Session Laws 1975, Chapter 287.

Bladen: Public-Local Laws 1933, Chapter 550, Section 2 (as it pertains to fox season); Session Laws 1961, Chapter 348 (as it applies to Bladen residents fishing in Robeson County); Session Laws 1961, Chapter 1023; Session Laws 1971, Chapter 384.

Brunswick: Session Laws 1975, Chapter 218.

Buncombe: Public-Local Laws 1933, Chapter 308.

Burke: Public-Local Laws 1921, Chapter 454; Public-Local Laws 1921 (Extra Session), Chapter 213, Section 3 (with respect to fox seasons); Public-Local Laws 1933, Chapter 422, Section 3; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636.

Caldwell: Former G.S. 113-122; Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68; Session Laws 1977, Chapter 636; Session Laws 1979, Chapter 507.

Camden: Session Laws 1955, Chapter 362 (to the extent it applies to inland fishing waters); Session Laws 1967, Chapter 441.

Carteret: Session Laws 1955, Chapter 1036; Session Laws 1977, Chapter 695.

Caswell: Public-Local Laws 1933, Chapter 311; Public-Local Laws 1937, Chapter 411.

Catawba: Former G.S. 113-111, as amended by Session Laws 1955, Chapter 1037.

Chatham: Public-Local Laws 1937 Chapter 236; Session Laws 1963, Chapter 271.

Chowan: Session Laws 1979, Chapter 184; Session Laws 1979, Chapter 582.

Cleveland: Public Laws 1907, Chapter 388; Session Laws 1951, Chapter 1101; Session Laws 1979, Chapter 587.

Columbus: Session Laws 1951, Chapter 492, as amended by Session Laws 1955, Chapter 506.

Craven: Session Laws 1971, Chapter 273, as amended by Session Laws 1971, Chapter 629.

Cumberland: Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 471.

Dare: Session Laws 1973, Chapter 259.

Davie: Former G.S. 113-111, as amended by Session Laws 1947, Chapter 333.

Duplin: Session Laws 1965, Chapter 774; Session Laws 1973 (Second Session 1974), Chapter 1266; Session Laws 1979, Chapter 466.

Edgecombe: Session Laws 1961, Chapter 408.

Gates: Session Laws 1959, Chapter 298; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748.

Granville: Session Laws 1963, Chapter 670.

Greene: Session Laws 1975, Chapter 219; Session Laws 1979, Chapter 360.

Halifax: Public-Local Laws 1925, Chapter 571, Section 3 (with respect to fox-hunting seasons); Session Laws 1947, Chapter 954; Session Laws 1955, Chapter 1376.

Harnett: Former G.S. 113-111, as modified by Session Laws 1977, Chapter 636.

Haywood: Former G.S. 113-111, as modified by Session Laws 1963, Chapter 322.

Henderson: Former G.S. 113-111.

Hertford: Session Laws 1959, Chapter 298; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67.

Hoke: Session Laws 1963, Chapter 267.

Hyde: Public-Local Laws 1929, Chapter 354, Section 1 (as it relates to foxes); Session Laws 1951, Chapter 932.

Iredell: Session Laws 1979, Chapter 577.

Jackson: Session Laws 1965, Chapter 765; Session Laws 1971, Chapter 424.

Johnston: Session Laws 1975, Chapter 342.

Jones: Session Laws 1979, Chapter 441.

Lee: Session Laws 1963, Chapter 271; Session Laws 1977, Chapter 636.

Lenoir: Session Laws 1979, Chapter 441.

Lincoln: Public-Local Laws 1925, Chapter 449, Sections 1 and 2; Session Laws 1955, Chapter 878.

Madison: Public-Local Laws 1925, Chapter 418, Section 4; Session Laws 1951, Chapter 1040.

Martin: Session Laws 1955, Chapter 1376; Session Laws 1977, Chapter 636.

Mitchell: Session Laws 1965, Chapter 608, as amended by Session Laws 1977, Chapter 68.

Montgomery: Session Laws 1977 (Second Session 1978), Chapter 1142.

Nash: Session Laws 1961, Chapter 408.

New Hanover: Session Laws 1971, Chapter 559; Session Laws 1975, Chapter 95.

Northampton: Session Laws 1955, Chapter 1376; Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 748; Session Laws 1977, Chapter 67; Session Laws 1979, Chapter 548.

Orange: Public-Local Laws 1913, Chapter 547.

Pamlico: Session Laws 1977, Chapter 636.

Pender: Session Laws 1961, Chapter 333; Session Laws 1967, Chapter 229; Session Laws 1969, Chapter 258, as amended by Session Laws 1973, Chapter 420; Session Laws 1977, Chapter 585, as amended by Session Laws 1985, Chapter 421; Session Laws 1977, Chapter 805; Session Laws 1979, Chapter 546.

Perquimans: Former G.S. 113-111; Session Laws 1973, Chapter 160; Session Laws 1973, Chapter 264; Session Laws 1979, Chapter 582.

Polk: Session Laws 1975, Chapter 397; Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Randolph: Public-Local Laws 1941, Chapter 246; Session Laws 1947, Chapter 920.

Robeson: Public-Local Laws 1924 (Extra Session), Chapter 92; Session Laws 1961, Chapter 348.

Rockingham: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310.

Rowan: Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 106, and Session Laws 1977, Chapter 500; Session Laws 1979, Chapter 556.

Rutherford: Session Laws 1973, Chapter 114; Session Laws 1975, Chapter 397.

Sampson: Session Laws 1979, Chapter 373.

Scotland: Session Laws 1959, Chapter 1143; Session Laws 1977, Chapter 436.

Stokes: Former G.S. 113-111; Public-Local Laws 1933, Chapter 310; Session Laws 1979, Chapter 556.

Surry: Public-Local Laws 1925, Chapter 474, Section 6 (as it pertains to fox seasons); Session Laws 1975, Chapter 269, as amended by Session Laws 1977, Chapter 167.

Swain: Public-Local Laws 1935, Chapter 52; Session Laws 1953, Chapter 270; Session Laws 1965, Chapter 765.

Transylvania: Public Laws 1935, Chapter 107, Section 2, as amended by Public Laws 1935, Chapter 238.

Tyrrell: Former G.S. 113-111; Session Laws 1953, Chapter 685.

Wake: Session Laws 1973 (Second Session 1974), Chapter 1382.

Washington: Session Laws 1947, Chapter 620.

Wayne: Session Laws 1975, Chapter 269; Session Laws 1975, Chapter 342, as amended by Session Laws 1977, Chapter 43; Session Laws 1975, Chapter 343, as amended by Session Laws 1977, Chapter 45; Session Laws 1977, Chapter 695.

Wilkes: Former G.S. 113-111, as amended by Session Laws 1971, Chapter 385; Session Laws 1951, Chapter 665; Session Laws 1973, Chapter 106; Session Laws 1979, Chapter 507.

Yadkin: Former G.S. 113-111, as amended by Session Laws 1953, Chapter 199; Session Laws 1979, Chapter 507.

Yancey: Session Laws 1965, Chapter 522.

(f) The Wildlife Resources Commission is directed to review periodically all local acts affecting conservation of wildlife resources and notify local authorities and the General Assembly as to those that:

(1) Substantially duplicate provisions of this Subchapter.

(2) Seriously conflict with conservation policies set out in this Subchapter.

(3) Seriously conflict with conservation policies developed for the people of this State as a whole by the Wildlife Resources Commission.

(g) Notwithstanding G.S. 113-133.1(b), Chapter 565 of the Session Laws of 1977 is retained in effect. The following local conservation acts which specify that they must be specifically repealed are so repealed: Chapters 434 and 441 of the Session Laws of 1977. To provide for their retention or repeal in accordance with provisions applying to all other local wildlife acts, the following acts are amended to repeal the cited sections: Section 11, Chapter 258, Session Laws of 1969; and Section 4, Chapter 585, Session Laws of 1977. (1979, c. 830, ss. 1, 14; 1979, 2nd Sess., c. 1285, ss. 2, 11; c. 1324, s. 2; 1981, c. 249, s. 2; c. 250, s. 2; 1983, c. 109, s. 2; c. 487, s. 2; 1985, c. 112, s. 1; c. 302, s. 1; c. 689, s. 27; 1986, c. 893, s. 4; 1987, c. 33, s. 4; c. 131, ss. 4, 5; c. 245, s. 2; c. 282, s. 16; 1987 (Reg. Sess., 1988), c. 955, s. 4; 1989, c. 80, s. 2; 1989 (Reg. Sess., 1990), c. 837, s. 2; 1993, c. 65, s. 1; c. 221, s. 3; 1995, c. 509, s. 55; 1997-456, s. 26; 1997-496, s. 18.)

Editor's Note. — Session Laws 1997-456, s. 26, effective August 29, 1997 and 1997-496, s. 18, effective September 11, 1997, substituted "G.S. 113-133.1(e)" for "113-133(e)" in Session Laws 1995, c. 627, s. 2, deleting "Currituck: Session Laws 1959, Chapter 545" from subsection (e).

OPINIONS OF ATTORNEY GENERAL

Legislature Has Preempted Regulation of Wildlife Resources. — The Legislature has reserved the regulation of wildlife resources to itself and has thus preempted the entire field, to the exclusion of all local ordinances except those which have only a "minor and incidental" impact on wildlife conservation (e.g., an ordinance prohibiting the discharge of firearms from public roads). See opinion of Attorney General to Mr. H.T. Mullen, Jr., County Attorney, Pasquotank County, 51 N.C.A.G. 85 (1982).

County May Not Regulate Method of Trapping by Ordinance. — In light of the clear legislative intention to preempt the entire field of wildlife regulation, a county may not adopt an ordinance regulating the method of trapping wildlife. See opinion of Attorney General to Mr. H.T. Mullen, Jr., County Attorney, Pasquotank County, 51 N.C.A.G. 85 (1982).

§ 113-134. Rules.

The Marine Fisheries Commission and the Wildlife Resources Commission may, within their jurisdictional limitations imposed by this Article, adopt rules implementing this Subchapter. (1915, c. 84, s. 21; 1917, c. 290, s. 7; C.S., 1878; 1925, c. 168, s. 2; 1935, c. 35; 1945, c. 776; 1953, cc. 774, 1251; 1963, c. 1097, s. 1; 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1987, c. 827, s. 97.)

§ 113-134.1. Jurisdiction over marine fisheries resources in Atlantic Ocean.

The Marine Fisheries Commission is directed to exercise all regulatory authority over the conservation of marine fisheries resources in the Atlantic Ocean to the seaward extent of the State jurisdiction over the resources as now or hereafter defined. Marine fisheries inspectors may enforce these regulations and all other provisions of law applicable under the authority granted in this section in the same manner and with the same powers elsewhere granted them as enforcement officers. (1973, c. 1315; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1987, c. 641, ss. 5, 8.)

§ 113-135. General penalties for violating Subchapter or rules; increased penalty for prior convictions; interpretive provisions.

(a) Any person who violates any provision of this Subchapter or any rule adopted by the Marine Fisheries Commission or the Wildlife Resources Commission, as appropriate, pursuant to the authority of this Subchapter, is guilty of a misdemeanor except that punishment for violation of the rules of the Wildlife Resources Commission is limited as set forth in G.S. 113-135.1. Unless a different level of punishment is elsewhere set out, anyone convicted of a misdemeanor under this section is punishable as follows:

(1) For a first conviction, as a Class 3 misdemeanor.

(2) For a second or subsequent conviction within three years, as a Class 2 misdemeanor.

(b) In interpreting this section, provisions elsewhere in this Subchapter making an offense a misdemeanor "punishable in the discretion of the court" must be considered to set a different level of punishment, to be interpreted in the light of G.S. 14-3 or any equivalent or successor statute. Noncriminal sanctions, however, such as license revocation or suspension, and exercise of powers auxiliary to criminal prosecution, such as seizure of property involved in the commission of an offense, do not constitute different levels of punishment so as to oust criminal liability. Any previous conviction of an offense under this Subchapter, or under rules authorized by it, serves to increase the punishment under subsection (a) even though for a different offense than the second or subsequent one.

(c) For the purposes of this Subchapter, violations of laws or rules administered by the Wildlife Resources Commission under any former general or local law replaced by the present provisions of this Subchapter are deemed to be violations of laws or rules under this Subchapter. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1979, c. 830, s. 1; 1987, c. 827, s. 98; 1991, c. 176, s. 1; c. 761, s. 50.5; 1993, c. 539, s. 836; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 209, s. 3.)

Cross References. — As to failure to remove posted signs from nonregistered property, see § 113-282. As to hunting or fishing on registered property without permission, see § 113-285.

§ 113-135.1. Limitation upon penalty for offense created by rules of Wildlife Resources Commission in certain instances.

(a) To prevent unsuspecting members of the public from being subject to harsh criminal penalties for offenses created by rules of the Wildlife Resources Commission, the penalty for an offense which is solely a violation of rules of the Wildlife Resources Commission is limited to a fine of ten dollars ($10.00) except that offenses set out in Section [subsection] (b) are punished as set forth in G.S. 113-135 or other sections.

(b) The limitation upon penalty does not apply to any rule violation:

(1) Punishable under G.S. 113-294 or otherwise involving aggravating elements which result in a greater punishment than provided by G.S. 113-135;

(2) Which involves a defendant subject to the collection-license provisions of G.S. 113-272.4 or who is a dealer as defined in G.S. 113-273; or

(3) Relating to seasons, bag limits, creel limits, taking fish other than with hook and line, buying or selling wildlife, possessing or transporting live wildlife, taking wildlife at night or with the aid of a conveyance, or falconry. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-136. Enforcement authority of inspectors and protectors; refusal to obey or allow inspection by inspectors and protectors.

(a) Inspectors and protectors are granted the powers of peace officers anywhere in this State, and beyond its boundaries to the extent provided by law, in enforcing all matters within their respective subject-matter jurisdiction as set out in this section.

(b) The jurisdiction of inspectors extends to all matters within the jurisdiction of the Department set out in this Subchapter, Part 5D of Article 7 of Chapter 143B of the General Statutes, Article 5 of Chapter 76 of the General Statutes, and Article 2 of Chapter 77 of the General Statutes, and to all other matters within the jurisdiction of the Department which it directs inspectors to enforce. In addition, inspectors have jurisdiction over all offenses involving property of or leased to or managed by the Department in connection with the conservation of marine and estuarine resources.

(c) The jurisdiction of protectors extends to all matters within the jurisdiction of the Wildlife Resources Commission, whether set out in this Chapter, Chapter 75A, Chapter 143, Chapter 143B, or elsewhere. The Wildlife Resources Commission is specifically granted jurisdiction over all aspects of:

(1) Boating and water safety;
(2) Hunting and trapping;
(3) Fishing, exclusive of fishing under the jurisdiction of the Marine Fisheries Commission; and
(4) Activities in woodlands and on inland waters governed by G.S. 113-60.1 to G.S. 113-60.3.

In addition, protectors have jurisdiction over all offenses involving property of or leased by the Wildlife Resources Commission or occurring on wildlife refuges, game lands, or boating and fishing access areas managed by the Wildlife Resources Commission. The authority of protectors over offenses on public hunting grounds is governed by the jurisdiction granted the Commission in G.S. 113-264(c).

(d) Inspectors and protectors are additionally authorized to arrest without warrant under the terms of G.S. 15A-401(b) for felonies, for breaches of the peace, for assaults upon them or in their presence, and for other offenses evincing a flouting of their authority as enforcement officers or constituting a threat to public peace and order which would tend to subvert the authority of the State if ignored. In particular, they are authorized, subject to the direction of the administrative superiors, to arrest for violations of G.S. 14-223, 14-225, 14-269, and 14-277.

(d1) In addition to law enforcement authority granted elsewhere, a protector has the authority to enforce criminal laws under the following circumstances:

(1) When the protector has probable cause to believe that a person committed a criminal offense in his presence and at the time of the violation the protector is engaged in the enforcement of laws otherwise within his jurisdiction; or
(2) When the protector is asked to provide temporary assistance by the head of a State or local law enforcement agency or his designee and the request is within the scope of the agency's subject matter jurisdiction.

While acting pursuant to this subsection, a protector shall have the same powers invested in law enforcement officers by statute or common law. When acting pursuant to (2) of this subsection a protector shall not be considered an officer, employee, or agent for the state or local law enforcement agency or designee asking for temporary assistance. Nothing in this subsection shall be

construed to expand the authority of protectors to initiate or conduct an independent investigation into violations of criminal laws outside the scope of their subject matter or territorial jurisdiction.

(e) Inspectors and protectors may serve arrest warrants, search warrants, orders for arrest, criminal summonses, subpoenas, and all other process connected with any cases within their subject-matter jurisdiction. In the exercise of their law enforcement powers, inspectors are subject to provisions relating to police officers in general set out in Chapter 15, Chapter 15A, and elsewhere.

(f) Inspectors and protectors are authorized to stop temporarily any persons they reasonably believe to be engaging in activity regulated by their respective agencies to determine whether such activity is being conducted within the requirements of the law, including license requirements. If the person stopped is in a motor vehicle being driven at the time and the inspector or protector in question is also in a motor vehicle, the inspector or protector is required to sound a siren or activate a special light, bell, horn, or exhaust whistle approved for law-enforcement vehicles under the provisions of G.S. 20-125(b) or 20-125(c).

(g) Protectors may not temporarily stop or inspect vehicles proceeding along primary highways of the State without clear evidence that someone within the vehicle is or has recently been engaged in an activity regulated by the Wildlife Resources Commission. Inspectors may temporarily stop vehicles, boats, airplanes, and other conveyances upon reasonable grounds to believe that they are transporting seafood products; they are authorized to inspect any seafood products being transported to determine whether they were taken in accordance with law and to require exhibition of any applicable license, receipts, permits, bills of lading, or other identification required to accompany such seafood products.

(h), (i) Repealed by Session Laws 1979, c. 830, s. 1.

(j) The refusal of any person to stop in obedience to the directions of an inspector or protector acting under the authority of this section is unlawful. A violation of this subsection is a Class 3 misdemeanor and may include a fine of not less than fifty dollars ($50.00).

(k) It is unlawful to refuse to exhibit upon request by any inspector, protector, or other law enforcement officer any item required to be carried by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction.

(*l*) Nothing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures. (1915, c. 84, s. 6; 1917, c. 290, s. 2; C.S., s. 1885; 1935, c. 118; 1957, c. 1423, s. 2; 1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28, 86; c. 1286, s. 17; c. 1297; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1987, c. 641, ss. 20, 22; c. 827, s. 98; 1991, c. 730, s. 1; 1997-80, s. 5; 1998-225, ss. 3.1, 3.2.)

Cross References. — As to issuance of warning tickets, see § 113-140.

Editor's Note. — Section 20-125(c), referred to in subsection (f) of this section, was repealed by Session Laws 1979, c. 653. See now § 20-130.1.

Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to

which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — Session Laws 1998-225, s. 3.1, effective retroactively to September 1, 1997, in subsection (b), substituted "Part 5D" for "Part 5A."

Session Laws 1998-225, s. 3.2, effective November 5, 1998, in subsection (g), in the second sentence, deleted "taxable" preceding the first occurrence of "seafood products," and deleted "tax" preceding "receipts."

CASE NOTES

Test For Reasonable Warrantless Inspection. — Warrantless inspections will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made; second, the warrantless inspections must be necessary to further the regulatory scheme; and finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. Where this test is satisfied and the public interest outweighs a minimal intrusion, the statute does not violate U.S. Const., Amend. IV. State v. Nobles, 107 N.C. App. 627, 422 S.E.2d 78 (1992), aff'd per curiam, 333 N.C. 787, 429 S.E.2d 716 (1993), cert. denied, 510 U.S. 946, 114 S. Ct. 387, 126 L. Ed. 2d 335 (1993).

§ 113-137. Search on arrest; seizure and confiscation of property; disposition of confiscated property.

(a) Every inspector or protector who arrests a person for an offense as to which he has enforcement jurisdiction is authorized to search the person arrested and the surrounding area for weapons and for fruits, instrumentalities, and evidence of any crime for which the person arrested is or might have been arrested.

(b) Every inspector or protector who issues a citation instead of arresting a person, in cases in which the inspector or protector is authorized to arrest, may seize all lawfully discovered evidence, fruits, and instrumentalities of any crime as to which he has arrest jurisdiction and probable cause. When live fish are returned to public fishing bottoms or public waters, the inspector or protector shall state on the citation the quantity returned.

(c) Every inspector or protector who in the lawful pursuit of his duties has probable cause for believing he has discovered a violation of the law over which he has jurisdiction may seize in connection therewith any fish, wildlife, weapons, equipment, vessels, or other evidence, fruits, or instrumentalities of the crime, notwithstanding the absence of any person in the immediate area subject to arrest or the failure or inability of the inspector or protector to capture or otherwise take custody of the person guilty of the violation in question. Where the owner of such property satisfies the Secretary or the Executive Director, as the case may be, of his ownership and that he had no knowledge or culpability in regard to the offense involving the use of his property, such property must be returned to the owner. If after due diligence on the part of employees of the Department or the Wildlife Resources Commission, as the case may be, the identity or whereabouts of the violator or of the owner of the property seized cannot be determined, such property may be sold by the Department or the Wildlife Resources Commission in accordance with the provisions of this section.

(d) The Marine Fisheries Commission and the Wildlife Resources Commission may provide by rule for summary disposition of live or perishable fish or wildlife seized by an inspector or protector. If the property seized consists of live fish which may again be placed to the benefit of the public on public fishing

bottoms or in public waters, the inspector or protector may require the person in possession of the seized live fish to transport it the distance necessary to effect placement on appropriate bottoms or waters. In the event of refusal by the person in question to transport the fish, the inspector or protector must take appropriate steps to effect the transportation. The steps may include seizure of any conveyance or vessel of the person refusing to transport the fish if the conveyance or vessel was one on which the fish were located or was used to take or transport the fish. When a conveyance or vessel is seized, it is to be safeguarded by the inspector or protector seizing it pending trial and it becomes subject to the orders of the court. Transportation costs borne by the Department or by the Wildlife Resources Commission, as the case may be, may be collected by the agency from the proceeds of the sale of any other property of the defendant seized and sold in accordance with the provisions of this section.

Except as provided in subsection (g), when the seizure consists of edible fish or wildlife which is not alive, may not live, or may not otherwise benefit conservation objectives if again placed on open lands, on public fishing bottoms, or in public fishing waters, the inspector or protector must dispose of the property in a charitable or noncommercial manner in accordance with the directions of his administrative superiors.

(e) Except as otherwise specifically provided in this section, all property seized must be safeguarded pending trial by the inspector or protector initiating the prosecution. Upon a conviction the property seized in connection with the offense in question is subject to the disposition ordered by the court. Upon an acquittal, property seized must be returned to the defendant or established owner, except:

(1) Where the property was summarily disposed of in accordance with subsection (d);

(2) Where possession of the property by the person to whom it otherwise would be returned would constitute a crime; and

(3) Where the property seized has been sold in accordance with subsection (g). In this event the net proceeds of the sale must be returned to the defendant or established owner, as the case may be.

Where property seized summarily under subsection (d) is not available for return, an acquitted defendant or established owner is entitled to no compensation where there was probable cause for the action taken. Within 20 days of the final court adjudication of a citation, the Department or the Wildlife Resources Commission shall notify any acquitted defendant or established owner of its duly established procedures whereby reimbursement may be sought for live fish seized summarily under subsection (d) that is not available for return. Any action or proceeding to recover compensation must be begun within 30 days after receipt of the notice of applicable procedures. After the expiration of this period of limitation, no right or action or claim for compensation shall be asserted.

In safeguarding property seized pending trial, an inspector or protector is authorized in his discretion, subject to orders of his administrative superiors, to make his own provisions for storage or safekeeping or to deposit the property with the sheriff of the county in which the trial is to be held for custody pending trial. In the event the mode of safekeeping reasonably selected by the inspector or protector entails a storage or handling charge, such charge is to be paid as follows:

(1) By the defendant if he is convicted but the court nevertheless orders the return of the property to the defendant;

(2) From the proceeds of the sale of the property if the property is sold under court order or in accordance with the provisions of this section; or

(3) By the Department or by the Wildlife Resources Commission, as the case may be, if no other provision for payment exists.

(f) Subject to orders of his administrative superiors, an inspector or protector in his discretion may leave property which he is authorized to seize in the possession of the defendant with the understanding that such property will be subject to the orders of the court upon disposition of the case. Willful failure or inexcusable neglect of the defendant to keep such property subject to the orders of the court is a Class 1 misdemeanor. In exercising his discretion, the inspector or protector should not permit property to be retained by the defendant if there is any substantial risk of its being used by the defendant in further unlawful activity.

(g) Where a prosecution involving seized saleable fish is pending and such fish are perishable or seasonal, the inspector or protector may apply to the court in which the trial is pending for an order permitting sale prior to trial. As used in this subsection, seasonal fish are those which command a higher price at one season than at another so that economic loss may occur if there is a delay in the time of sale. When ordered by the court, such sale prior to trial must be conducted in accordance with the order of the court or in accordance with the provisions of this section. The net proceeds of such sale are to be deposited with the court and are subject to the same disposition as would have been applicable to other types of property seized. Where sale is not lawful for public health reasons or otherwise not practicable or where prosecution is not pending, disposal of the fish is in accordance with subsection (d).

(h) Pending trial, the defendant or the established owner of any nonperishable and nonconsumable property seized may apply to the court designated to try the offense for return of the property. The property must be returned pending trial if:

(1) The court is satisfied that return of the property will not facilitate further violations of the law; and

(2) The claimant posts a bond for return of the property at trial in an amount double the value of the property as assessed by the court.

(i) Upon conviction of any defendant for a violation of the laws or rules administered by the Department or the Wildlife Resources Commission under the authority of this Subchapter, the court in its discretion may order the confiscation of all weapons, equipment, vessels, conveyances, fish, wildlife, and other evidence, fruits, and instrumentalities of the offense in question, whether or not seized or made subject to the orders of the court pending trial. If the confiscated property is lawfully saleable, it must be sold; otherwise it must be disposed of in a manner authorized in this section. Unless otherwise specified in the order of the court, sales are to be held by the Department or the Wildlife Resources Commission, as the case may be.

The Department and the Wildlife Resources Commission may administratively provide for an orderly public sale procedure of property which it may sell under this section. The procedure may include turning the property to be sold over to some other agency for sale, provided that the provisions of subsection (j) are complied with and there is proper accounting for the net proceeds of the sale. In the case of property that cannot lawfully be sold or is unlikely to sell for a sufficient amount to offset the costs of sale, the Department and the Wildlife Resources Commission may provide either for destruction of the property or legitimate utilization of the property by some public agency.

(j) Except as provided in subsection (d), if property is seized under subsection (c) or it appears that a person not a defendant has an interest in any property to be sold, destroyed, or otherwise disposed of, the Department and the Wildlife Resources Commission must provide for public notice of the description of the property and the circumstances of its seizure for a sufficient period prior to the time set for sale or other disposition to allow innocent

owners or lienholders to assert their claims. The validity of claims are to be determined by the trial court in the event there is or has been a prosecution in connection with the seizure of the property. If there has been no prosecution and none is pending, the validity of claims must be determined by the Secretary or by the Executive Director, as the case may be. When there has been a sale under subsection (g), the provisions of this subsection apply to the net proceeds of the sale.

(k) Except as provided in subsection (j) and in subdivision (3) of the first paragraph of subsection (e), the net proceeds of all sales made pursuant to this section must be deposited in the school fund of the county in which the property was seized. (1915, c. 84, s. 6; 1917, c. 290, s. 2; C.S., s. 1885; 1935, c. 118; 1953, c. 1134; 1957, c. 1423, s. 2; 1961, c. 1189, s. 4; 1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1979, c. 830, s. 1; 1983 (Reg. Sess., 1984), c. 1083, ss. 1-3; 1987, c. 827, s. 98; 1993, c. 539, s. 837; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to issuance of warning tickets, see § 113-140.

CASE NOTES

Homicide Committed by Wildlife Protector Engaged in Performance of His Official Duties. — See State v. Ellis, 241 N.C. 702, 86 S.E.2d 272 (1955), decided under former § 113-91.

§ 113-138. Enforcement jurisdiction of special conservation officers.

(a) The Wildlife Resources Commission by rule may confer law-enforcement powers over matters within its jurisdiction with respect to wildlife resources conservation laws and rules within its jurisdiction upon the employees of the United States Fish and Wildlife Service, and the Marine Fisheries Commission may confer law-enforcement powers over matters within its jurisdiction with respect to marine and estuarine resources conservation laws and rules upon the employees of the National Marine Fisheries Service, who:

(1) Possess special law-enforcement jurisdiction that would not otherwise extend to the subject matter of this Subchapter;

(2) Are assigned during the duration of such appointment to duty stations within North Carolina; and

(3) Take the oath required of public officers before an officer authorized to administer oaths.

These conferred powers do not constitute an appointment of any officer to an additional office.

(b) The Marine Fisheries Commission and Wildlife Resources Commission shall limit the exercise of this authority to situations when:

(1) The best interests of the conservation of marine and estuarine and wildlife resources managed by the respective State and federal agencies are being adversely affected by restrictions upon jurisdictional subject matter that limit law-enforcement authority; and

(2) The best interests of the conservation of marine and estuarine and wildlife resources managed by the adopting Commission will benefit by conferring law-enforcement authority on the employees of the United States Fish and Wildlife Service or the National Marine Fisheries Service.

(c) The enabling rule shall specify the particular officers or class of officers upon whom the law-enforcement powers are conferred and the geographic areas within which the special enforcement officers can exercise the law-

enforcement powers over matters within the jurisdiction of the adopting Commission. The conferred powers may be used only during the scope of employment of the special conservation officers.

(d) Unless otherwise provided by the enabling rule, such special enforcement officers shall have the same jurisdiction and powers with respect to resource conservation and the same rights, privileges and immunities (including those relating to the defense of civil actions and payment of judgments) as the State officers in addition to those the federal officer normally possesses. (1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1977, c. 771, s. 4; 1983, c. 484; 1987, c. 827, s. 98; 1991 (Reg. Sess., 1992), c. 890, s. 5.)

§ 113-139: Repealed by Session Laws 1979, c. 830, s. 1.

§ 113-140. Warning tickets.

(a) In enforcing the laws and rules within their subject matter jurisdiction, wildlife protectors and marine fisheries inspectors may, in accordance with the criteria of this section, issue warning tickets to offenders instead of initiating criminal prosecutions.

(b) To secure uniformity of enforcement, the Executive Director and the Director of the Division of Marine Fisheries may administratively promulgate standards consistent with subsection (c) providing that warning tickets may or may not be issued with respect to particular offenses, classes of offenses, or ways of committing offenses.

(c) A protector or inspector may issue a warning ticket only if all of the following conditions are met:

(1) The protector or inspector is convinced that the offense was not intentional.

(2) The offense is not of a kind or committed in a manner as to which warning tickets have been prohibited by the Executive Director or the Director of the Division of Marine Fisheries.

(3) The conduct of the offender was not calculated to result in any significant destruction of wildlife or fisheries resources.

(4) The conduct of the offender did not constitute a hazard to the public.

A warning ticket may not be issued if the offender has previously been charged with or issued a warning ticket for a similar offense.

(d) If any law-enforcement officer with jurisdiction over the offense or if any employee of the Wildlife Resources Commission or the Department learns that under the criteria of this section a warning ticket was inappropriately issued to an offender, he must take action to secure initiation of prosecution for the appropriate charge or charges unless barred by the statute of limitations or unless prosecution is not otherwise feasible because of unavailability of evidence or necessary witnesses.

(e) Before any warning tickets are issued, the Executive Director or the Director of the Division of Marine Fisheries must institute a procedure to ensure an accurate accounting for and recording of all warning tickets issued. This procedure may include use of prenumbered tickets and immediate notation of issuance of the warning ticket on each appropriate license or permit issued by the Wildlife Resources Commission or Department held by the offender. The Executive Director or the Director of the Division of Marine Fisheries may also provide for issuance of new, replacement, or renewal licenses and permits bearing the notation. The licenses covered by this subsection include certificates of number for motorboats.

(f) This section does not entitle any person who has committed an offense with the right to be issued a warning ticket. That issuance of a warning ticket may be appropriate under the criteria of this section does not restrict in any

manner the powers of a wildlife protector or marine fisheries inspector or any other law-enforcement officer under G.S. 113-136, 113-137, and other provisions of law in dealing with hunters, fishermen, operators of vessels, and other offenders and suspected offenders.

(g) Issuance of a warning ticket does not constitute evidence of the commission of an offense, but may be used to prevent issuance of a subsequent warning ticket to the same person for a similar offense. (1981, c. 252, s. 1; 1987, c. 827, s. 98; 1989, c. 308.)

§§ 113-141 through 113-145: Reserved for future codification purposes.

ARTICLE 13A.

Clean Water Management Trust Fund.

§ 113-145.1. Purpose.

The General Assembly recognizes that a critical need exists in this State to clean up pollution in the State's surface waters and to protect and conserve those waters that are not yet polluted. The task of cleaning up polluted waters and protecting the State's water resources is multifaceted and requires different approaches that take into account the problems, the type of pollution, the geographical area, and the recognition that the hydrological and ecological values of each resource sought to be upgraded, conserved, and protected are unique.

It is the intent of the General Assembly that moneys from the Fund created under this Article shall be used to help finance projects that specifically address water pollution problems and focus on upgrading surface waters, eliminating pollution, and protecting and conserving unpolluted surface waters, including urban drinking water supplies. It is the further intent of the General Assembly that moneys from the Fund also be used to build a network of riparian buffers and greenways for environmental, educational, and recreational benefits. While the purpose of this Article is to focus on the cleanup and prevention of pollution of the State's surface waters and the establishment of a network of riparian buffers and greenways, the General Assembly believes that the results of these efforts will also be beneficial to wildlife and marine fisheries habitats. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a).)

§ 113-145.2. Definitions.

As used in this Article:

(1) Council. — The advisory council for the Clean Water Management Trust Fund.

(2) Economically Distressed Units of Local Government. — Counties designated as economically distressed by the Secretary of Commerce under G.S. 143B-437A and any cities located in those counties.

(3) Fund. — The Clean Water Management Trust Fund created pursuant to this Article.

(4) Land. — Real property and any interest in, easement in, or restriction on real property.

(5) Trustees. — The trustees of the Clean Water Management Trust Fund. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a).)

§ 113-145.3. Clean Water Management Trust Fund: established.

(a) Fund Established. — There is established a Clean Water Management Trust Fund in the State Treasurer's Office that shall be used to finance projects to clean up or prevent surface water pollution in accordance with this Article.

(b) Fund Earnings, Assets, and Balances. — The State Treasurer shall hold the Fund separate and apart from all other moneys, funds, and accounts. Investment earnings credited to the assets of the Fund shall become part of the Fund. Any balance remaining in the Fund at the end of any fiscal year shall be carried forward in the Fund for the next succeeding fiscal year. Payments from the Fund shall be made on the warrant of the Chair of the Board of Trustees.

(c) Fund Purposes. — Moneys from the Fund may be used for any of the following purposes:

(1) To acquire land for riparian buffers for the purposes of providing environmental protection for surface waters and urban drinking water supplies and establishing a network of riparian greenways for environmental, educational, and recreational uses.

(2) To acquire conservation easements or other interests in real property for the purpose of protecting and conserving surface waters and urban drinking water supplies.

(3) To coordinate with other public programs involved with lands adjoining water bodies to gain the most public benefit while protecting and improving water quality.

(4) To restore previously degraded lands to reestablish their ability to protect water quality.

(5) To repair failing waste treatment systems if: (i) an application has first been submitted to receive a loan or grant from the Clean Water Revolving Loan and Grant Fund and the application was denied during the latest review cycle; (ii) the repair is a reasonable remedy for resolving an existing waste treatment problem; and (iii) the repair is not for the purpose of expanding the system to accommodate future anticipated growth of a community. Priority shall be given to economically distressed units of local government.

(6) To repair and eliminate failing septic tank systems, to eliminate illegal drainage connections, and to expand waste treatment systems if the system is being expanded as a remedy to eliminate failing septic tank systems or illegal drainage connections. Priority shall be given to economically distressed units of local government.

(7) To improve stormwater controls and management practices.

(8) To facilitate planning that targets reductions in surface water pollution.

(9) To fund operating expenses of the Board of Trustees and its staff.

(d) Limit on Operating and Administrative Expenses. — No more than two percent (2%) of the annual balance of the Fund on July 1 or a total sum of eight hundred fifty thousand dollars ($850,000), whichever is less, may be used each fiscal year for administrative and operating expenses of the Board of Trustees and its staff. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a).)

§ 113-145.4. Clean Water Management Trust Fund: eligibility for grants; matching funds or property requirement.

(a) Eligible Grant Applicants. — Any of the following are eligible to apply for a grant from the Fund for the purpose of protecting and enhancing water quality:

(1) A State agency.
(2) A local government or other political subdivision of the State or a combination of such entities.
(3) A nonprofit corporation whose primary purpose is the conservation, preservation, and restoration of our State's environmental and natural resources.

(b) Grant Matching Requirement. — The Board of Trustees shall establish matching requirements for grants awarded under this Article. The Board of Trustees may require a match of up to twenty percent (20%) of the amount of the grant awarded. This requirement may be satisfied by the donation of land to a public or private nonprofit conservation organization as approved by the Board of Trustees. The Board of Trustees may also waive the requirement to match a grant pursuant to guidelines adopted by the Board of Trustees.

(c) Grants Not Available to Satisfy Compensatory Mitigation Requirements. — No grant shall be awarded under this article to satisfy compensatory mitigation requirements under 33 USC § 1344 or G.S.143-214.11. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a).)

§ 113-145.5. Clean Water Management Trust Fund: Board of Trustees established; membership qualifications; vacancies; meetings and meeting facilities.

(a) Board of Trustees Established. — There is established the Clean Water Management Trust Fund Board of Trustees. The Clean Water Management Trust Fund Board of Trustees shall be independent, but for administrative purposes shall be located under the Department of Environment and Natural Resources.

(b) Membership. — The Clean Water Management Trust Fund Board of Trustees shall be composed of 18 members. Six members shall be appointed by the Governor, six by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121, and six by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121. The office of Trustee is declared to be an office that may be held concurrently with any other executive or appointive office, under the authority of Article VI, Section 9, of the North Carolina Constitution.

Persons appointed shall be knowledgeable in one of the following areas:
(1) Acquisition and management of natural areas.
(2) Conservation and restoration of water quality.
(3) Wildlife and fisheries habitats and resources.
(4) Environmental management.

(c) Initial Appointments. — Each appointing officer shall designate two of the officer's initial appointments to serve two-year terms, two to serve four-year terms, and two to serve six-year terms. Thereafter, all appointments shall be for four years, subject to reappointment. All initial appointments shall be made on or before January 1, 1997. The Governor shall appoint one Trustee to serve as Chair of the Board.

(d) Vacancies. — If a vacancy occurs, other than by the expiration of term, of a member subject to appointment by the General Assembly upon the recommendation of the Speaker of the House of Representatives or the President Pro Tempore of the Senate, the vacancy shall be filled in accordance with G.S. 120-122. All other vacancies shall be filled by the appointing official in the original manner.

(e) Frequency of Meetings. — The Trustees shall meet at least twice each year and may hold special meetings at the call of the Chair or a majority of the members.

(f) Per Diem and Expenses. — The Trustees shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. Per diem, subsistence, and travel expenses of the Trustees shall be paid from the Fund.

(g) Meeting Facilities. — The Secretary of the Department of Environment and Natural Resources shall provide meeting facilities for the Board of Trustees and its staff as requested by the Chair. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a); 1997-443, s. 11A.119(a).)

§ 113-145.6. Clean Water Management Trust Fund Board of Trustees: powers and duties.

(a) Allocate Grant Funds. — The Trustees shall allocate moneys from the Fund as grants. A grant may be awarded only for a project or activity that satisfies the criteria and furthers the purposes of this Article.

(b) Develop Grant Criteria. — The Trustees shall develop criteria for awarding grants under this Article. The criteria developed shall include consideration of the following:

(1) The significant enhancement and conservation of water quality in the State.
(2) The objectives of the basinwide management plans for the State's river basins and watersheds.
(3) The promotion of regional integrated ecological networks insofar as they affect water quality.
(4) The specific areas targeted as being environmentally sensitive.
(5) The geographic distribution of funds as appropriate.
(6) The preservation of water resources with significant recreational or economic value and uses.
(7) The development of a network of riparian buffer- greenways bordering and connecting the State's waterways that will serve environmental, educational, and recreational uses.

(c) Develop Additional Guidelines. — The Trustees may develop guidelines in addition to the grant criteria consistent with and as necessary to implement this Article.

(d) Acquisition of Land. — The Trustees may acquire land by purchase, negotiation, gift, or devise. Any acquisition of land by the Trustees must be reviewed and approved by the Council of State and the deed for the land subject to approval of the Attorney General before the acquisition can become effective. In determining whether to acquire land as permitted by this Article, the Trustees shall consider whether the acquisition furthers the purposes of this Article and may also consider recommendations from the Council. Nothing in this section shall allow the Trustees to acquire land under the right of eminent domain.

(e) Exchange of Land. — The Trustees may exchange any land they acquire in carrying out the powers conferred on the Trustees by this Article.

(f) Land Management. — The Trustees may designate managers or managing agencies of the lands acquired under this Article.

(g) Tax Credit Certification. — The Trustees shall develop guidelines to determine whether land donated for a tax credit under G.S. 105-130.34 or G.S. 105-151.12 are suitable for one of the purposes under this Article and may be certified for a tax credit.

(h) Rule-making Authority. — The Trustees may adopt rules to implement this Article. Chapter 150B of the General Statutes applies to the adoption of rules by the Trustees.

(i) Repealed by Session Laws 1999-237, s. 15.11, effective July 1, 1999. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a), (c); 1999-237, s. 15.11.)

Editor's Note. — Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — Session Laws 1999-237, s. 15.11, effective July 1, 1999, repealed subsection (i), pertaining to annual reports by the Chair of the Board of Trustees.

§ 113-145.6A. Clean Water Management Trust Fund: reporting requirement.

(a) The Chair of the Trustee shall report each year by November 1 to the Joint Legislative Commission on Governmental Operations, the Environmental Review Commission and the Subcommittees on Natural and Economic Resources of the House of Representatives and Senate Appropriations Committees regarding the implementation of this Article. A written copy of the report shall also be sent to the Fiscal Research Division of the General Assembly by November 1 each year.

(b) No later than November 1, 1997, and quarterly thereafter, the Chair of the Trustees shall submit to the Joint Legislative Commission on Governmental Operations, the Environmental Review Commission and the Subcommittees on Natural and Economic Resources of the House of Representatives and Senate Appropriations Committees a list of the projects awarded grants from the Fund that quarter. The list shall include for each project a description of the project, the amount of the grant awarded for the project, and the total cost of the project. A written copy of the list and other information regarding the projects shall also be sent to the Fiscal Research Division of the General Assembly by November 1, 1997, and for each subsequent quarter. (1997-443, s. 7.10.)

§ 113-145.7. Clean Water Management Trust Fund: Executive Director and staff.

The Clean Water Management Trust Fund Board of Trustees, as soon as practicable after its organization, shall select and appoint a competent person in accordance with this section as Executive Director of the Clean Water Management Trust Fund Board of Trustees. The Executive Director shall be charged with the supervision of all activities under the jurisdiction of the Trustees and shall serve as the chief administrative officer of the Trustees. Subject to the approval of the Trustees and the Director of the Budget, the Executive Director may employ such clerical and other assistants as may be deemed necessary.

The person selected as Executive Director shall have had training and experience in conservation, protection, and management of surface water resources. The salary of the Executive Director shall be fixed by the Trustees, and the Executive Director shall be allowed travel and subsistence expenses in accordance with G.S. 138-6. The Executive Director's salary and expenses shall be paid from the Fund. The term of office of the Executive Director shall be at the pleasure of the Trustees. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a).)

§ 113-145.8. Clean Water Management Trust Fund: Advisory Council.

There is established the Clean Water Management Trust Fund Advisory Council. The Council shall advise the Trustees with regard to allocations made from the Fund, and other issues as requested by the Trustees. The Council shall be composed of the following or its designees:

(1) Commissioner of Agriculture.
(2) Chair of the Wildlife Resources Commission.
(3) Secretary of the Department of Environment and Natural Resources.
(4) Secretary of the Department of Commerce. (1996, 2nd Ex. Sess., c. 18, s. 27.6(a); 1997-443, s. 11A.119(a).)

§§ 113-145.9 through 113-150: Reserved for future codification purposes.

Article 14.

Commercial And Sports Fisheries Licenses.

§§ 113-151 through 113-167: Repealed by Session Laws 1997-400, s. 5.4, effective July 1, 1999.

Cross References. — For provisions relating to coastal and estuarine commercial fishing licenses, see now §§ 113-168 to 113-173.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 576, ss. 3 to 6 provided for a moratorium on the issuance of new licenses under §§ 113-152, 113-153.1, 113-154, and 113-154.1, effective July 1, 1994, until June 30, 1996, with certain exceptions. Renewal of licenses on and after June 1, 1993, under §§ 113-152, 113-154 and 113-154.1 was allowed. The act created an appeals panel to consider license applications. It provided for a study of the fishing industry, and for a quarterly report to the Joint Legislative Commission on Seafood and Aquaculture and the Marine Fisheries Commission. In addition, the act limited the authority of the Marine Fisheries Commission during the moratorium.

The date on the moratorium created by Session Laws 1993 (Reg. Sess., 1994), c. 576, ss. 3 to 6 was extended to August 15, 1997, and additional amendments and modifications were made by the following acts: Session Laws 1993 (Reg. Sess., 1994), c. 675, s. 3; c. 769, s. 17.7 (b); c. 770, s. 1; 1995, c. 507, s. 26.5; 1997-256, s. 7; 1997-347, s. 3; 1997-400, ss. 6.1, 6.2, 6.10; 1997-401, ss. 3, 6.1; 1998-212, s. 14.2.

Session Laws 1997-400, s. 5.2 provides transitional provisions for the moratorium to Article 14A. For a full treatment of the transitional provisions, see the Editor's Note following § 113-168.2.

Repealed § 113-151 had been repealed by Session Laws 1987, c. 827, s. 100. Repealed § 113-155 had been repealed by Session Laws 1983, c. 570, s. 10. Repealed § 113-157 had been repealed by Session Laws 1983, c. 570, s. 12. Repealed § 113-159 had been repealed by Session Laws 1973, c. 975.

Session Laws 1999-209, s. 5, provides that notwithstanding Session Laws 1997-400 and Session Laws 1998-225, a license or endorsement issued for the 1998-1999 license year by the Division of Marine Fisheries of the Department of Environment and Natural Resources under Article 14 of Chapter 113 of the General Statutes (now repealed) that has not been suspended or revoked shall continue in effect from July 1, 1999 until the earlier of: (i) the date on which the license or endorsement is replaced by a license or endorsement issued pursuant to Article 14A of Chapter 113 of the General Statutes or (ii) August 1, 1999.

Article 14A.

Coastal and Estuarine Commercial Fishing Licenses.

[Article 14A expires September 1, 2003]

§ 113-168. (Expires September 1, 2003) Definitions.

As used in this Article:

(1) "Commercial fishing operation" means any activity preparatory to, during, or subsequent to the taking of any fish, the taking of which is subject to regulation by the Commission, either with the use of

Article 14A has a postponed expiration date.

commercial fishing equipment or gear, or by any means if the purpose of the taking is to obtain fish for sale. Commercial fishing operation does not include (i) the taking of fish as part of a recreational fishing tournament, unless commercial fishing equipment or gear is used or (ii) the taking of fish under a RCGL.

(2) "Commission" means the Marine Fisheries Commission.

(3) "Division" means the Division of Marine Fisheries in the Department of Environment and Natural Resources.

(3a) "Immediate family" means the mother, father, brothers, sisters, spouse, children, stepparents, stepbrothers, stepsisters, and stepchildren of a person.

(4) "License year" means the period beginning 1 July of a year and ending on 30 June of the following year.

(5) "North Carolina resident" means a person who is a resident within the meaning of G.S. 113-130(4).

(6) "RCGL" means Recreational Commercial Gear License.

(7) "RSCFL" means Retired Standard Commercial Fishing License.

(8) "SCFL" means Standard Commercial Fishing License. (1997-400, s. 5.1; 1997-443, s. 11A.119(b); 1998-225, s. 4.9.)

Editor's Note. — Session Laws 1997-400, s. 6.15, made this Article effective July 1, 1999, and provides that it expires September 1, 2003.

Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules. Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Session Laws 1999-209, s. 5, provides that notwithstanding Session Laws 1997-400 and Session Laws 1998-225, a license or endorsement issued for the 1998-1999 license year by the Division of Marine Fisheries of the Department of Environment and Natural Resources under Article 14 of Chapter 113 of the General Statutes (now repealed) that has not been suspended or revoked shall continue in effect from July 1, 1999 until the earlier of: (i) the date on which the license or endorsement is replaced by a license or endorsement issued pursuant to Article 14A of Chapter 113 of the General Statutes or (ii) August 1, 1999.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subdivision (1), substituted the present second sentence for the former, which read, "Commercial fishing operation includes taking people fising for hire"; added subdivision (3a); and in subdivision (5), inserted "who" following "person," and deleted "and who filed a State income tax return as a resident of the State for the previous calendar or tax year" following "G.S. 113-130(4)."

Legal Periodicals. — For a note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For a note on the State's interest in wild animals, see 2 Campbell L. Rev. 151 (1980).

For 1997 legislative survey, see 20 Campbell L. Rev. 443.

§ 113-168.1. (Expires September 1, 2003) General provisions governing licenses and endorsements.

(a) Duration, Fees. — Except as provided in G.S. 113-173(f), all licenses and endorsements issued under this Article expire on the last day of the license year. An applicant for any license or endorsement shall pay the full annual fee

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at the time the applicant applies for the license or endorsement regardless of when application is made.

(b) Licenses Required to Engage in Commercial Fishing. — It is unlawful for any person to engage in a commercial fishing operation without holding a license and any endorsements required by this Article. It is unlawful for anyone to command a vessel engaged in a commercial fishing operation without complying with the provisions of this Article and rules adopted by the Commission under this Article.

(c) Licenses, Assignments, and Endorsements Available for Inspection. — It is unlawful for any person to engage in a commercial fishing operation in the State without having ready at hand for inspection all valid licenses, assignments, and endorsements required under this Article. To comply with this subsection, a person must have any required endorsements and either a currently valid (i) license issued in the person's true name and bearing the person's current address or (ii) SCFL and an assignment of the SCFL authorized under this Article. It is unlawful for a person to refuse to exhibit any license, assignment, or endorsement required by this Article upon the request of an inspector or other law enforcement officer authorized to enforce federal or State laws, regulations, or rules relating to marine fisheries.

(d) No Dual Residency. — It is unlawful for any person to hold any currently valid license issued under this Article to the person as a North Carolina resident if that person holds any currently valid commercial or recreational fishing license issued by another state to the person as a resident of that state.

(e) License Format. — Licenses issued under this Article shall be issued in the name of the applicant. Each license shall show the type of license and any endorsements; the name, mailing address, physical or residence address, and date of birth of the licensee; the date on which the license is issued; the date on which the license expires; and any other information that the Commission or the Division determines to be necessary to accomplish the purposes of this Subchapter.

(f) License Issuance and Renewal. — Except as provided in G.S. 113-173(d), the Division shall issue licenses and endorsements under this Article to eligible applicants at any office of the Division or by mail from the Morehead City office of the Division. A license or endorsement may be renewed in person at any office of the Division or by mail to the Morehead City office of the Division. Eligibility to renew an expired SCFL shall end one year after the date of expiration of the SCFL.

(g) Limitations on Eligibility. — A person is not eligible to obtain or renew a license or endorsement under this Article if, at the time the person applies for the license or endorsement, any other license or endorsement issued to the person under this Article is suspended or revoked. A person is not eligible to obtain a license or endorsement under this Article if, within the three years prior to the date of application, the person has been determined to be responsible for four or more violations of state laws, regulations, or rules governing the management of marine and estuarine resources. An applicant shall certify that the applicant has not been determined to be responsible for four or more violations of state laws, regulations, or rules governing the management of marine and estuarine resources during the previous three years. The Division may also consider violations of federal law and regulations governing the management of marine and estuarine resources in determining whether an applicant is eligible for a license.

(h) Replacement Licenses and Endorsements. — The Division shall issue a replacement license, including any endorsements, to a licensee for a license that has not been suspended or revoked. A licensee may apply for a replacement license for a license that has been lost, stolen, or destroyed and shall apply for a replacement license within 30 days of a change in the licensee's

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name or address. A licensee may apply for a replacement license in person at any office of the Division or by mail to the Morehead City office of the Division. A licensee may use a copy of the application for a replacement license that has been filed with the Division as a temporary license until the licensee receives the replacement license. The Commission may establish a fee for each type of replacement license, not to exceed ten dollars ($10.00), that compensates the Division for the administrative costs associated with issuing the replacement license.

(i) Cancellation. — The Division may cancel a license or endorsement issued on the basis of an application that contains false information supplied by the applicant. A cancelled license or endorsement is void from the date of issuance. A person in possession of a cancelled license or endorsement shall surrender the cancelled license or endorsement to the Division. It is unlawful to refuse to surrender a cancelled license or endorsement upon demand of any authorized agent of the Division.

(j) Advance Sale of Licenses, License Revenue. — To ensure an orderly transition from one license year to the next, the Division may issue a license or endorsement prior to 1 July of the license year for which the license or endorsement is valid. Revenue that the Division receives for the issuance of a license or endorsement prior to the beginning of a license year shall not revert at the end of the fiscal year in which the revenue is received and shall be credited and available to the Division for the license year in which the license or endorsement is valid. (1997-400, s. 5.1; 1998-225, s. 4.10; 1999-209, s. 6.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Session Laws 1999-209, s. 5, provides that notwithstanding Session Laws 1997-400 and Session Laws 1998-225, a license or endorsement issued for the 1998-1999 license year by the Division of Marine Fisheries of the Department of Environment and Natural Resources under Article 14 of Chapter 113 of the General Statutes that has not been suspended or revoked shall continue in effect from July 1, 1999 until the earlier of: (i) the date on which the license or endorsement is replaced by a license or endorsement issued pursuant to Article 14A of Chapter 113 of the General Statutes or (ii) August 1, 1999.

Session Laws 1999-209, s. 7, as amended by Session Laws 1999-456, s. 70, provides that the Department of Environment and National [Natural] Resources shall report to the Joint Legislative Commission on Seafood and Aquaculture on the use of funds derived from the sale of licenses and endorsements under Article 14A of Chapter 113 of the General Statutes no later October 1, 2000.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, substituted "governing" for "for commercial" in the catchline; in subsection (a), added "Except as provided in G.S. 113-173(f)," and twice inserted "or endorsement"; in subsection (b), substituted "holding a license and any endorsements" for "being licensed as"; rewrote subsection (c); in subsection (e), substituted "mailing address, physical or residence address" for "address"; and added subsections (f) through (i).

Session Laws 1999-209, s. 6, effective June 30, 1999, added subsection (j).

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§ 113-168.2. (Expires September 1, 2003) Standard Commercial Fishing License.

(a) Requirement. — Except as otherwise provided in this Article, it is unlawful for any person to engage in a commercial fishing operation in the coastal fishing waters without holding a SCFL issued by the Division. A person who works as a member of the crew of a vessel engaged in a commercial fishing operation under the direction of a person who holds a valid SCFL is not required to hold a SCFL. A person who holds a SCFL is not authorized to take shellfish unless the SCFL is endorsed as provided in G.S. 113-168.5(d) or the person holds a shellfish license issued pursuant to G.S. 113-169.2.

(a1) Use of Vessels. — The holder of a SCFL is authorized to use only one vessel in a commercial fishing operation at any given time. The Commission may adopt a rule to exempt from this requirement a person in command of a vessel that is auxiliary to a vessel engaged in a pound net operation, long-haul operation, beach seine operation, or menhaden operation.

(b) through (d) Repealed by Session Laws 1998-225, s. 4.11, effective July 1, 1999.

(e) Fees. — The annual SCFL fee for a resident of this State shall be two hundred dollars ($200.00). The annual SCFL fee for a person who is not a resident of this State shall be eight hundred dollars ($800.00) or the amount charged to a resident of this State in the nonresident's state, whichever is less. In no event, however, may the fee be less than two hundred dollars ($200.00). For purposes of this subsection, a "resident of this State" is a person who is a resident within the meaning of:

(1) Sub-subdivisions a. through d. of G.S. 113-130(4) and who filed a State income tax return as a resident of North Carolina for the previous calendar or tax year, or
(2) G.S. 113-130(4)e.

(f) Assignment. — The holder of a SCFL may assign the SCFL to any individual who is eligible to hold a SCFL under this Article. The assignment shall be in writing on a form provided by the Division and shall include the name of the licensee, the license number, any endorsements, the assignee's name, mailing address, physical or residence address, and the duration of the assignment. If a notarized copy of an assignment is not filed with the Morehead City office of the Division within five days of the date of the assignment, the assignment shall expire. It is unlawful for the assignee of a SCFL to assign the SCFL. The assignment shall terminate:

(1) Upon written notification by the assignor to the assignee and the Division that the assignment has been terminated.
(2) Upon written notification by the estate of the assignor to the assignee and the Division that the assignment has been terminated.
(3) If the Division determines that the assignee is operating in violation of the terms and conditions applicable to the assignment.
(4) If the assignee becomes ineligible to hold a license under this Article.
(5) Upon the death of the assignee.
(6) If the Division suspends or revokes the assigned SCFL.
(7) At the end of the license year.

(g) Transfer. — A SCFL may be transferred only by the Division. A SCFL may be transferred pursuant to rules adopted by the Commission or upon the request of:

(1) A licensee, from the licensee to a member of the licensee's immediate family who is eligible to hold a SCFL under this Article.
(2) The administrator or executor of the estate of a deceased licensee, to the administrator or executor of the estate if a surviving member of the deceased licensee's immediate family is eligible to hold a SCFL

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under this Article. The administrator or executor must request a transfer under this subdivision within six months after the administrator or executor qualifies under Chapter 28A of the General Statutes. An administrator or executor who holds a SCFL under this subdivision may, for the benefit of the estate of the deceased licensee:

a. Engage in a commercial fishing operation under the SCFL if the administrator or executor is eligible to hold a SCFL under this Article.
b. Assign the SCFL as provided in subsection (f) of this section.
c. Renew the SCFL as provided in G.S. 113-168.1.

(3) An administrator or executor to whom a SCFL was transferred pursuant to subdivision (2) of this subsection, to a surviving member of the deceased licensee's immediate family who is eligible to hold a SCFL under this Article.

(4) The surviving member of the deceased licensee's immediate family to whom a SCFL was transferred pursuant to subdivision (3) of this subsection, to a third-party purchaser of the deceased licensee's fishing vessel.

(5) A licensee who is retiring from commercial fishing, to a third-party purchaser of the licensee's fishing vessel.

(h) Identification as Commercial Fisherman. — The receipt of a current and valid SCFL or shellfish license issued by the Division shall serve as proper identification of the licensee as a commercial fisherman.

(i) Record-Keeping Requirements. — The fish dealer shall record each transaction at the time and place of landing on a form provided by the Division. The transaction form shall include the information on the SCFL or shellfish license, the quantity of the fish, the identity of the fish dealer, and other information as the Division deems necessary to accomplish the purposes of this Subchapter. The person who records the transaction shall provide a completed copy of the transaction form to the Division and to the other party of the transaction. The Division's copy of each transaction form shall be transmitted to the Division by the fish dealer on or before the tenth day of the month following the transaction. (1997-400, s. 5.1; 1998-225, s. 4.11.)

Editor's Note. — The subdivision designations in subsection (f) were redesignated at the direction of the Revisor of Statutes.

Session Laws 1997-400, s. 5.2, as amended by 1998-225, s. 4.24, effective July 1, 1998, provides: "(a) Definitions; Citations. The definitions set out in G.S. 113-168 apply to this section. A citation to a provision of the General Statutes in this section means that provision of the General Statutes as enacted by this act.

"(b) Transitional Provisions. In order to effect an orderly implementation of this part and the transition from the moratorium imposed by subsection (a) of Section 3 of Chapter 576 of the 1993 Session Laws, Regular Session 1994, as amended by Section 3 of Chapter 675 of the 1993 Session Laws, Regular Session 1994; subsection (a) of Section 26.5 of Chapter 507 of the 1995 Session Laws; Section 7 of S.L. 1997-256; Section 3 of S.L. 1997-347; and Section 6.1 of this act, to the licensing provision of Article 14A of Chapter 113 of the General Statutes, the provisions of this section shall apply to the issuance of licenses under Article 14A of Chapter 113 of the General Statutes until all Fishery Management Plans have been adopted as required by G.S. 113-182.1 and G.S. 143B-289.22.

"(c) Temporary Cap. There is hereby imposed a temporary cap on the total number of SCFLs that the Division may issue. The temporary cap equals the total number of endorsements to sell fish that establish eligibility for a SCFL under subsection (g) of this section plus 500 additional SCFLs, authorized by subsection (d) of this section.

"(d) 1999-2000 License Year. For the 1999-2000 license year, the Commission is authorized to issue SCFLs as provided in subsection (g) of this section plus an additional 500 SCFLs using the procedure set out in subsection (h) of this section.

"(e) Subsequent License Years. For license years beginning with the 2000-01 license year, the Commission is authorized to issue SCFLs from the pool of available SCFLs as provided in subsection (f) of this section using the proce-

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dure set out in subsection (h) of this section.

"(f) Adjustment of Number of SCFLs. The number of SCFLs in the pool of available SCFLs in license years beginning with the 2000-01 license year is the temporary cap less the number of SCFLs that were issued and renewed during the previous year. The Commission may increase or decrease the number of SCFLs that are issued from the pool of available SCFLs. The Commission may increase the number of SCFLs that are issued from the pool of available SCFLs up to the temporary cap. The Commission may decrease the number of SCFLs that are issued from the pool of available SCFLs but may not refuse to renew a SCFL that is issued during the previous license year and that has not been suspended or revoked. The Commission shall increase or decrease the number of SCFLs that are issued to reflect its determination as to the effort that the fishery can support, based on the best available scientific evidence.

"(g) Eligibility for SCFL. Any person who holds a valid endorsement to sell fish of a vessel license on 30 June 1999 is eligible to receive a SCFL. Any person who holds a valid nonvessel endorsement to sell fish, other than a nonvessel endorsement to sell fish issued for an aquaculture operation or a fishing tournament, on 30 June 1999 is eligible to receive a SCFL. The Division shall issue a SCFL to any person who is eligible under this subsection upon receipt of an application and required fees. If the person held more than one endorsement to sell fish, the person is eligible to receive a SCFL for each endorsement to sell previously held. Eligibility to receive a SCFL under this subsection shall expire 30 June 2000.

"(h) Procedure for Issuing Additional SCFLs. The Commission shall determine a procedure for issuing the 500 additional SCFLs authorized by subsection (d) of this section for the 1999-2000 license year and for issuing SCFLs from the pool of available SCFLs authorized by subsection (e) of this section. The procedure shall set a date on which the Division will begin receiving applications and a date on which the determination by lot of which applicants will receive a SCFL will be made. The Commission shall develop criteria to be used by the SCFL Eligibility Board in determining eligibility for a SCFL under this subsection. Criteria shall include the past involvement of the applicant and the applicant's family in commercial fishing; the extent to which the applicant has relied on commercial fishing the for applicant's livelihood; the extent to which the applicant has complied with federal and State laws, regulations, and rules relating to coastal fishing and protection of the environment; and any other factors the Commission determines to be relevant. The SCFL Eligibility Board shall review each application for a SCFL that the Division receives during the application period to determine whether the applicant is eligible under the eligibility criteria established by the Commission. The Division shall issue SCFLs under this subsection by lot. All applicants who are determined to be eligible shall have an equal chance of being issued a SCFL."

"(i) SCFL Eligibility Board. There is established a SCFL Eligibility Board. The Board shall apply the eligibility criteria adopted by the Commission to determine whether an applicant for a SCFL is eligible for a SCFL under subsection (h) of this section. The Board shall consist of the Secretary of Environment and Natural Resources or the Secretary's designee, the Fisheries Director or the Director's designee, and the Chair of the Commission or the Chair's designee. The Secretary shall designate one member of the Board to serve as Chair of the Board. The Commission shall adopt rules to govern the operation of the Board. The Board is exempt from the provisions of Article 3 of Chapter 150B of the General Statutes. Decisions of the Board shall be subject to judicial review under the provisions of Article 4 of Chapter 150B of the General Statutes.

Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 5.6, provides: "The Revisor of Statutes shall set out Section 5.2 of this act as a note to G.S. 113-168.2, as enacted by Section 5.1 of this act."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Session Laws 1999-209, ss. 4(a)-(*l*), made effective July 1, 1999, until October 1, 2000, by Session Laws 1999-209, s. 10, provide:

"(a) The definitions set out in G.S. 113-168 shall apply to this section.

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"(b) SCFL Not Valid to Take Crabs. — Notwithstanding G.S. 113-168.2, it is unlawful for any person to take crabs as part of a commercial fishing operation from the coastal fishing waters of North Carolina under a SCFL or any other license issued by the Division other than an interim crab license issued pursuant to this section.

"(c) Interim Crab License Required to Take Crabs as Part of a Commercial Fishing Operation; Sale of Crabs. — Except as otherwise provided by this section, it is unlawful for any person to take crabs as part of a commercial fishing operation from the coastal fishing waters of North Carolina without having first procured an interim crab license. A person who works as a member of the crew of a vessel that is taking crabs as part of a commercial fishing operation under the direction of a person who holds an interim crab license is not required to hold an interim crab license. An interim crab license entitles the holder to transfer crabs taken under the interim crab license to a person who holds a Standard Commercial fishing License issued under G.S. 113-168.2 or a Retired Standard commercial Fishing License issued under G.S. 113-168.3.

"(d) Eligibility for Interim Crab License. — Any person who held a valid crab license issued pursuant to G.S.113-153.1 at any time during the period July 1, 1994, through june 30, 1999, is eligible to receive an interim crab license. The Division shall issue an interim crab license to any person who is eligible under this section upon receipt of an application and required fees.

"(e) Duration; Fees. — The interim crab license expires on October 1, 2000. The fee for the interim crab license shall be seven dollars and fifty cents ($7.50) for a resident of this State and one hundred dollars ($100.00) for a person who is not a resident of this State.

"(f) General Provisions. — Subsections (c),(d), (e), (g), (h), and (i) of G.S. 113-168.1 shall apply to the interim crab license.

"(g) License Issuance. — The Division shall issue an interim crab license to eligible applicants at any office of the Division.

"(h) Assignment and Transfer. — Except as provided in this subsection and subsection (j) of this section,it is unlawful to buy, sell, lend, borrow, assign, or otherwise transfer an interim crab license, or to attempt to buy, sell,lend, borrow, assign, or otherwise transfer an interim crab license. An interim crab license may be transferred only by the division. The Division shall transfer an interim crab license only to a person who is eligible to obtain or renew a license or endorsement under G.S. 113-168.1(g). The Division may transfer an interim crab license upon the request of:

"(1) A licensee, from the licensee to a member of the licensee's immediate family.

"(2) The administrator or executor of the estate of a deceased licensee, to the administrator or executor of the estate. The administrator or executor must request a transfer under this subdivision within six months after the administrator or executor qualifies under Chapter 28A of the General Statutes. An administrator or executor who holds an interim crab license under this subdivision may, for the benefit of the estate of the deceased licensee, take crabs as part of a commercial fishing operation.

"(3) An administrator or executor to whom an interim crab license was transferred pursuant to subdivision (2) of this subsection, to a surviving member of the deceased licensee's immediate family.

"(4) The surviving member of the deceased licensee's immediate family to whom an interim crab license was transferred pursuant to subdivision (3) of this subsection, to a third-party purchaser of the deceased licensee's fishing vessel.

"(i) Record-Keeping Requirements. — The record-keeping requirements of G.S. 113-168.2(i) shall apply to the interim crab license.

"(j) Exemptions. — A person who is under 16years of age is exempt from the license requirements of this section if the person is accompanied by a parent, grandparent, or guardian who holds an interim crab license or if the person has in the person's possession a valid interim crab license issued to the person's parent, grandparent, or guardian.

"(k) Rules on Incidental Taking of Crabs. — Notwithstanding subsections (b) and (c) of this section, the marine Fisheries Commission may adopt rules to allow the landing and sale of crabs taken incidentally in the course of other commercial fishing operations.

"(*l*) Note to G.S. 113-168.2 — The Revisor of Statutes shall set out this section [s. 4 of Session Laws 1999-209] as a note to G.S. 113-168.2."

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, rewrote the section.

§ 113-168.3. (Expires September 1, 2003) Retired Standard Commercial Fishing License.

(a) SCFL Provisions Applicable. — Except as provided in this section, the

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provisions set forth in this Article concerning the SCFL shall apply to the RSCFL.

(b) Eligibility; Fees. — Any individual who is 65 years of age or older and who is eligible for a SCFL under G.S. 113-168.2 may apply for either a SCFL or RSCFL. An applicant for a RSCFL shall provide proof of age at the time the application is made. The annual fee for a RSCFL for a resident of this State shall be one hundred dollars ($100.00). The annual fee for a RSCFL for a person who is not a resident of this State shall be eight hundred dollars ($800.00) or the amount charged to a resident of this State in the nonresident's state, whichever is less. In no event, however, shall the fee be less than one hundred dollars ($100.00). For purposes of this subsection, a "resident of this State" is a person who is a resident within the meaning of:

(1) Sub-subdivisions a. through d. of G.S. 113-130(4) and who filed a State income tax return as a resident of North Carolina for the previous calendar or tax year, or

(2) G.S. 113-130(4)e.

(c) Transfer. — The holder of a RSCFL may transfer the RSCFL as provided in G.S. 113-168.2.

(1) If the transferee is less than 65 years of age, the transferee holds a SCFL. When the transferee renews the SCFL, the transferee shall pay the fee set out in G.S. 113-168.2.

(2) If the transferee is 65 years of age or older, the transferee may elect to hold either a SCFL or RSCFL. If the transferee elects to hold a SCFL, the transferee shall pay the fee set out in G.S. 113-168.2. If the transferee elects to hold a RSCFL, the transferee shall pay the fee set out in this section.

(d) Assignment. — The RSCFL shall not be assignable. (1997-400, s. 5.1; 1998-225, s. 4.12.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (a), substituted "this Article" for "G.S. 113-168.2"; and rewrote subsections (b) and (c).

§ 113-168.4. (Expires September 1, 2003) Sale of fish.

(a) Except as otherwise provided in this section, it is unlawful for any person who takes or lands any species of fish under the authority of the Commission from coastal fishing waters by any means whatever, including mariculture operations, to sell, offer for sale, barter or exchange these fish for anything of value without holding a license required to sell the type of fish being offered.

(b) It is unlawful for any person licensed under this Article to sell fish taken outside the territorial waters of the State or to sell fish taken from coastal fishing waters except to:

(1) Fish dealers licensed under G.S. 113-169.3; or

(2) The public, if the seller is also licensed as a fish dealer under G.S. 113-169.3.

(c) A person who organizes a recreational fishing tournament may sell fish taken in connection with the tournament pursuant to a recreational fishing

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tournament license to sell fish. A person who organizes a recreational fishing tournament may obtain a recreational fishing tournament license to sell fish upon application to the Division and payment of a fee of one hundred dollars ($100.00). It is unlawful for any person licensed under this subsection to sell fish to any person other than a fish dealer licensed under G.S. 113-169.3 unless the seller is also a licensed fish dealer. A recreational fishing tournament is an organized fishing competition occurring within a specified time period not to exceed one week and that is not a commercial fishing operation. Gross proceeds from the sale of fish may be used only for charitable, religious, educational, civic, or conservation purposes and shall not be used to pay tournament expenses. (1997-400, s. 5.1; 1998-225, s. 4.13.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, deleted "Regulations concerning the" preceding "Sale" in the catchline; rewrote subsections (a) and (c); and in subsection (b), substituted "this Article" for "this section."

§ 113-168.5. (Expires September 1, 2003) License endorsements for Standard Commercial Fishing License.

(a), (b) Repealed by Session Laws 1998-225, s. 4.14, effective July 1, 1999.

(c) Menhaden Endorsements. — Except as provided in G.S. 113-169, it is unlawful to use a vessel to take menhaden by purse seine in coastal fishing waters, to land menhaden taken by purse seine, or to sell menhaden taken by purse seine without obtaining a menhaden endorsement of a SCFL. The fee for a menhaden endorsement shall be two dollars ($2.00) per ton, based on gross tonnage as determined by the custom house measurement for the mother ship. The menhaden endorsement shall be required for the mother ship but no separate endorsement shall be required for a purse boat carrying a purse seine. The application for a menhaden endorsement must state the name of the person in command of the vessel. Upon a change in command of a menhaden vessel, the owner must notify the Division in writing within 30 days.

(d) Shellfish Endorsement for North Carolina Residents. — The Division shall issue a shellfish endorsement of a SCFL to a North Carolina resident at no charge. The holder of a SCFL with a shellfish endorsement is authorized to take and sell shellfish. (1997-400, s. 5.1; 1998-225, s. 4.14.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, deleted

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"and Retired Standard Commercial Fishing License" in the catchline; deleted former subsections (a) and (b), pertaining respectively to SCFL and RSCFL endorsements and vessel endorsements; in subsection (c), substituted "in coastal fishing waters, to land menhaden taken by purse seine, or to sell menhaden taken by purse seine" for "in the coastal fishing waters of the State, to land menhaden in the State, or to sell menhaden from a vessel in the State," and deleted "or RSCFL" following "SCFL"; and in subsection (d), deleted "or RSCFL" following "SCFL," and added the second sentence.

§ 113-168.6. (Expires September 1, 2003) Commercial fishing vessel registration.

(a) As used in this subsection, a North Carolina vessel is a vessel that has its primary situs in the State. A vessel has its primary situs in the State if:

(1) A certificate of number has been issued for the vessel under Article 1 of Chapter 75A of the General Statutes;

(2) A certificate of title has been issued for the vessel under Article 4 of Chapter 75A of the General Statutes; or

(3) A certification of documentation has been issued for the vessel that lists a home port in the State under 46 U.S.C. § 12101, et seq., as amended.

(b) The owner of a vessel used in a commercial fishing operation in the coastal fishing waters of the State or a North Carolina vessel used to land or sell fish in the State shall register the vessel with the Division. It is unlawful to use a vessel that is not registered with the Division in a commercial fishing operation in the coastal fishing waters of the State. It is unlawful to use a North Carolina vessel that is not registered with the Division to land or sell fish in the State. No registration is required for a vessel of any length that does not have a motor if the vessel is used only in connection with another vessel that is properly registered.

(c) The annual fee for a commercial fishing vessel registration shall be determined by the length of the vessel and shall be in addition to the fee for other licenses issued under this Article. The length of a vessel shall be determined by measuring the distance between the ends of the vessel along the deck and through the cabin, excluding the sheer. The annual fee for a commercial fishing vessel registration is:

(1) One dollar ($1.00) per foot for a vessel not over 18 feet in length.

(2) One dollar and fifty cents ($1.50) per foot for a vessel over 18 feet but not over 38 feet in length.

(3) Three dollars ($3.00) per foot for a vessel over 38 feet but not over 50 feet in length.

(4) Six dollars ($6.00) per foot for a vessel over 50 feet in length.

(d) A vessel may be registered at any office of the Division. A commercial fishing vessel registration expires on the last day of the license year.

(e) Within 30 days of the date on which the owner of a registered vessel transfers ownership of the vessel, the new owner of the vessel shall notify the Division of the change in ownership and apply for a replacement commercial fishing vessel registration. An application for a replacement commercial fishing vessel registration shall be accompanied by proof of the transfer of the vessel. The provisions of G.S. 113-168.1(h) apply to a replacement commercial fishing vessel registration. (1998-225, s. 4.15.)

Editor's Note. — Session Laws 1998-225, s. 5.6, made this section effective July 1, 1999, and provided for its expiration on September 1, 2003.

Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in

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accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

§ 113-169. (Expires September 1, 2003) Menhaden license for nonresidents not eligible for a SCFL.

A person who is not a North Carolina resident, who is not eligible for a SCFL under this Article, and who only seeks to engage in a commercial fishing operation for the harvest and sale of menhaden is eligible to obtain a menhaden license for nonresidents. The fee for the menhaden license for nonresidents shall be two dollars ($2.00) per ton, gross tonnage, customhouse measurements for the mother ship. The menhaden license for nonresidents shall be required for the mother ship to take, land, or sell menhaden in North Carolina taken by purse seine. No separate endorsement shall be required for a purse boat carrying a purse seine. The application for a menhaden license for nonresidents must state the name of the person in command of the vessel. Upon change in command of a menhaden vessel, the owner must notify the Division within 30 days. A person who works as a member of the crew of a vessel engaged in a commercial fishing operation for the harvest and sale of menhaden under the direction of a person who holds a valid menhaden license for nonresidents is not required to hold a menhaden license for nonresidents or a SCFL. (1997-400, s. 5.1; 1998-225, s. 4.16.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, substituted "North Carolina resident" for "resident of North Carolina"; substituted "engage in a commercial fishing operation for the harvest and sale of menhaden is eligible to obtain" for "engage in menhaden fishing is eligible to purchase"; added the last sentence.

§ 113-169.1. (Expires September 1, 2003) Permits for gear, equipment, and other specialized activities authorized.

The Commission may adopt rules to establish permits for gear, equipment, and specialized activities, including commercial fishing operations that do not involve the use of a vessel and transplanting oysters or clams. The Commission shall establish a fee for each permit in an amount that compensates the Division for the actual administrative costs associated with the permit but that does not exceed fifty dollars ($50.00) per permit. (1997-400, s. 5.1.)

§ 113-169.2. (Expires September 1, 2003) Shellfish license for North Carolina residents without a SCFL.

(a) License or Endorsement Necessary to Take or Sell Shellfish. — It is

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unlawful for an individual to take shellfish from the public or private grounds of the State by mechanical means or in quantities greater than the personal use limits set forth in subsection (i) of this section by any means without holding either a shellfish license or a shellfish endorsement of a SCFL. A North Carolina resident who seeks only to take and sell shellfish shall be eligible to obtain a shellfish license without holding a SCFL. The shellfish license authorizes the licensee to sell shellfish.

(b) Repealed by Session Laws 1998-225, s. 4.17, effective July 1, 1999.

(c) Fees. — Shellfish licenses shall be issued annually upon payment of a fee of twenty-five dollars ($25.00) upon proof that the license applicant is a North Carolina resident.

(d) License Available for Inspection. — It is unlawful for any individual to take shellfish in quantities greater than the personal use limits set forth in subsection (i) of this section from the public or private grounds of the State without having ready at hand for inspection a current and valid shellfish license issued to the licensee personally and bearing the licensee's correct name and address. It is unlawful for any individual taking or possessing freshly taken shellfish to refuse to exhibit the individual's license upon the request of an officer authorized to enforce the fishing laws.

(e) Repealed by Session Laws 1998-225, s. 4.17, effective July 1, 1999.

(f) Name or Address Change. — In the event of a change in name or address or upon receipt of an erroneous shellfish license, the licensee shall, within 30 days, apply for a replacement shellfish license bearing the correct name and address. Upon a showing by the individual that the name or address change occurred within the past 30 days, the trial court or prosecutor shall dismiss any charges brought pursuant to this subsection.

(g) Transfer Prohibited. — It is unlawful for an individual issued a shellfish license to transfer or offer to transfer the license, either temporarily or permanently, to another. It is unlawful for an individual to secure or attempt to secure a shellfish license from a source not authorized by the Commission.

(h) Exemption. — Persons under 16 years of age are exempt from the license requirements of this section if accompanied by a parent, grandparent, or guardian who is in compliance with the requirements of this section or if in possession of a parent's, grandparent's or guardian's shellfish license.

(i) Taking Shellfish Without a License for Personal Use. —

(1) A person may take shellfish for personal use without obtaining a license under this section in quantities up to:
   a. One bushel of oysters per day.
   b. One-half bushel of scallops per day.
   c. One hundred clams per day.
   d. Ten conchs per day.
   e. One hundred mussels per day.

(2) Two or more persons who are using a vessel to take shellfish may take shellfish for personal use without obtaining a license under this section in quantities up to:
   a. Two bushels of oysters per day.
   b. One bushel of scallops per day.
   c. Two hundred clams per day.
   d. Twenty conchs per day.
   e. Two hundred mussels per day. (1997-400, s. 5.1; 1998-225, s. 4.17.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This

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act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, rewrote subsection (a); repealed subsection (b), regarding purchase and renewal of a shellfish license; in subsection (c), substituted "North Carolina resident" for "resident of North Carolina"; in subsection (d), substituted "shellfish in quantities greater than the personal use limits set forth in subsection (i) of this section" for "shellfish for commercial use," and inserted "or private"; repealed subsection (e), providing that vessel endorsement is required; and added subdivisions (i)(1)d. and e. and (i)(2)d. and e.

§ 113-169.3. (Expires September 1, 2003) Licenses for fish dealers.

(a) Eligibility. — A fish dealer license shall be issued to a North Carolina resident upon receipt of a proper application at any office of the Division together with all license fees including the total number of dealer categories set forth in this section. The license shall be issued in the name of the applicant and shall include all dealer categories on the license.

(b) Application for License. — Applications shall not be accepted from persons ineligible to hold a license issued by the Division, including any applicant whose license is suspended or revoked on the date of the application. The applicant shall be provided with a copy of the application marked received. The copy shall serve as the fish dealer's license until the license issued by the Division is received, or the Division determines that the applicant is ineligible to hold a license. Where an applicant does not have an established location for transacting the fisheries business within the State, the license application shall be denied unless the applicant satisfies the Secretary that his residence, or some other office or address within the State, is a suitable substitute for an established location and that records kept in connection with licensing, sale, and purchase requirements will be available for inspection when necessary. Fish dealers" licenses are issued on a fiscal year basis upon payment of a fee as set forth herein upon proof, satisfactory to the Secretary, that the license applicant is a North Carolina resident.

(c) License Requirement. — Any person subject to the licensing requirements of this section is a fish dealer. Any person subject to the licensing requirements of this section shall obtain a separate license for each physical location conducting activities required to be licensed under this section. Except as otherwise provided in this section, it is unlawful for any person not licensed pursuant to this Article:

(1) To buy fish for resale from any person involved in a commercial fishing operation that takes any species of fish from coastal fishing waters. For purposes of this subdivision, a retailer who purchases fish from a fish dealer shall not be liable if the fish dealer has not complied with the licensing requirements of this section;
(2) To sell fish to the public; or
(3) To sell to the public any species of fish under the authority of the Commission taken from coastal fishing waters.

(d) Exceptions to License Requirements. — The Commission may adopt rules to implement this subsection including rules to clarify the status of the listed classes of exempted persons, require submission of statistical data, and require that records be kept in order to establish compliance with this section. Any person not licensed pursuant to this section is exempt from the licensing requirements of this section if all fish handled within any particular licensing category meet one or more of the following requirements:

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(1) The fish are sold by persons whose dealings in fish are primarily educational, scientific, or official, and who have been issued a permit by the Division that authorizes the educational, scientific, or official agency to sell fish taken or processed in connection with research or demonstration projects;
(2) The fish are sold by individual employees of fish dealers when transacting the business of their duly licensed employer;
(3) The fish are shipped to a person by a dealer from without the State;
(4) The fish are of a kind the sale of which is regulated exclusively by the Wildlife Resources Commission; or
(5) The fish are purchased from a licensed dealer.

(e) Application Fee for New Fish Dealers. — An applicant for a new fish dealer license shall pay a nonrefundable application fee of fifty dollars ($50.00) in addition to the license category fees set forth in this section.

(f) License Category Fees. — Every fish dealer subject to licensing requirements shall secure an annual license at each established location for each of the following activities transacted there, upon payment of the fee set out:
(1) Dealing in oysters: $50.00;
(2) Dealing in scallops: $50.00;
(3) Dealing in clams: $50.00;
(4) Dealing in hard or soft crabs: $50.00;
(5) Dealing in shrimp, including bait: $50.00;
(6) Dealing in finfish, including bait: $50.00;
(7) Operating menhaden or other fish-dehydrating or oil-extracting processing plants: $50.00; or
(8) Consolidated license (all categories): $300.00.

(f1) Other License Categories. — Any person subject to fish dealer licensing requirements who deals in fish not included in the categories listed in subsection (f) of this section shall secure a finfish dealer license. The Commission may adopt rules implementing and clarifying the dealer categories of this section. Bait operations shall be licensed under either the finfish or shrimp dealer license categories.

(g) Repealed by Session Laws 1998-225, s. 4.18, effective July 1, 1999.

(h) Replacement License. — If the licensee fails to comply with the requirements of G.S. 113-168.1(h), the license is revoked.

(i) Unlawful Purchase and Sale of Fish. — It is unlawful for a fish dealer to purchase, possess, or sell fish taken from coastal fishing waters in violation of this Subchapter or the rules adopted by the Commission implementing this Subchapter. It is unlawful for a fish dealer to buy or accept fish unless, at the time of the transaction:
(1) The seller or donor presents a current and valid license to sell the type of fish being offered;
(2) The seller or donor presents the commercial fishing vessel registration of the vessel that was used to take the fish being offered; and
(3) The dealer records the transaction consistent with the record-keeping requirements of G.S. 113-168.2(i).

(j) Transfer Prohibited. — Any fish dealer license issued under this section is nontransferable. It is unlawful to use a fish dealer license issued to another person in the sale or attempted sale of fish or for a licensee to lend or transfer a fish dealer license for the purpose of circumventing the requirements of this section. (1997-400, s. 5.1; 1998-225, s. 4.18.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of

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this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (a), substituted "at any office" for "in the Morehead City Office"; in subsection (c), made the former last two sentence the first two sentence; added the subsection (f1) designation and its catchline, and in that subsection, substituted "categories listed in subsection (f) of this section" for "above categories," and "this section" for "this subsection"; repealed subsection (g), relating to license format; rewrote subsections (h) and (i); and made stylistic changes.

§ 113-169.4. (Expires September 1, 2003) Licensing of ocean fishing piers; fees.

(a) The owner or operator of an ocean fishing pier within the coastal fishing waters who charges the public a fee to fish in any manner from the pier shall secure a current and valid pier license from the Division. An application for a pier license shall disclose the names of all parties involved in the pier operations, including the owner of the property, owner of the pier if different, and all leasehold or other corporate arrangements, and all persons with a substantial financial interest in the pier.

(b) Within 30 days following a change of ownership of a pier, or a change as to the manager, the manager or new manager shall secure a replacement pier license as provided in G.S. 113-168.1(h).

(c) Pier licenses are issued upon payment of fifty cents (50 cents) per linear foot, to the nearest foot, that the pier extends into coastal fishing waters beyond the mean high waterline. The length of the pier shall be measured to include all extensions of the pier.

(d) The manager who secures the pier license shall be the individual with the duty of executive-level supervision of pier operations. (1997-400, s. 5.1; 1998-225, s. 4.19.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (b), substituted "pier license as provided in G.S. 113-168.1(h)" for "pier license from the Division. The replacement license is issued without charge."

CASE NOTES

Constitutionality. — This section, requiring managers of ocean fishing piers to obtain a license, satisfies the requirements of uniformity, equal protection and due process under both the State and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to § 113-185(a), and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986), decided under

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prior statutory provisions.

This section does not violate N.C. Const., Art. V, § 5, which provides that every act of the General Assembly levying a tax shall state the special object to which it is to be applied and that it shall be applied to no other purpose, as this section is part of Subchapter IV of this chapter, the special purpose of which is the conservation of marine and estuarine and wildlife resources, and it is evident that the license tax is levied and applied for this purpose. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986), decided under prior statutory provisions.

§ 113-169.5. (Expires September 1, 2003) Land or sell license; vessels fishing beyond territorial waters.

(a) Persons aboard vessels not having their primary situs in the State that are carrying a cargo of fish taken outside the waters of the State may land or sell their catch in the State by purchasing a land or sell license as set forth in this section with respect to the vessel in question. The Commission may by rule modify the land or sell licensing procedure in order to devise an efficient and convenient procedure for licensing out-of-state vessels to only land, or after landing to permit sale of cargo.

(b) The fee for a land or sell license for a vessel not having its primary situs in North Carolina is two hundred dollars ($200.00), or an amount equal to the nonresident fee charged by the nonresident's state, whichever is greater. Persons aboard vessels having a primary situs in a jurisdiction that would allow North Carolina vessels without restriction to land or sell their catch, taken outside the jurisdiction, may land or sell their catch in the State without complying with this section if the persons are in possession of a valid license from their state of residence. (1997-400, s. 5.1.)

§ 113-170. (Expires September 1, 2003) Exportation and importation of fish and equipment.

The Commission may adopt rules governing the importation and exportation of fish, and equipment that may be used in taking or processing fish, as necessary to enhance the conservation of marine and estuarine resources of the State. These rules may regulate, license, prohibit, or restrict importation into the State and exportation from the State of any and all species of fish that are native to coastal fishing waters or may thrive if introduced into these waters. (1997-400, s. 5.1.)

§ 113-170.1. (Expires September 1, 2003) Nonresidents reciprocal agreements.

Persons who are not North Carolina residents are not eligible to obtain licenses under the provisions of this Article except as provided in this section. Residents of jurisdictions that sell commercial fishing licenses to North Carolina residents are eligible to hold North Carolina commercial fishing licenses under the provisions of G.S. 113-168.2. Licenses may be restricted in terms of area, gear, and fishery by the Commission so that the nonresidents are licensed to engage in North Carolina fisheries on the same or similar terms that North Carolina residents can be licensed to engage in the fisheries of other jurisdictions. The Secretary may enter into reciprocal agreements with other jurisdictions as necessary to allow nonresidents to obtain commercial fishing licenses in the State subject to the foregoing provisions. (1997-400, s. 5.1; 1998-225, s. 4.20.)

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Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, substituted "eligible" for "entitled," and "eligible to hold" for "entitled to" in the first sentence.

§ 113-170.2. (Expires September 1, 2003) Fraud or deception as to licenses, permits, or records.

(a) It is unlawful for any person to give any false information or willfully to omit giving required information to the Division or any license agent when the information is material to the securing of any license or permit under this Article. It is unlawful to falsify, fraudulently alter, or counterfeit any license, permit, identification, or record to which this Article applies or otherwise practice any fraud or deception designed to evade the provisions of this Article or reasonable administrative directives made under the authority of this Article.

(b) A violation of this section is punishable by a fine of not less than one hundred dollars ($100.00) nor more than five hundred dollars ($500.00). (1997-400, s. 5.1.)

§ 113-170.3. (Expires September 1, 2003) Record-keeping requirements.

(a) The Commission may require all licensees under this Article to keep and to exhibit upon the request of an authorized agent of the Department records and accounts as may be necessary to the equitable and efficient administration and enforcement of this Article. In addition, licensees may be required to keep additional information of a statistical nature or relating to location of catch as may be needed to determine conservation policy. Records and accounts required to be kept must be preserved for inspection for not less than three years.

(b) It is unlawful for any licensee to refuse or to neglect without justifiable excuse to keep records and accounts as may be reasonably required. The Department may distribute forms to licensees to aid in securing compliance with its requirements, or it may inform licensees of requirements in other effective ways such as distributing memoranda and sending agents of the Department to consult with licensees who have been remiss. Detailed forms or descriptions of records, accounts, collection and inspection procedures, and the like that reasonably implement the objectives of this Article need not be embodied in rules of the Commission in order to be validly required.

(c) The following records collected and compiled by the Department shall not be considered public records within the meaning of Chapter 132 of the General Statutes, but shall be confidential and shall be used only for the equitable and efficient administration and enforcement of this Article or for determining conservation policy, and shall not be disclosed except when required by the order of a court of competent jurisdiction: all records, accounts, and reports that licensees are required by the Commission to make, keep, and exhibit pursuant to the provisions of this section, and all records, accounts, and memoranda compiled by the Department from records, accounts, and reports of licensees and from investigations and inspections, containing data and

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information concerning the business and operations of licensees reflecting their assets, liabilities, inventories, revenues, and profits; the number, capacity, capability, and type of fishing vessels owned and operated; the type and quantity of fishing gear used; the catch of fish or other seafood by species in numbers, size, weight, quality, and value; the areas in which fishing was engaged in; the location of catch; the time of fishing, number of hauls, and the disposition of the fish and other seafood. The Department may compile statistical information in any aggregate or summary form that does not directly or indirectly disclose the identity of any licensee who is a source of the information, and any compilation of statistical information by the Department shall be a public record open to inspection and examination by any person, and may be disseminated to the public by the Department. (1997-400, s. 5.1.)

§ 113-170.4. (Expires September 1, 2003) Rules as to possession, transportation, and disposition of fisheries resources.

The Commission may adopt rules governing possession, transportation, and disposition of fisheries resources by all persons, including those not subject to fish dealer licensing requirements, in order that inspectors may adequately distinguish regulated coastal fisheries resources from those not so regulated and enforce the provisions of this Article equitably and efficiently. These rules may include requirements as to giving notice, filing declarations, securing permits, marking packages, and the like. (1997-400, s. 5.1.)

§ 113-170.5. (Expires September 1, 2003) Violations with respect to coastal fisheries resources.

It is unlawful to take, possess, transport, process, sell, buy, or in any way deal in coastal fisheries resources without conforming with the provisions of this Article or of rules adopted under the authority of this Article. (1997-400, s. 5.1.)

§ 113-171. (Expires September 1, 2003) Suspension, revocation, and reissuance of licenses.

(a) Upon receipt of reliable notice that a person licensed under this Article has had imposed against the person a conviction of a criminal offense within the jurisdiction of the Department under the provisions of this Subchapter or of rules of the Commission adopted under the authority of this Subchapter, the Secretary must suspend or revoke all licenses held by the person in accordance with the terms of this section. Reliable notice includes information furnished the Secretary in prosecution or other reports from inspectors. As used in this section, a conviction includes a plea of guilty or nolo contendere, any other termination of a criminal prosecution unfavorably to the defendant after jeopardy has attached, or any substitute for criminal prosecution whereby the defendant expressly or impliedly confesses the defendant's guilt. In particular, procedures whereby bond forfeitures are accepted in lieu of proceeding to trial and cases indefinitely continued upon arrest of judgment or prayer for judgment continued are deemed convictions. The Secretary may act to suspend or revoke licenses upon the basis of any conviction in which:

(1) No notice of appeal has been given;

(2) The time for appeal has expired without an appeal having been perfected; or

Article 14A has a postponed expiration date.

(3) The conviction is sustained on appeal. Where there is a new trial, finality of any subsequent conviction will be determined in the manner set out above.

(b) The Secretary must initiate an administrative procedure designed to give the Secretary systematic notice of all convictions of criminal offenses by licensees covered by subsection (a) of this section above and keep a file of all convictions reported. Upon receipt of notice of conviction, the Secretary must determine whether it is a first, a second, a third, or a fourth or subsequent conviction of some offense covered by subsection (a). In the case of second convictions, the Secretary must suspend all licenses issued to the licensee for a period of 10 days. In the case of third convictions, the Secretary must suspend all licenses issued to the licensee for a period of 30 days. In the case of fourth or subsequent convictions, the Secretary must revoke all licenses issued to the licensee. Where several convictions result from a single transaction or occurrence, they are to be treated as a single conviction so far as suspension or revocation of the licenses of any licensee is concerned. Anyone convicted of taking or of knowingly possessing, transporting, buying, selling, or offering to buy or sell oysters or clams from areas closed because of suspected pollution will be deemed by the Secretary to have been convicted of two separate offenses on different occasions for license suspension or revocation purposes.

(c) Where a license has been suspended or revoked, the former licensee is not eligible to apply for reissuance of license or for any additional license authorized in this Article during the suspension or revocation period. Licenses must be returned to the licensee by the Secretary or the Secretary's agents at the end of a period of suspension. Where there has been a revocation, application for reissuance of license or for an additional license may not be made until six months following the date of revocation. In such case of revocation, the eligible former licensee must satisfy the Secretary that the licensee will strive in the future to conduct the operations for which the license is sought in accord with all applicable laws and rules. Upon the application of an eligible former licensee after revocation, the Secretary, in the Secretary's discretion, may issue one license sought but not another, as deemed necessary to prevent the hazard of recurring violations of the law.

(d) Upon receiving reliable information of a licensee's conviction of a second or subsequent criminal offense covered by subsection (a) of this section, the Secretary shall promptly cause the licensee to be personally served with written notice of suspension or revocation, as the case may be. The written notice may be served upon any responsible individual affiliated with the corporation, partnership, or association where the licensee is not an individual. The notice of suspension or revocation may be served by an inspector or other agent of the Department, must state the ground upon which it is based, and takes effect immediately upon personal service. The agent of the Secretary making service shall then or subsequently, as may be feasible under the circumstances, collect all license certificates and plates and other forms or records relating to the license as directed by the Secretary. It is unlawful for any licensee willfully to evade the personal service prescribed in this subsection.

(e) A licensee served with a notice of suspension or revocation may obtain an administrative review of the suspension or revocation by filing a petition for a contested case under G.S. 150B-23 within 20 days after receiving the notice. The only issue in the hearing shall be whether the licensee was convicted of a criminal offense for which a license must be suspended or revoked. A license remains suspended or revoked pending the final decision by the Secretary.

Article 14A has a postponed expiration date.

(f) If the Secretary refuses to reissue the license of or issue an additional license to an applicant whose license was revoked, the applicant may contest the decision by filing a petition for a contested case under G.S. 150B-23 within 20 days after the Secretary makes the decision. The Commission shall make the final agency decision in a contested case under this subsection. An applicant whose license is denied under this subsection may not reapply for the same license for at least six months.

(g) The Commission may adopt rules to provide for the disclosure of the identity of any individual or individuals in responsible positions of control respecting operations of any licensee that is not an individual. For the purposes of this section, individuals in responsible positions of control are deemed to be individual licensees and subject to suspension and revocation requirements in regard to any applications for license they may make — either as individuals or as persons in responsible positions of control in any corporation, partnership, or association. In the case of individual licensees, the individual applying for a license or licensed under this Article must be the real party in interest.

(h) In determining whether a conviction is a second or subsequent offense under the provisions of this section, the Secretary may not consider convictions for:

(1) Offenses that occurred three years prior to the effective date of this Article; or

(2) Offenses that occurred more than three years prior to the time of the latest offense the conviction for which is in issue as a subsequent conviction. (1997-400, s. 5.1.)

§ 113-171.1. (Expires September 1, 2003) Use of spotter planes in commercial fishing operations regulated.

(a) Spotter Plane Defined. — A "spotter plane" is an aircraft used for aerial identification of the location of fish in coastal fishing waters so that a vessel may be directed to the fish.

(b) License. — Before an aircraft is used as a spotter plane in a commercial fishing operation, the owner or operator of the aircraft must obtain a license for the aircraft from the Division. The fee for a license for a spotter plane is one hundred dollars ($100.00). An applicant for a license for a spotter plane shall include in the application the identity, either by boat or by company, of the specific commercial fishing operations in which the spotter plane will be used during the license year. If, during the course of the license year, the aircraft is used as a spotter plane in a commercial fishing operation that is not identified in the original license application, the owner or operator of the aircraft shall amend the license application to add the identity of the additional commercial fishing operation.

(c) Unlawful Activity. — It shall be unlawful to:

(1) Use a spotter plane directed at food fish, except in connection with a purse seine operation authorized by a rule of the Commission.

(2) Use or permit the use of an unlicensed spotter plane or a licensed spotter plane whose license application does not identify the specific commercial fishing operation involved.

(3) Participate knowingly in a commercial fishing operation that uses an unlicensed spotter plane or a licensed spotter plane whose license application does not identify the specific commercial fishing operation involved.

Article 14A has a postponed expiration date.

(d) Violation a Misdemeanor. — A violation of subsection (c) of this section is a Class 1 misdemeanor. (1997-400, s. 5.1.)

§ 113-172. (Expires September 1, 2003) License agents.

(a) The Secretary shall designate license agents for the Department. At least one license agent shall be designated for each county that contains or borders on coastal fishing waters. The Secretary may designate additional license agents in any county if the Secretary determines that additional agents are needed to provide efficient service to the public. The Division and license agents designated by the Secretary under this section shall issue licenses authorized under this Article in accordance with this Article and the rules of the Commission. The Secretary may require license agents to enter into a contract that provides for their duties and compensation, post a bond, and submit to reasonable inspections and audits. If a license agent violates any provision of this Article, the rules of the Commission, or the terms of the contract, the Secretary may initiate proceedings for the forfeiture of the license agent's bond and may summarily suspend, revoke, or refuse to renew a designation as a license agent and may impound or require the return of all licenses, moneys, record books, reports, license forms and other documents, ledgers, and materials pertinent or apparently pertinent to the license agency. The Secretary shall report evidence or misuse of State property, including license fees, by a license agent to the State Bureau of Investigation as provided by G.S. 114-15.1.

(b) License agents shall be compensated by adding a surcharge of one dollar ($1.00) to each license sold and retaining the surcharge. If more than one license is listed on a consolidated license form, the license agent shall be compensated as if a single license were sold. It is unlawful for a license agent to add more than the surcharge authorized by this section to the fee for each license sold. (1997-400, s. 5.1; 1999-209, s. 3.)

Effect of Amendments. — Session Laws 1999-209, s. 3, effective July 1, 1999, substituted "may require" for "shall require" in the fifth sentence of subsection (a).

§ 113-173. (Expires September 1, 2003) Recreational Commercial Gear License.

(a) License Required. — Except as provided in subsection (j) of this section, it is unlawful for any person to take or attempt to take fish for recreational purposes by means of commercial fishing equipment or gear in coastal fishing waters without holding a RCGL. As used in this section, fish are taken for recreational purposes if the fish are not taken for the purpose of sale. The RCGL entitles the licensee to use authorized commercial gear to take fish for personal use subject to recreational possession limits. It is unlawful for any person licensed under this section or fishing under a RCGL to possess fish in excess of recreational possession limits.

(b) Sale of Fish Prohibited. — It is unlawful for the holder of a RCGL or for a person who is exempt under subsection (j) of this section to sell fish taken under the RCGL or pursuant to the exemption.

(c) Authorized Commercial Gear. — The Commission shall adopt rules authorizing the use of a limited amount of commercial fishing equipment or gear for recreational fishing under a RCGL. The Commission may authorize the limited use of commercial gear on a uniform basis in all coastal fishing waters or may vary the limited use of commercial gear within specified areas of the coastal fishing waters. The Commission shall periodically evaluate and

Article 14A has a postponed expiration date.

revise the authorized use of commercial gear for recreational fishing. Authorized commercial gear shall be identified by visible colored tags or other means specified by the Commission in order to distinguish between commercial gear used in a commercial operation and commercial gear used for recreational purposes.

(d) Purchase; Renewal. — A RCGL may be purchased at designated offices of the Division and from a license agent authorized under G.S. 113-172. A RCGL may be renewed by mail.

(e) Replacement RCGL. — The provisions of G.S 113-168.1(h) apply to this section.

(f) Duration; Fees. — The RCGL shall be valid for a one-year period from the date of purchase. The fee for a RCGL for a North Carolina resident shall be thirty-five dollars ($35.00). The fee for a RCGL for an individual who is not a North Carolina resident shall be two hundred fifty dollars ($250.00).

(g) RCGL Available for Inspection. — It is unlawful for any person to engage in recreational fishing by means of restricted commercial gear in the State without having ready at hand for inspection a valid RCGL. A holder of a RCGL shall not refuse to exhibit the RCGL upon the request of an inspector or any other law enforcement officer authorized to enforce federal or State laws, regulations, or rules relating to marine fisheries.

(h) Assignment and Transfer Prohibited. — A RCGL is not transferable. Except as provided in subsection (j) of this section, it is unlawful to buy, sell, lend, borrow, assign, or otherwise transfer a RCGL, or to attempt to buy, sell, lend, borrow, assign, or otherwise transfer a RCGL.

(i) Reporting Requirements. — The holder of a RCGL shall comply with the biological data sampling and survey programs of the Commission and the Division.

(j) Exemptions. —

(1) A person who is under 16 years of age may take fish for recreational purposes by means of authorized commercial gear without holding a RCGL if the person is accompanied by a parent, grandparent, or guardian who holds a valid RCGL or if the person has in the person's possession a valid RCGL issued to the person's parent, grandparent, or guardian.

(2) A person may take crabs for recreational purposes by means of one or more crab pots attached to the shore along privately owned land or to a privately owned pier without holding a RCGL provided that the crab pots are attached with the permission of the owner of the land or pier.

(3) A person who is on a vessel may take fish for recreational purposes by means of authorized commercial gear without holding a RCGL if there is another person on the vessel who holds a valid RCGL. This exemption does not authorize the use of commercial gear in excess of that authorized for use by the person who holds the valid RCGL or, if more than one person on the vessel holds a RCGL, in excess of that authorized for use by those persons.

(4) A person using nonmechanical means may take shellfish for personal use within the limits specified in G.S. 113-169.2(i) without holding a RCGL.

(5) A person may take fish for recreational purposes by means of a gig without holding a RCGL. (1997-400, s. 5.1; 1997-456, s. 55.7; 1998-225, s. 4.21; 1999-209, s. 9.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'." Session Laws 1997-400, s. 5.3, provides that

the Marine Fisheries Commission shall adopt rules authorizing the use of a limited amount of commercial gear for recreational fishing under a Recreational Commercial Gear License, as required by this section, on or before July 1, 1999.

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (a), substituted "possession limits" for "quotas or limits," and added the last sentence; rewrote subsection (e); and added subdivision (j)(4).

Session Laws 1999-209, s. 9, effective July 1, 1999, added subdivision (j)(5).

§§ 113-174 through 113-180: Reserved for future codification purposes.

Article 15.

Regulation of Coastal Fisheries.

§ 113-181. Duties and powers of Department.

(a) It is the duty of the Department to administer and enforce the provisions of this Subchapter pertaining to the conservation of marine and estuarine resources. In execution of this duty, the Department may collect such statistics, market information, and research data as is necessary or useful to the promotion of sports and commercial fisheries in North Carolina and the conservation of marine and estuarine resources generally; conduct or contract for research programs or research and development programs applicable to resources generally and to methods of cultivating, harvesting, marketing, or processing fish as may be beneficial in achieving the objectives of this Subchapter; enter into reciprocal agreements with other jurisdictions with regard to the conservation of marine and estuarine resources; and regulate placement of nets and other sports or commercial fishing apparatus in coastal fishing waters with regard to navigational and recreational safety as well as from a conservation standpoint.

(b) The Department is directed to make every reasonable effort to carry out the duties imposed in this Subchapter. (1915, c. 84, s. 5; 1917, c. 290, s. 10; C.S., s. 1883; 1953, c. 1086; 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1987, c. 827, s. 101.)

§ 113-182. Regulation of fishing and fisheries.

(a) The Marine Fisheries Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict all forms of marine and estuarine resources in coastal fishing waters with respect to:

(1) Time, place, character, or dimensions of any methods or equipment that may be employed in taking fish;

(2) Seasons for taking fish;

(3) Size limits on and maximum quantities of fish that may be taken, possessed, bailed to another, transported, bought, sold, or given away.

(b) The Marine Fisheries Commission is authorized to authorize, regulate, prohibit, prescribe, or restrict and the Department is authorized to license:

(1) The opening and closing of coastal fishing waters, except as to inland

game fish, whether entirely or only as to the taking of particular classes of fish, use of particular equipment, or as to other activities within the jurisdiction of the Department; and

(2) The possession, cultivation, transportation, importation, exportation, sale, purchase, acquisition, and disposition of all marine and estuarine resources and all related equipment, implements, vessels, and conveyances as necessary to implement the work of the Department in carrying out its duties.

(3) The possession, transportation, importation, exportation, sale, purchase, acquisition, and disposition of all fish taken in the Atlantic Ocean out to a distance of 200 miles from the State's mean low watermark, consistent with the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq., as amended. (1915, c. 84, s. 21; 1917, c. 290, s. 7; C.S., s. 1878; 1925, c. 168, s. 2; 1935, c. 35; 1945, c. 776; 1953, cc. 774, 1251; 1961, c. 1189, s. 1; 1963, c. 1097, s. 1; 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1995, c. 507, s. 26.5(c); 1997-400, s. 6.6.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997.'"

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

§ 113-182.1. Fishery Management Plans.

(a) The Department shall prepare proposed Fishery Management Plans for adoption by the Marine Fisheries Commission for all commercially or recreationally significant species or fisheries that comprise State marine or estuarine resources. Proposed Fishery Management Plans shall be developed in accordance with the Priority List, Schedule, and guidance criteria established by the Marine Fisheries Commission under G.S. 143B-289.52.

(b) The goal of the plans shall be to ensure the long-term viability of the State's commercially and recreationally significant species or fisheries. Each plan shall be designed to reflect fishing practices so that one plan may apply to a specific fishery, while other plans may be based on gear or geographic areas. Each plan shall:

(1) Contain necessary information pertaining to the fishery or fisheries, including management goals and objectives, status of relevant fish stocks, stock assessments for multiyear species, fishery habitat and water quality considerations consistent with Coastal Habitat Protection Plans adopted pursuant to G.S. 143B-279.8, social and economic impact of the fishery to the State, and user conflicts.

(2) Recommend management actions pertaining to the fishery or fisheries.

(3) Include conservation and management measures that prevent overfishing, while achieving, on a continuing basis, the optimal yield from each fishery.

(c) To assist in the development of each Fishery Management Plan, the Chair of the Marine Fisheries Commission shall appoint a fishery management plan advisory committee. Each fishery management plan advisory committee shall be composed of commercial fishermen, recreational fishermen,

and scientists, all with expertise in the fishery for which the Fishery Management Plan is being developed.

(c1) The Department shall consult with the regional advisory committees established pursuant to G.S. 143B-289.57(e) regarding the preparation of each Fishery Management Plan. Before submission of a plan for review by the Joint Legislative Commission on Seafood and Aquaculture or the Environmental Review Commission, the Department shall review any comment or recommendation regarding the plan that a regional advisory committee submits to the Department within the time limits established in the Schedule for the development and adoption of Fishery Management Plans established by G.S. 143B-289.52. The Commission shall consult with the regional advisory committees regarding the development of any temporary management measure that the Commission determines to be necessary to ensure the viability of the species or fishery while the plan is being developed and regarding the development of any management measure to implement the plan. Before the Commission adopts a temporary management measure or a management measure to implement a plan, the Commission shall review any comment or recommendation regarding the management measure that a regional advisory committee submits to the Commission.

(d) Each Fishery Management Plan shall be revised at least once every three years. The Marine Fisheries Commission may revise the Priority List and guidance criteria whenever it determines that a revision of the Priority List or guidance criteria will facilitate or improve the development of Fishery Management Plans or is necessary to restore, conserve, or protect the marine and estuarine resources of the State. The Marine Fisheries Commission may not revise the Schedule for the development of a Fishery Management Plan, once adopted, without the approval of the Secretary of Environment and Natural Resources.

(e) The Secretary of Environment and Natural Resources shall monitor progress in the development and adoption of Fishery Management Plans in relation to the Schedule for development and adoption of the plans established by the Marine Fisheries Commission. The Secretary of Environment and Natural Resources shall report to the Joint Legislative Commission on Seafood and Aquaculture and the Environmental Review Commission on progress in developing and implementing the Fishery Management Plans on or before 1 September of each year. The Secretary of Environment and Natural Resources shall report to the Joint Legislative Commission on Seafood and Aquaculture and the Environmental Review Commission within 30 days of the completion or substantial revision of each proposed Fishery Management Plan. The Joint Legislative Commission on Seafood and Aquaculture and the Environmental Review Commission shall concurrently review each proposed Fishery Management Plan within 30 days of the date the proposed Plan is submitted by the Secretary. The Joint Legislative Commission on Seafood and Aquaculture and the Environmental Review Commission may submit comments and recommendations on the proposed Plan to the Secretary within 30 days of the date the proposed Plan is submitted by the Secretary.

(f) The Marine Fisheries Commission shall adopt rules to implement Fishery Management Plans in accordance with Chapter 150B of the General Statutes.

(g) To achieve optimal yield under a Fishery Management Plan, the Marine Fisheries Commission may include in the Plan a recommendation that the General Assembly limit the number of fishermen authorized to participate in the fishery. The Commission may recommend that the General Assembly limit participation in a fishery only if the Commission determines that optimal yield cannot otherwise be achieved. In determining whether to recommend that the General Assembly limit participation in a fishery, the Commission shall consider all of the following factors:

(1) Current participation in and dependence on the fishery.
(2) Past fishing practices in the fishery.
(3) Economics of the fishery.
(4) Capability of fishing vessels used in the fishery to engage in other fisheries.
(5) Cultural and social factors relevant to the fishery and any affected fishing communities.
(6) Capacity of the fishery to support biological parameters.
(7) Equitable resolution of competing social and economic interests.
(8) Any other relevant considerations. (1997-400, s. 3.4; 1997-443, s. 11A.119(b); 1998-212, s. 14.3; 1998-225, s. 2.1.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 5.5, provides that the Marine Fisheries Commission shall adopt a Fishery Management Plan for the blue crab fishery in accordance with G.S. 143B-289.22, as enacted by that act, and G.S. 113-182.1, as enacted by that act, no later than January 1, 1999.

Session Laws 1997-400, s. 6.9, effective July 1, 1998, provides that all of the Coastal Habitat Protection Plans required by G.S. 143B-279.8 shall be adopted no later than July 1, 2003; that the Coastal Resources Commission, the Environmental Management Commission, and the Marine Fisheries Commission shall make the first report on progress on or before September 1, 1999; and that the Secretary of Environment, Health, and Natural Resources [Secretary of Environment and Natural Resources] shall make the first report on Fishery Management Plans on or before September 1, 1999.

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.15, made this section effective July 1, 1998.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — Session Laws 1998-212, s. 14.3, effective July 1, 1998, in subsection (a), substituted "G.S. 143B-289.52" for "G.S. 143B-289.22"; in subsection (c), twice substituted "fishery management plan advisory committee" for "advisory council"; added subsection (c1); and in subsection (d), substituted "Fishery" for "Fisheries".

Session Laws 1998-225, s. 2.1, effective November 5, 1998, added subsections (c1) and (g); in subsection (a), substituted "G.S. 143B-289.52" for "G.S. 143B-289.22"; in subsection (c), substituted "fishery management plan advisory committee" for "Advisory Council"; in subsection (d), substituted "Fishery Management Plan" for "Fisheries Management Plan"; and made stylistic changes.

Legal Periodicals. — For 1997 Legislative Survey, see 20 Campbell L. Rev. 443.

§ 113-183. Unlawful possession, transportation and sale of fish.

(a) It is unlawful to possess, transport, offer to transport, sell, offer to sell, receive, buy, or attempt to buy any fish regulated by the Department with knowledge or reason to believe that such fish are illicit.

(b) Fish are illicit when taken, possessed, or dealt with unlawfully, or when there has occurred at any time with respect to such fish a substantial failure of compliance with the applicable provisions of this Subchapter or of rules made under the authority of this Subchapter. (1961, c. 1189, s. 2; 1965, c. 957, s. 2; 1987, c. 827, s. 98.)

§ 113-184. Possession and transportation of prohibited oyster equipment.

(a) It is unlawful to carry aboard any vessel subject to licensing requirements under Article 14A under way or at anchor in coastal fishing waters during the regular closed oyster season any scoops, scrapes, dredges, or winders such as are usually or can be used for taking oysters. Provided that when such vessels are engaged in lawfully permitted oyster harvesting operations on any privately held shellfish bottom lease under G.S. 113-202 or G.S. 113-205, the vessel shall be exempt from this requirement.

(b) If any vessel has recently been under way or at anchor in coastal fishing waters engaged in activity similar in manner to that in which oysters are taken with scoops, scrapes, or dredges and at a time or place in which the taking of oysters is prohibited, the presence on board of the vessel of wet oysters or scoops, scrapes, dredges, lines, or deck wet, indicating the taking of oysters, constitutes prima facie evidence that the vessel was engaged in taking oysters unlawfully with scoops, scrapes, or dredges at the time or place prohibited.

(c) Repealed by Session Laws 1991, c. 86, s. 1. (1903, c. 516, ss. 13-15, 28; Rev., ss. 2385, 2397; C.S., s. 1926; 1963, c. 452; 1965, c. 957, s. 2; 1991, c. 86, s. 1; 1991 (Reg. Sess., 1992), c. 788, s. 1; 1998-225, s. 3.3.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 27.17 creates within the Department of Environment and Natural Resources, the Fishery Resource Grant Program, to enhance the State's coastal fishery resources through individual grants to test new equipment, research industry trends, perform environmental pilot studies, and study other fishery issues, provides for administration, specifies an application procedure, and appropriates funds for the 1994-95 fiscal year.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994'."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (a), substituted "Article 14A" for "Article 14."

§ 113-185. Fishing near ocean piers; trash or scrap fishing.

(a) It is unlawful to fish in the ocean from vessels or with a net within 750 feet of an ocean pier licensed in accordance with G.S. 113-169.4. The prohibition shall be effective when:

(1) Buoys or beach markers, placed at the owner's expense in accordance with the rules adopted by the Marine Fisheries Commission, indicate clearly to fishermen in vessels and on the beach the requisite distance of 750 feet from the pier, and

(2) The public is allowed to fish from the pier for a reasonable fee.

The prohibition shall not apply to littoral proprietors whose property is within 750 feet of a duly licensed ocean pier.

(b) It is unlawful to engage in any fishing operations known as trash fishing or scrap fishing. "Trash fishing" or "scrap fishing" consists of taking the young of edible fish before they are of sufficient size to be of value as individual food fish:

(1) For commercial disposition as bait; or

(2) For sale to any dehydrating or nonfood processing plant; or

(3) For sale or commercial disposition in any manner.

The Marine Fisheries Commission may by rule authorize the disposition of the young of edible fish taken in connection with the legitimate commercial fishing operations, provided that the quantity of such fish that may be disposed of is sufficiently limited, or the taking and disposition is otherwise so regulated, as to discourage any practice of trash or scrap fishing for its own

sake. (1965, c. 957, s. 2; 1973, c. 1262, ss. 28, 86; 1985, c. 452, ss. 1-4; 1987, c. 641, s. 5; c. 827, s. 98; 1991, c. 86, s. 2; 1998-225, s. 3.4.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsection (a), substituted "G.S. 113-169.4" for "G.S. 113-156.1."

CASE NOTES

Classification of Ocean Piers. — Section 113-156.1, requiring managers of ocean fishing piers to obtain a license, satisfies the requirements of uniformity, equal protection and due process under both the State and federal Constitutions, as the opportunity to establish an exclusive zone around ocean piers, pursuant to subsection (a) of this section, and the cost to the State of enforcing this zone, distinguishes ocean piers from other piers and provides reasonable grounds for their separate license tax classification. State v. Rippy, 80 N.C. App. 232, 341 S.E.2d 98 (1986).

§ 113-186. Measures for fish scrap and oil.

All persons buying or selling menhaden for the purpose of manufacturing fish scrap and oil within the State must buy or sell according to the measure prescribed in this section: 22,000 cubic inches for every 1,000 fish. Each day of failure to use the prescribed measure constitutes a separate offense. (1911, c. 101; C.S., s. 1963; 1965, c. 957, s. 2.)

§ 113-187. Penalties for violations of Subchapter and rules.

(a) Any person who participates in a commercial fishing operation conducted in violation of any provision of this Subchapter and its implementing rules or in an operation in connection with which any vessel is used in violation of any provision of this Subchapter and its implementing rules is guilty of a Class A1 misdemeanor.

(b) Any owner of a vessel who knowingly permits it to be used in violation of any provision of this Subchapter and its implementing rules is guilty of a Class A1 misdemeanor.

(c) Any person in charge of a commercial fishing operation conducted in violation of any provision of this Subchapter and its implementing rules or in charge of any vessel used in violation of any provision of this Subchapter and its implementing rules is guilty of a Class A1 misdemeanor.

(d) Any person in charge of a commercial fishing operation conducted in violation of the following provisions of this Subchapter or the following rules of the Marine Fisheries Commission; and any person in charge of any vessel used in violation of the following provisions of the Subchapter or the following rules, shall be guilty of a Class A1 misdemeanor. The violations of the statute or the rules for which the penalty is mandatory are:

(1) Taking or attempting to take, possess, sell, or offer for sale any oysters, mussels, or clams taken from areas closed by statute, rule, or proclamation because of suspected pollution.

(2) Taking or attempting to take or have in possession aboard a vessel, shrimp taken by the use of a trawl net, in areas not opened to shrimping, pulled by a vessel not showing lights required by G.S. 75A-6 after sunset and before sunrise.
(3) Using a trawl net in any coastal fishing waters closed by proclamation or rule to trawl nets.
(4) Violating the provisions of a special permit or gear license issued by the Department.
(5) Using or attempting to use any trawl net, long haul seine, swipe net, mechanical methods for oyster or clam harvest or dredge in designated primary nursery areas. (1965, c. 957, s. 2; 1973, c. 1102; c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1979, c. 388, s. 5; 1987, c. 641, s. 6; c. 827, s. 98; 1989, c. 275, s. 2; 1993, c. 539, s. 839; 1994, Ex. Sess., c. 24, s. 14(c); 1997-400, s. 4.1.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 443.

§ 113-188. Additional restrictions authorized.

The setting out of particular offenses or requirements with regard to specific species of fish or with regard to certain types of equipment does not affect the authority of the Marine Fisheries Commission to make similar additional restrictions not in conflict with the provisions of this Article under authority granted in this Chapter. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1987, c. 827, s. 102.)

§ 113-189. Protection of sea turtles and porpoises.

(a) It is unlawful to willfully take, disturb or destroy any sea turtles including green, hawksbill, loggerhead, Kemp's ridley, and leatherback turtles, or their nests or eggs.
(b) It shall be unlawful willfully to harm or destroy porpoises. (1967, cc. 198, 1225; 1981, c. 873; 1991, c. 86, s. 3.)

§ 113-190: Recodified as § 113-200 by Session Laws 1997-400, s. 6.7.

§ 113-191. Unlawful sale or purchase of fish; criminal and civil penalties.

(a) Any person who sells fish in violation of G.S. 113-168.4 or a rule of the Marine Fisheries Commission to implement that section is guilty of a Class A1 misdemeanor.
(b) Any person who purchases fish in violation of G.S. 113-169.3 or a rule of the Marine Fisheries Commission to implement that section is guilty of a Class A1 misdemeanor.

(c) A civil penalty of not more than ten thousand dollars ($10,000) may be assessed by the Secretary against any person who sells fish in violation of G.S. 113-168.4 or purchases fish in violation of G.S. 113-169.3.

(d) In determining the amount of the penalty, the Secretary shall consider the factors set out in G.S. 143B-289.53(b). The procedures set out in G.S. 143B-289.53 shall apply to civil penalty assessments that are presented to the Commission for final agency decision.

(e) The Secretary shall notify any person assessed a civil penalty of the assessment and the specific reasons therefor by registered or certified mail or by any means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed pursuant to G.S. 150B-23 within 30 days of receipt of the notice of assessment.

(f) Requests for remission of civil penalties shall be filed with the Secretary. Remission requests shall not be considered unless filed within 30 days of receipt of the notice of assessment. Remission requests must be accompanied by a waiver of the right to a contested case hearing pursuant to Chapter 150B of the General Statutes and a stipulation of the facts on which the assessment was based. Consistent with the limitations in G.S. 143B-289.53(c), remission requests may be resolved by the Secretary and the violator. If the Secretary and the violator are unable to resolve the request, the Secretary shall deliver remission requests and his recommended action to the Committee on Civil Penalty Remissions of the Marine Fisheries Commission appointed pursuant to G.S. 143B-289.53(c).

(g) If any civil penalty has not been paid within 30 days after notice of assessment has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment, unless the violator contests the assessment as provided in subsection (e) of this section, or requests remission of the assessment in whole or in part as provided in subsection (f) of this section. If any civil penalty has not been paid within 30 days after the final agency decision or court order has been served on the violator, the Secretary shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Civil actions must be filed within three years of the date the final agency decision or court order was served on the violator. (1997-400, ss. 4.2, 4.5; 1998-225, ss. 3.5, 3.6.)

Editor's Note. — Session Laws 1997-400, s. 4.2, enacted as § 113-190, was codified as this section at the direction of the Revisor of Statutes.

Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 4.4 instructs the Marine Fisheries Commission to develop a Violation Points System applicable to the fishing licenses of all persons who violate marine fisheries statutes or rules.

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — Session Laws 1997-400, s. 4.5, effective July 1, 1999, and applicable to violations and offenses on or after July 1, 1999, substituted "G.S. 113-168.4" for "G.S. 113-154.1" in subsections (a) and (c); and substituted "G.S. 113-169.3" for "G.S. 113-156" in subsections (b) and (c).

The 1998 amendment, effective retroactively

to September 1, 1997, in subsection (d), substituted "G.S. 143B-289.53(b)" for "G.S. 143B-289.23(b)," and substituted "G.S. 143B-289.53" for "G.S. 143B-289.23"; and in subsection (f), twice substituted "G.S. 143B-289.53(c)" for "G.S. 143B-289.23(c)."

§§ 113-192 through 113-199: Reserved for future codification purposes.

§ 113-200. Fishery Resource Grant Program.

(a) Creation. — There is created within the Sea Grant College Program at The University of North Carolina, the Fishery Resource Grant Program. The purpose of the program is to work within priorities established by the Grants Committee to protect and enhance the State's coastal fishery resources through individual grants in the following areas:

(1) New fisheries equipment or gear.
(2) Environmental pilot studies, including water quality and fisheries habitat.
(3) Aquaculture or mariculture of marine dependent species.
(4) Seafood technology.

(b) Definition; Annual Establishment of Priorities. — For purposes of this section, the term "fishing related industry" means any of the following: (i) commercial fishing; (ii) recreational fishing; (iii) aquaculture; (iv) mariculture; and (v) handling of seafood products, including seafood dealing and seafood processing. The Grants Committee shall, in cooperation with persons involved in fishing related industries, the Division of Marine Fisheries, and the Sea Grant College Program, establish funding priorities effective July 1 of each year for the grant program. In adopting priorities, the Grants Committee is exempt from Article 2A of Chapter 150B of the General Statutes. The Grants Committee shall provide public notice of its proposed priorities at least 30 days before the Grants Committee meeting prior to a final determination of its priorities for the fiscal year.

(c) Procedure to Solicit Proposals. — Following the establishment of priorities by the Grants Committee, the Sea Grant College Program shall hold workshops within the northern, southern, central, and Pamlico coastal regions to solicit applications and to assist persons involved in fishing related industries in writing proposals. The Sea Grant College Program shall encourage preproposal conferences among persons involved in fishing related industries and those with technical or research backgrounds to work as partners in developing and writing the proposals and in writing reports of final results. If the grants approved by the Grants Committee do not utilize all available funds, the Sea Grant College Program may advertise and solicit additional applications during the applicable fiscal year.

(d) Application for Grant Program. — An applicant may apply for grant funds to the Sea Grant College Program. For purposes of this subsection, every proposal shall include substantial involvement of residents of North Carolina who are actively involved in a fishing related industry. A proposal generated by a person not involved in a fishing related industry may be eligible for funding only if the proposal includes written endorsements supporting the project from persons or organizations representing fishing related industries. An application shall include:

(1) Name and address of the primary applicant.
(2) List of marine fishing licenses issued under Chapter 113 of the General Statutes to the applicant by the State of North Carolina.
(3) A description of the project.
(4) A detailed statement of the projected costs of the project including the cost to plan and design the project.

(5) An explanation of how the project will enhance the fishery resource.
(6) List of names and addresses of any other persons who will participate in the project.
(7) Any other information necessary to make a recommendation on the application.

(e) Review Process. — The Sea Grant College Program shall conduct an anonymous peer review of all applications for fisheries grants. At least one of the peer reviewers shall be a person involved in a fishing related industry. An application is confidential and is not a public record under G.S. 132-1 until after the closing date for submission of applications. Following the review of all proposals, the Sea Grant College Program shall rank proposals in order of priority and shall present the recommendations to the Grants Committee. The Sea Grant College Program may adopt criteria to rank proposals. In adopting criteria, the Sea Grant College Program is exempt from Article 2A of Chapter 150B of the General Statutes. Criteria adopted pursuant to this subsection are public records within the meaning of G.S. 132-1.

(e1) Grants Committee. — The Grants Committee shall consist of eleven members as follows:

(1) Three employees of the Sea Grant College Program, appointed by the Director of the Sea Grant College Program.
(2) Two employees of the Division of Marine Fisheries, appointed by the Fisheries Director.
(3) Two members of the Marine Fisheries Commission, appointed by the Chair of the Marine Fisheries Commission.
(4) One member of the Northeast Regional Advisory Committee established pursuant to G.S. 143B-289.57(e), appointed by the Northeast Regional Advisory Committee.
(5) One member of the Central Regional Advisory Committee established pursuant to G.S. 143B-289.57(e), appointed by the Central Regional Advisory Committee.
(6) One member of the Southeast Regional Advisory Committee established pursuant to G.S. 143B-289.57(e), appointed by the Southeast Regional Advisory Committee.
(7) One member of the Inland Regional Advisory Committee established pursuant to G.S. 143B-289.57(e), appointed by the Inland Regional Advisory Committee.

(f) Award Process. — The Grants Committee shall evaluate all grant proposals and the results of the peer review and ranking conducted pursuant to subsection (e) of this section. On the basis of this evaluation, the Grants Committee shall determine the amount of funding, if any, to be awarded to each grant applicant. To the extent practicable, the Grants Committee shall distribute grant funding among the northern, southern, central, and Pamlico coastal regions. Proposals for projects that include involvement of persons involved in a fishing related industry shall be accorded a priority in funding by the Grants Committee. Following approval by the Grants Committee, the Sea Grant College Program shall award the grants.

(g) Restrictions on Grants. — No member of the Grants Committee may benefit financially from a grant. If a grant recipient from a prior year has failed to perform a grant project to the satisfaction of the Sea Grant College Program or the Grants Committee, the Grants Committee may decline to fund any new application involving the principal applicant.

(h) Grant Reports and Funding. — Grant recipients shall provide quarterly progress reports to the Sea Grant College Program and shall submit invoices for expenditures for each quarter. Twenty-five percent (25%) of the total grant award shall be held until the grant recipient has completed the project and submitted a final written report. The remainder of the grant award shall be

distributed upon approval of each quarterly report and upon verification of the expenditures.

(i) Report on Grant Program. — The Sea Grant College Program shall report on the Fishery Resource Grant Program to the Marine Fisheries Commission and the Joint Legislative Commission on Seafood and Aquaculture no later than January 1 of each year. (1995 (Reg. Sess., 1996), c. 633, s. 2; 1997-400, s. 6.7; 1999-162, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 633, s. 6, provides: "Notwithstanding subsection (b) of Section 2 of this act, the Marine Fisheries Commission may establish priorities by September 1, 1996, for the 1996-97 fiscal year."

This section, as enacted by Session Laws 1995 (Reg. Sess., 1996), c. 633, s. 2, was formerly numbered 113-190. It was recodified as 113-200 by Session Laws 1997-400, s. 6.7, effective August 14, 1997.

Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1999-162, s. 2 provides that the Sea Grant College Program shall submit the first report required by G.S. 113-200(i), as amended by Session Laws 1999-162, s. 1, no later than January 1, 2000.

Effect of Amendments. — Session Laws 1999-162, s. 1, effective June 8, 1999, substituted "Grants Committee" for "Marine Fisheries Commission" in subsection (a) and deleted "or" following "species" in subdivision (a)(3); rewrote subsections (b) through (e) and (f); added subsection (e1); in subsection (g), substituted "Grants Committee" for "Commission" twice and substituted "Grants Committee" for "Sea Grant College Program"; and in subsection (i), substituted "the Fishery Resource Grant Program" for "an annual basis" and added "no later than January 1 of each year"; and made minor punctuation changes.

Article 16.

Cultivation of Shellfish.

§ 113-201. Authority of Marine Fisheries Commission.

The Marine Fisheries Commission is empowered to make rules and take all steps necessary to develop and improve the cultivation, harvesting, and marketing of shellfish in North Carolina both from public grounds and private beds. (1921, c. 132, s. 1; C.S., s. 1959(a); 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1983, c. 621, s. 2; 1987, c. 827, s. 98.)

CASE NOTES

Cited in Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997).

§ 113-201.1. Definitions.

As used in this Article:

(1) "Natural shellfish bed" means an area of public bottom where oysters,

clams, scallops, mussels or other shellfish are found to be growing in sufficient quantities to be valuable to the public.

(2) "Riparian owner" means the holder(s) of the fee title to land that is bordered by waters of an arm of the sea or any other navigable body of water.

(3) "Shellfish" means oysters, clams, scallops, mussels or any other species of mollusks that the Marine Fisheries Commission determines suitable for cultivation, harvesting, and marketing from public grounds and private beds.

(4) "Single family unit" means the husband and wife and any unemancipated children in the household.

(5) "Water column" means the vertical extent of water, including the surface thereof, above a designated area of submerged bottom land. (1983, c. 621, s. 3; 1987, c. 641, s. 15.)

CASE NOTES

Quoted in In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Cited in State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988).

§ 113-202. New and renewal leases for shellfish cultivation; termination of leases issued prior to January 1, 1966.

(a) To increase the use of suitable areas underlying coastal fishing waters for the production of shellfish, the Secretary may grant shellfish cultivation leases to persons who reside in North Carolina under the terms of this section when the Secretary determines, in accordance with his duty to conserve the marine and estuarine resources of the State, that the public interest will benefit from issuance of the lease. Suitable areas for the production of shellfish shall meet the following minimum standards:

(1) The area leased must be suitable for the cultivation and harvesting of shellfish in commercial quantities.

(2) The area leased must not contain a natural shellfish bed.

(3) Cultivation of shellfish in the leased area will be compatible with lawful utilization by the public of other marine and estuarine resources. Other public uses which may be considered include, but are not limited to, navigation, fishing and recreation.

(4) Cultivation of shellfish in the leased area will not impinge upon the rights of riparian owners.

(5) The area leased must not include an area designated for inclusion in the Department's Shellfish Management Program.

(6) The area leased must not include an area which the State Health Director has recommended be closed to shellfish harvest by reason of pollution.

(b) The Secretary may delete any part of an area proposed for lease or may condition a lease to protect the public interest with respect to the factors enumerated in subsection (a) of this section. The Secretary may not grant a new lease in an area heavily used for recreational purposes.

(c) No person, including a corporate entity, or single family unit may acquire and hold by lease, lease renewal, or purchase more than 50 acres of public bottoms under shellfish cultivation leases.

(d) Any person desiring to apply for a lease must make written application to the Secretary on forms prepared by the Department containing such information as deemed necessary to determine the desirability of granting or not granting the lease requested. Except in the case of renewal leases, the

application must be accompanied by a map or diagram made at the expense of the applicant, showing the area proposed to be leased.

The map or diagram must conform to standards prescribed by the Secretary concerning accuracy of map or diagram and the amount of detail that must be shown. If on the basis of the application information and map or diagram the Secretary deems that granting the lease would benefit the shellfish culture of North Carolina, the Secretary, in the case of initial lease applications, must order an investigation of the bottom proposed to be leased. The investigation is to be made by the Secretary or his authorized agent to determine whether the area proposed to be leased is consistent with the standards in subsection (a) and any other applicable standards under this Article and the rules of the Marine Fisheries Commission. In the event the Secretary finds the application inconsistent with the applicable standards, the Secretary shall deny the application or propose that a conditional lease be issued that is consistent with the applicable standards. In the event the Secretary authorizes amendment of the application, the applicant must furnish a new map or diagram meeting requisite standards showing the area proposed to be leased under the amended application. At the time of making application for an initial lease, the applicant must pay a filing fee of one hundred dollars ($100.00).

(e) The area of bottom applied for in the case of an initial lease or amended initial lease must be as compact as possible, taking into consideration the shape of the body of water, the consistency of the bottom, and the desirability of separating the boundaries of a leasehold by a sufficient distance from any known natural shellfish bed to prevent the likelihood of disputes arising between the leaseholder and members of the public taking shellfish from the natural bed.

(f) Within a reasonable time after receipt of an application that complies with subsection (d), the Secretary shall notify the applicant of the intended action on the lease application. If the intended action is approval of the application as submitted or approval with a modification to which the applicant agrees, the Secretary shall conduct a public hearing in the county where the proposed leasehold lies. The Secretary must publish at least two notices of the intention to lease in a newspaper of general circulation in the county in which the proposed leasehold lies. The first publication must precede the public hearing by more than 20 days; the second publication must follow the first by seven to 11 days. The notice of intention to lease must contain a sufficient description of the area of the proposed leasehold that its boundaries may be established with reasonable ease and certainty and must also contain the date, hour and place of the hearing.

(g) After consideration of the public comment received and any additional investigations the Secretary orders to evaluate the comments, the Secretary shall notify the applicant in person or by certified or registered mail of the decision on the lease application. The Secretary shall also notify persons who submitted comments at the public hearing and requested notice of the lease decision. An applicant who is dissatisfied with the Secretary's decision or another person aggrieved by the decision may commence a contested case by filing a petition under G.S. 150B-23 within 20 days after receiving notice of the Secretary's decision. In the event the Secretary's decision is a modification to which the applicant agrees, the lease applicant must furnish an amended map or diagram before the lease can be issued by the Secretary. The Secretary shall make the final agency decision in a contested case.

(h) Repealed by Session Laws 1993, c. 466, s. 1.

(i) After a lease application is approved by the Secretary, the applicant shall submit to the Secretary a survey of the area approved for leasing and define the bounds of the area approved for leasing with markers in accordance with the rules of the Commission. The survey shall conform to standards prescribed

by the Secretary concerning accuracy of survey and the amount of detail to be shown. When an acceptable survey is submitted, the boundaries are marked and all fees and rents due in advance are paid, the Secretary shall execute the lease on forms approved by the Attorney General. The Secretary is authorized, with the approval of the lessee, to amend an existing lease by reducing the area under lease or by combining contiguous leases without increasing the total area leased.

(j) Initial leases begin upon the issuance of the lease by the Secretary and expire at noon on the first day of April following the tenth anniversary of the granting of the lease. Renewal leases are issued for a period of 10 years effective from the time of expiration of the previous lease. At the time of making application for renewal of a lease, the applicant must pay a filing fee of fifty dollars ($50.00). The rental for initial leases is one dollar ($1.00) per acre for all leases entered into before July 1, 1965, and for all other leases until noon on the first day of April following the first anniversary of the lease. Thereafter, for initial leases entered into after July 1, 1965, and from the beginning for renewals of leases entered into after said date, the rental is five dollars ($5.00) per acre per year. Rental must be paid annually in advance prior to the first day of April each year. Upon initial granting of a lease, the pro rata amount for the portion of the year left until the first day of April must be paid in advance at the rate of one dollar ($1.00) per acre per year; then, on or before the first day of April next, the lessee must pay the rental for the next full year.

(k) Except as restricted by this Subchapter, leaseholds granted under this section are to be treated as if they were real property and are subject to all laws relating to taxation, sale, devise, inheritance, gift, seizure and sale under execution or other legal process, and the like. Leases properly acknowledged and probated are eligible for recordation in the same manner as instruments conveying an estate in real property. Within 30 days after transfer of beneficial ownership of all or any portion of or interest in a leasehold to another, the new owner must notify the Secretary of such fact. Such transfer is not valid until notice is furnished the Secretary. In the event such transferee is a nonresident, the Secretary must initiate proceedings to terminate the lease.

(*l*) Upon receipt of notice by the Secretary of any of the following occurrences, he must commence action to terminate the leasehold:

(1) Failure to pay the annual rent in advance.
(2) Failure to file information required by the Secretary upon annual remittance of rental or filing false information on the form required to accompany the annual remittance of rental.
(3) Failure by new owner to report a transfer of beneficial ownership of all or any portion of or interest in the leasehold.
(4) Failure to mark the boundaries in the leasehold and to keep them marked as required in the rules of the Marine Fisheries Commission.
(5) Failure to utilize the leasehold on a continuing basis for the commercial production of shellfish.
(6) Transfer of all or part of the beneficial ownership of a leasehold to a nonresident.
(7) Substantial breach of compliance with the provisions of this Article or of rules of the Marine Fisheries Commission governing use of the leasehold.

The Marine Fisheries Commission is authorized to make rules defining commercial production of shellfish, based upon the productive potential of particular areas climatic or biological conditions at particular areas or particular times, availability of seed shellfish, availability for purchase by lessees of shells or other material to which oyster spat may attach, and the like. Commercial production may be defined in terms of planting effort made as well

as in terms of quantities of shellfish harvested. Provided, however, that if a lessee has made a diligent effort to effectively and efficiently manage his lease according to accepted standards and practices in such management, and because of reasons beyond his control, such as acts of God, such lessee has not and cannot meet the requirements set out by the Marine Fisheries Commission under the provisions of this paragraph of this subsection, his leasehold shall not be terminated under subdivision (5) of this subsection.

(m) In the event the leaseholder takes steps within 30 days to remedy the situation upon which the notice of intention to terminate was based and the Secretary is satisfied that continuation of the lease is in the best interests of the shellfish culture of the State, the Secretary may discontinue termination procedures. Where there is no discontinuance of termination procedures, the leaseholder may initiate a contested case by filing a petition under G.S. 150B-23 within 30 days of receipt of notice of intention to terminate. The Secretary shall make the final agency decision of all lease terminations. Where the leaseholder does not initiate a contested case, or the Secretary's final decision upholds termination, the Secretary must send a final letter of termination to the leaseholder. The final letter of termination may not be mailed sooner than 30 days after receipt by the leaseholder of the Secretary's notice of intention to terminate, or of the Secretary's final agency decision, as appropriate. The lease is terminated effective at midnight on the day the final notice of termination is served on the leaseholder. The final notice of termination may not be issued pending hearing of a contested case initiated by the leaseholder.

Service of any notice required in this subsection may be accomplished by certified mail, return receipt requested; personal service by any law-enforcement officer; or upon the failure of these two methods, publication. Service by publication shall be accomplished by publishing such notices in a newspaper of general circulation within the county where the lease is located for at least once a week for three successive weeks. The format for notice by publication shall be approved by the Attorney General.

(n) Upon final termination of any leasehold, the bottom in question is thrown open to the public for use in accordance with laws and rules governing use of public grounds generally. Within 30 days of final termination of the leasehold, the former leaseholder shall remove all abandoned markers denominating the area of the leasehold as a private bottom. The State may, after 10 days' notice to the owner of the abandoned markers thereof, remove the abandoned structure and have the area cleaned up. The cost of such removal and cleanup shall be payable by the owner of the abandoned markers and the State may bring suit to recover the costs thereof.

(o) Every year between January 1 and February 15 the Secretary must mail to all leaseholders a notice of the annual rental due and include forms designed by him for determining the amount of shellfish or shells planted on the leasehold during the preceding calendar year, and the amount of harvest gathered. Such forms may contain other pertinent questions relating to the utilization of the leasehold in the best interests of the shellfish culture of the State, and must be executed and returned by the leaseholder with the payment of his rental. Any leaseholder or his agent executing such forms for him who knowingly makes a false statement on such forms is guilty of a Class 1 misdemeanor.

(p) All leases and renewal leases granted after the effective date of this Article are made subject to this Article and to reasonable amendment of governing statutes, rules of the Marine Fisheries Commission, and requirements imposed by the Secretary or his agents in regulating the use of the leasehold or in processing applications of rentals. This includes such statutory increase in rentals as may be necessitated by changing conditions and refusal

to renew lease after expiration, in the discretion of the Secretary. No increase in rentals, however, may be given retroactive effect.

The General Assembly declares it to be contrary to public policy to the oyster and clam bottoms which were leased prior to January 1, 1966, and which are not being used to produce oysters and clams in commercial quantities to continue to be held by private individuals, thus depriving the public of a resource which belongs to all the people of the State. Therefore, when the Secretary determines, after due notice to the lessee, and after opportunity for the lessee to be heard, that oysters or clams are not being produced in commercial quantities, due to the lessee's failure to make diligent effort to produce oysters and clams in commercial quantities, the Secretary may decline to renew, at the end of the current term, any oyster or clam bottom lease which was executed prior to January 1, 1966. The lessee may appeal the denial of the Secretary to renew the lease by initiating a contested case pursuant to G.S. 150B-23. In such contested cases, the burden of proof, by the greater weight of the evidence, shall be on the lessee.

(q) Repealed by Session Laws 1983, c. 621, s. 16. (1893, c. 287, s. 1; Rev., s. 2371; 1909, c. 871, ss. 1-9; 1919, c. 333, s. 6; C.S., ss. 1902-1911; Ex. Sess. 1921, c. 46, s. 1; 1933, c. 346; 1953, cc. 842, 1139; 1963, c. 1260, ss. 1-3; 1965, c. 957, s. 2; 1967, c. 24, s. 16; c. 88; c. 876, s. 1; 1971, c. 447; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; 1983, c. 601, ss. 1-3; c. 621, ss. 4-16; 1985, c. 275, ss. 1-3; 1987, c. 641, s. 16; c. 773, s. 11; c. 827, s. 98; 1989, c. 423, s. 2; c. 727, s. 99; 1991 (Reg. Sess., 1992), c. 788, s. 2; 1993, c. 466, s. 1; c. 539, s. 840; 1994, Ex. Sess., c. 24, s. 14(c).)

Local Modification. — Brunswick: 1967, c. 876, s. 2; Carteret (Moratorium as to Portsmouth Island, Core Banks, Core Sound): 1995 (Reg. Sess., 1996), c. 547; c. 633, s. 1(b); 1996, 2nd Ex. Sess., c. 18, s. 27.33; 1997-256, s. 12; 1997-347, s. 8; 1997-400, s. 6.14; 1997-401, s. 8; 1998-23, s. 15; 1998-56; 1999-209, s. 1.

Editor's Note. — Session Laws 1983, c. 601, which amended this section, in s. 4, provides that the act shall be reconsidered on or before July 1, 1989, and every six years thereafter, by the Joint Legislative Commission on Governmental Operations.

Session Laws 1993, c. 539, s. 840, effective October 1, 1994, which amended this section was made applicable to offenses occurring on or after that date.

Session Laws 1999-209, s. 2 provides that the Division of Marine Fisheries and the Primary Investigator for the Human Use Mapping Project in Core Sound shall report the results of the shellfish mapping and human use mapping of Core Sound to the Joint Legislative Commission on Seafood and Aquaculture and the Marine Fisheries Commission no later than October 1, 1999.

Legal Periodicals. — For a note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Riparian rights are vested property rights that cannot be taken for private or public purposes without compensating the owner, and they arise out of ownership of land bounded or traversed by navigable water. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Lease Constitutes Contract That May Not Be Abrogated by Subsequent Statute. — While there is no vested right in the provisions of a statute, where a person has leased the bottom of waters from the State for oyster beds pursuant to former law, the lease constitutes a contract between the lessee and the State, and the State may not by subsequent statute abrogate the terms of the contract, either as to duration and renewals or the amount of rent. Oglesby v. Adams, 268 N.C. 272, 150 S.E.2d 383 (1966).

Requested Fee Increase After First Renewal Term Permissible. — Where plaintiff and State, parties to a lease of oyster bottoms, did not intend to create a perpetual lease, a third renewal of the lease was within the discretion of the State, and a requested increase in the rental fee, pursuant to this section, after the first renewal term had ended, was constitutionally permissible and did not impair the State's obligation of its lease contract with

plaintiff. Oglesby v. McCoy, 41 N.C. App. 735, 255 S.E.2d 773, cert. denied, 298 N.C. 299, 259 S.E.2d 301 (1979).

Lease May Not Impinge upon Riparian Rights. — The Legislature vested the authority to promote the shellfish industry in the Marine Fisheries Commission, but it also mandated that the Commission may not lease a bottom area if the lease would impinge upon riparian rights. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Lease for shellfish cultivation issued under this section did not infringe upon the riparian rights of the landowner. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Findings Prerequisite to Lease. — As the Commission's regulations define the term "natural shellfish bed" as an area of public bottom where 10 bushels or more of shellfish per acre are found to be growing, and this section specifically requires that the Commission's regulations, as well as the statutory requirements, be followed in conducting an investigation and in making the determination of acceptability of a proposed site under subsection (a) of this section, before a lease may be approved there must be a finding under the Commission's regulatory standards that the site contains less than 10 bushels of shellfish per acre. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

This section requires an investigation to determine whether a natural shellfish bed exists within the bounds of the area proposed to be leased. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Survey Required. — Without the results of a proper and timely survey, the Commission's regulations and the minimum requirements of this section cannot be satisfied. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Commission May Not Adopt One Standard But Apply Another. — The Commission may not adopt in its regulations one standard (an objective "10 bushels per acre" standard) and then apply another (a subjective standard that considers an area's substrate, vegetation and wind exposure). In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Planting Must Await Determination. — To allow the unauthorized planting of artificial beds before investigations, and then conclude that there must be no natural beds at the mat-obstructed sites, would defeat the purpose of this section. Clearly, the planting must await the determination of the absence of a natural bed; otherwise, the determination is a foregone conclusion. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Where lease applicant's protective mats prevented a proper investigation, the Commission had insufficient evidence in the record, taken as a whole, to conclude that the area did not contain a natural shellfish bed. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Access as Condition of Lease. — The Commission was well within its authority to condition lease for shellfish cultivation on the provision of a zone of access for the owner of the riparian rights. In re Mason ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985), cert. denied, 315 N.C. 588, 341 S.E.2d 27 (1986).

Applied in State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988).

§ 113-202.1. Water column leases for aquaculture.

(a) To increase the productivity of leases for shellfish culture issued under G.S. 113-202, the Secretary may amend shellfish cultivation leases to authorize use of the water column superjacent to the leased bottom under the terms of this section when he determines the public interest will benefit from amendment of the leases. Leases with water column amendments must produce shellfish in commercial quantities at four times the minimum production rate of leases issued under G.S. 113-202, or any higher quantity required by the Marine Fisheries Commission through duly adopted rules.

(b) Suitable areas for the authorization of water column use shall meet the following minimum standards:

(1) Aquaculture use of the leased area must not significantly impair navigation;

(2) The leased area must not be within a navigation channel marked or maintained by a state or federal agency;

(3) The leased area must not be within an area traditionally used and available for fishing or hunting activities incompatible with the activities proposed by the leaseholder, such as trawling or seining;
(4) Aquaculture use of the leased area must not significantly interfere with the exercise of riparian rights by adjacent property owners including access to navigation channels from piers or other means of access; and
(5) Any additional standards, established by the Commission in duly adopted rules, to protect the public interest in coastal fishing waters.

(c) The Secretary shall not amend shellfish cultivation leases to authorize use of the water column unless:
(1) The leaseholder submits an application, accompanied by a nonrefundable application fee of one hundred dollars ($100.00), which conforms to the standards for lease applications in G.S. 113-202(d) and the duly adopted rules of the Commission;
(2) The proposed amendment has been noticed consistent with G.S. 113-202(f);
(3) Public hearings have been conducted consistent with G.S. 113-202(g);
(4) The aspects of the proposals which require use and dedication of the water column have been documented and are recognized by the Secretary as commercially feasible forms of aquaculture which will enhance shellfish production on the leased area;
(5) It is not feasible to undertake the aquaculture activity outside of coastal fishing waters; and
(6) The authorized water column use has the least disruptive effect on other public trust uses of the waters of any available technology to produce the shellfish identified in the proposal.

(d) Amendments of shellfish cultivation leases to authorize use of the water column are issued for a period of five years or the remainder of the term of the lease, whichever is shorter. The annual rental for an initial water column amendment is one hundred dollars ($100.00) an acre for each of the first four years for which the amendment is issued and five hundred dollars ($500.00) an acre for the fifth year for which the amendment is issued. The annual rental for a renewed water column amendment is five hundred dollars ($500.00) an acre. If a year for which a water column amendment is issued is less than a 12-month period, the rental for that year shall be prorated based on the number of months in the year. The annual rental for an amendment is payable at the beginning of the year. The rental is in addition to that required in G.S. 113-202.

(e) Amendments of shellfish cultivation leases to authorize use of the water column are subject to termination in accordance with the procedures established in G.S. 113-202 for the termination of shellfish cultivation leases. Additionally, such amendments may be terminated for unauthorized or unlawful interference with the exercise of public trust rights by the leaseholder, agents and employees of the leaseholder.

(f) Amendments of shellfish cultivation leases to authorize use of the water column are not transferrable except when the Secretary approves the transfer after public notice and hearing consistent with subsection (c) of this section.

(g) After public notice and hearing consistent with subsection (c) of this section, the Secretary may renew an amendment, in whole or in part, when the leaseholder has produced commercial quantities of shellfish and has otherwise complied with the rules of the Commission. Renewals may be denied or reduced in scope when the public interest so requires. Appeal of renewal decisions shall be conducted in accordance with G.S. 113-202(p). Renewals are subject to the lease terms and rates established in subsection (d) of this section.

(h) The procedures and requirements of G.S. 113-202 shall apply to proposed amendments or amendments of shellfish cultivation leases considered

under this section except more specific provisions of this section control conflicts between the two sections.

(i) To the extent required by demonstration or research aquaculture development projects, the Secretary may amend existing leases and issue leases that authorize use of the bottom and the water column. Demonstration or research aquaculture development projects may be authorized for two years with no more than one renewal and when the project is proposed or formally sponsored by an educational institution which conducts research or demonstration of aquaculture. Production of shellfish with a sales value in excess of one thousand dollars ($1,000) per acre per year shall constitute commercial production. Demonstration or research aquaculture development projects shall be exempt for the rental rate in subsection (d) of this section unless commercial production occurs as a result of the project. (1989, c. 423, s. 1; 1989 (Reg. Sess., 1990), c. 1004, s. 4; c. 1024, s. 22; 1993, c. 322, s. 1; c. 466, s. 2.)

§ 113-202.2. Water column leases for aquaculture for perpetual franchises.

(a) To increase the productivity of shellfish grants and perpetual franchises for shellfish culture recognized under G.S. 113-206, the Secretary may lease the water column superjacent to such grants or perpetual franchises (hereinafter "perpetual franchises") under the terms of this section when it determines the public interest will benefit from the lease. Perpetual franchises with water column leases must produce shellfish in commercial quantities at four times the minimum production rate of leases issued under G.S. 113-202, or any higher quantity required by the Marine Fisheries Commission by rule.

(b) Suitable areas for the authorization of water column use shall meet the following minimum standards:

(1) Aquaculture use of the leased water column area must not significantly impair navigation;

(2) The leased water column area must not be within a navigation channel marked or maintained by a State or federal agency;

(3) The leased water column area must not be within an area traditionally used and available for fishing or hunting activities incompatible with the activities proposed by the perpetual franchise holder, such as trawling or seining;

(4) Aquaculture use of the leased water column area must not significantly interfere with the exercise of riparian rights by adjacent property owners including access to navigation channels from piers or other means of access;

(5) The leased water column area may not exceed 10 acres for grants or perpetual franchises recognized pursuant to G.S. 113-206;

(6) The leased water column area must not extend more than one-third of the distance across any body of water or into the channel third of any body of water for grants or perpetual franchises recognized pursuant to G.S. 113-206; and

(7) Any additional rules to protect the public interest in coastal fishing waters adopted by the Commission.

(c) The Secretary shall not lease the water column superjacent to oyster or other shellfish grants or perpetual franchises unless:

(1) The perpetual franchise holder submits an application, accompanied by a nonrefundable application fee of one hundred dollars ($100.00), which conforms to the standards for lease applications in G.S. 113-202(d) and rules adopted by the Commission;

(2) Notice of the proposed lease has been given consistent with G.S. 113-202(f);

(3) Public hearings have been conducted consistent with G.S. 113-202(g);
(4) The aspects of the proposals which require use and dedication of the water column have been documented and are recognized by the Secretary as commercially feasible forms of aquaculture which will enhance shellfish production;
(5) It is not feasible to undertake the aquaculture activity outside of coastal fishing waters; and
(6) The authorized water column use has the least disruptive effect on other public trust uses of the waters of any available technology to produce the shellfish identified in the proposal.

(d) Water column leases to perpetual franchises shall be issued for a period of five years and may be renewed pursuant to subsection (g) of this section. The rental for an initial water column lease issued under this section is the same as the rental set in G.S. 113-202.1 for an initial water column amendment issued under that section, and the rental for a renewed water column lease issued under this section is the same as the rental set in G.S. 113-202.1 for a renewed water column amendment issued under that section.

(e) Water column leases to perpetual franchises may be terminated for unauthorized or unlawful interference with the exercise of public trust rights by the leaseholder or his agents or employees.

(f) Water column leases to perpetual franchises are not transferrable except when the Secretary approves the transfer after public notice and hearing consistent with G.S. 113-202(f) and (g).

(g) After public notice and hearing consistent with G.S. 113-202(f) and (g), the Secretary may renew a water column lease, in whole or in part, if the leaseholder has produced commercial quantities of shellfish and has otherwise complied with this section and the rules of the Commission. Renewals may be denied or reduced in scope when the public interest so requires. Appeal of renewal decisions shall be conducted in accordance with G.S. 113-202(p). Renewals are subject to the lease terms and rates set out in subsection (d) of this section.

(h) The procedures and requirements of G.S. 113-202 shall apply to proposed water column leases or water column leases to perpetual franchises considered under this section except that more specific provisions of this section control conflicts between the two sections.

(i) Demonstration or research aquaculture development projects may be authorized for two years with no more than one renewal and when the project is proposed or formally sponsored by an educational institution which conducts aquaculture research or demonstration projects. Production of shellfish with a sales value in excess of one thousand dollars ($1,000) per acre per year shall constitute commercial production. Demonstration or research aquaculture development projects shall be exempt from the rental rate in subsection (d) of this section unless commercial production occurs as a result of the project. (1989 (Reg. Sess., 1990), c. 958, s. 1; 1993, c. 322, s. 2; c. 466, s. 3.)

§ 113-203. Transplanting of oysters and clams.

(a) It is unlawful to transplant oysters taken from public grounds to private beds except:

(1) When lawfully taken during open season and transported directly to a private bed in accordance with rules of the Marine Fisheries Commission;
(2) When the transplanting is done by a dealer in accordance with the provisions of G.S. 113-169.1(2) and implementing rules; or
(3) When the transplanting is done in accordance with the provisions of this section and implementing rules.

(b) It is lawful to transplant to private beds oysters or clams taken from polluted waters with a permit from the Secretary setting out the waters from which the oysters or clams may be taken, the quantities which may be taken, the times during which the taking is permissible, and other reasonable restrictions imposed by the Secretary to aid him in his duty of regulating such transplanting operations. Any transplanting operation which does not substantially comply with the restrictions of the permit issued is unlawful.

(c) It is lawful to transplant to private beds oysters taken from public beds managed by the State for the production of seed oysters in accordance with the implementing rules of the Marine Fisheries Commission. Persons taking such seed oysters may, in the discretion of the Marine Fisheries Commission, be required to pay to the Department for oysters taken an amount to reimburse the Department in full or in part for the costs of seed-oyster management operations.

(d) It is lawful to transplant to private beds in North Carolina oysters taken from public beds designated by the Marine Fisheries Commission as natural seed oyster areas. Such areas shall be designated as natural seed oyster areas in the following manner:

(1) A petition shall be filed with the Secretary by the board of county commissioners of the county in which such area is located requesting the designation of and describing the area proposed as a natural seed oyster area. Upon the receipt of the petition, the Secretary shall, within six weeks of the receipt by him of such petition, cause an investigation of the area proposed to be designated as a natural seed oyster area. Such investigation shall be made by qualified biologists of the Department. The Secretary shall then make a recommendation to the Marine Fisheries Commission as to whether the area described in the petition should be designated as a natural seed oyster area and such area shall be so designated by the Marine Fisheries Commission only after the Secretary so recommends as being in the best interests of the State.

(2) The Secretary shall issue permits to all qualified individuals who are residents of North Carolina without regard to county of residence to transplant seed oysters from said designated natural seed oyster areas, setting out the quantity which may be taken, the times which the taking is permissible and other reasonable restrictions imposed to aid him in his duty of regulating such transplanting operations. Any transplanting operation which does not substantially comply with the restrictions of the permit issued is unlawful.

(e) The Marine Fisheries Commission may implement the provisions of this section by rules governing sale, possession, transportation, storage, handling, planting, and harvesting of oysters and clams and setting out any system of marking oysters and clams or of permits or receipts relating to them generally, from both public and private beds, as necessary to regulate the lawful transplanting of seed oysters and oysters or clams taken from or placed on public or private beds. (1921, c. 132, s. 2; C.S., s. 1959(b); 1961, c. 1189, s. 1; 1965, c. 957, s. 2; 1967, c. 878; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1987, c. 641, s. 6; c. 827, s. 98; 1989, c. 727, s. 100; 1997-400, s. 5.7.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until

all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

Effect of Amendments. — The 1997 amendment, effective July 1, 1999, substituted "G.S. 113-169.1(2)" for "G.S. 113-158" in subdivision (a)(2).

Legal Periodicals. — For a note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

§ 113-204. Propagation of shellfish.

The Department is authorized to close areas of public bottoms under coastal fishing waters for such time as may be necessary in any program of propagation of shellfish. The Department is authorized to expend State funds planting such areas and to manage them in ways beneficial to the overall productivity of the shellfish industry in North Carolina. The Department in its discretion in accordance with desirable conservation objectives may make shellfish produced by it available to commercial fishermen generally, to those in possession of private shellfish beds, or to selected individuals cooperating with the Department in demonstration projects concerned with the cultivation, harvesting, or processing of shellfish. (1921, c. 132, s. 1; C.S., s. 1959(a); 1961, c. 1189, s. 1; 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 101.)

§ 113-205. Registration of grants in navigable waters; exercise of private fishery rights.

(a) Every person claiming to any part of the bed lying under navigable waters of any coastal county of North Carolina or any right of fishery in navigable waters of any coastal county superior to that of the general public must register the grant, charter, or other authorization under which he claims with the Secretary. Such registration must be accompanied by a survey of the claimed area, meeting criteria established by the Secretary for surveys of oyster and clam leases. All rights and titles not registered in accordance with this section on or before January 1, 1970, are hereby declared null and void. The Secretary must give notice of this section at least once each calendar year for three years by publication in a newspaper or newspapers of general circulation throughout all coastal counties of the State. For the purpose of this subsection, "coastal county" shall mean all the following counties: Beaufort, Bertie, Bladen, Brunswick, Camden, Carteret, Chowan, Columbus, Craven, Currituck, Dare, Gates, Halifax, Hertford, Hyde, Martin, New Hanover, Northampton, Onslow, Pamlico, Pasquotank, Pender, Perquimans, Tyrrell, and Washington. The provisions of this section shall not apply to the land lying under any private fish pond or irrigation pond.

(b) The Marine Fisheries Commission may make reasonable rules governing utilization of private fisheries and may require grantees or others with private rights to mark their fishery areas or private beds in navigable waters as a precondition to the right of excluding the public from exercising the private rights claimed to be secured to them. Nothing in this section is to be deemed to confer upon any grantee or other person with private rights the power to impede navigation upon or hinder any other appropriate use of the surface of navigable waters of North Carolina. (1965, c. 957, s. 2; 1971, c. 346, s. 1; 1973, c. 1262, s. 28; 1987, c. 827, s. 98.)

Legal Periodicals. — For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

For note on estuarine pollution, see 49 N.C.L. Rev. 921 (1971).

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust,"

see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Navigable Waters. — If a body of water in its natural condition can be navigated by watercraft, it is navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine. Gwathmey v. State ex rel. Dep't of Env't, Health & Natural Resources, 342 N.C. 287, 464 S.E.2d 674 (1995).

The superior court is accorded subject matter jurisdiction only over appeals of denial of a claim of title or franchise asserted pursuant to this section. Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997).

Applied in State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988).

Cited in State v. Chadwick, 31 N.C. App. 398, 229 S.E.2d 255 (1976); RJR Technical Co. v. Pratt, 113 N.C. App. 511, 439 S.E.2d 176 (1994); Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

§ 113-206. Chart of grants, leases and fishery rights; overlapping leases and rights; contest or condemnation of claims; damages for taking of property.

(a) The Secretary must commence to prepare as expeditiously as possible charts of the waters of North Carolina containing the locations of all oyster and clam leaseholds made by the Department under the provisions of this Article and of all existing leaseholds as they are renewed under the provisions of this Article, the locations of all claims of grant of title to portions of the bed under navigable waters registered with him, and the locations of all areas in navigable waters to which a right of private fishery is claimed and registered with him. Charting or registering any claim by the Secretary in no way implies recognition by the State of the validity of the claim.

(a1) If a claim is based on an oyster or other shellfish grantor a perpetual franchise for shellfish cultivation, the Secretary may, to resolve the claim, grant a shellfish lease to the claimant for part or all of the area claimed. If a claim of exclusive shellfishing rights was registered based upon a conveyance by the Literary Fund, the North Carolina Literary Board or the State Board of Education, and the claimant shows that the area had been cultivated by the claimant or his predecessor in title for the seven-year period prior to registration of the claim, the Secretary may, to resolve the claim, grant a shellfish lease to the claimant for all or part of the area claimed, not to exceed ten acres. A shellfish lease granted under this subsection is subject to the restrictions imposed on shellfish leases in G.S. 113-202, except the prohibition against leasing an area that contains a natural shellfish bed in G.S. 113-202(a)(2). This restriction is waived because, due to the cultivation efforts of the claimant, the area is likely to contain a natural shellfish bed.

(b) In the event of any overlapping of areas leased by the Department, the Secretary shall recommend modification of the areas leased as he deems equitable to all parties. Appeal from the recommendation of the Secretary lies for either party in the same manner as for a lease applicant as to which there is a recommendation of denial or modification of lease. If there is no appeal, or upon settlement of the issue upon appeal, the modified leases must be approved by the Marine Fisheries Commission and reissued by the Secretary in the same manner as initial or renewal leases. Leaseholders must furnish the Secretary surveys of the modified leasehold areas, meeting the requisite criteria for surveys established by the Secretary.

(c) In the event of any overlapping of areas leased by the Department and of areas in which title or conflicting private right of fishery is claimed and

registered under the provisions of this Article, the Secretary must give preference to the leaseholder engaged in the production of oysters or clams in commercial quantities who received the lease with no notice of the existence of any claimed grant or right of fishery. To this end, the Secretary shall cause a modification of the claim registered with him and its accompanying survey to exclude the leasehold area. Such modification effected by the Secretary has the effect of voiding the grant of title or right of fishing to the extent indicated.

(d) In the interest of conservation of the marine and estuarine resources of North Carolina, the Department may institute an action in the superior court to contest the claim of title or claimed right of fishery in any navigable waters of North Carolina registered with the Secretary. In such proceeding, the burden of showing title or right of fishery, by the preponderance of the evidence, shall be upon the claiming title or right holder. In the event the claiming title or right holder prevails, the trier of fact shall fix the monetary worth of the claim. The Department may elect to condemn the claim upon payment of the established owners or right holders their pro rata shares of the amount so fixed. The Department may make such payments from such funds as may be available to it. An appeal lies to the appellate division by either party both as to the validity of the claim and as to the fairness of the amount fixed. The Department in such actions may be represented by the Attorney General. In determining the availability of funds to the Department to underwrite the costs of litigation or make condemnation payments, the use which the Department proposes to make of the area in question may be considered; such payments are to be deemed necessary expenses in the course of operations attending such use or of developing or attempting to develop the area in the proposed manner.

(e) A person who claims that the application of G.S. 113-205 or this section has deprived him of his private property rights in land under navigable waters or his right of fishery in navigable waters without just compensation may file a complaint in the superior court of the county in which the property is located to contest the application of G.S. 113-205 or this section. If the plaintiff prevails, the trier of fact shall fix the monetary worth of the claim, and the Department may condemn the claim upon payment of this amount to him if the Secretary considers condemnation appropriate and necessary to conserve the marine and estuarine resources of the State. The Department may pay for a condemned claim from available funds. An action under this subsection is considered a condemnation action and is therefore subject to G.S. 7A-248.

The limitation period for an action brought under this subsection is three years. This period is tolled during the disability of the plaintiff. No action, however, may be instituted under this subsection after December 31, 2006.

(f) In evaluating claims registered pursuant to G.S. 113-205, the Secretary shall favor public ownership of submerged lands and public trust rights. The Secretary's action does not alter or affect in any way the rights of a claimant or the State.

To facilitate resolution of claims registered pursuant to G.S. 113-205, the Secretary, in cooperation with the Secretary of Administration and the Attorney General, shall establish a plan to resolve these claims by December 31, 2003. The Secretary shall notify the Secretary of Administration and the Attorney General of the resolution of each claim. In addition, on or before October 1 of each year, the Secretary shall submit a report to the Joint Legislative Commission on Governmental Operations stating the following:

(1) The number of claims registered pursuant to G.S. 113-205 that were resolved during the preceding year;
(2) The cost of resolving these claims;
(3) The number of unresolved claims; and
(4) Payments made to acquire claims by condemnation. (1965, c. 957, s. 2; 1969, c. 44, s. 69; c. 541, s. 11; 1973, c. 1262, s. 28; 1977, c. 771, s. 4;

1985, c. 279; c. 762; 1989, c. 423, s. 3; c. 727, s. 102; 1989 (Reg. Sess., 1990), c. 869, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 717, ss. 1-3; 1998-179, s. 1.)

Effect of Amendments. — The 1998 amendment, effective October 8, 1998, in subsection (e), substituted "December 31, 2006" for "December 31, 2001"; and in subsection (f), substituted "December 31, 2003" for "December 31, 1998."

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Subsection (d) is inapplicable to the Marine Fisheries Division's denial of a permit to harvest shell fish by mechanical means within submerged lands. Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997).

No exclusive right to fish in navigable streams exists. State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988).

The superior court is accorded subject matter jurisdiction only over appeals of denial of a claim of title or franchise asserted pursuant to § 113-205. Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997), cert. denied, 347 N.C. 396, 494 S.E.2d 406 (1997).

No Right in Natural Oyster Beds Can Be Gained by Prescription. — The general common law rule is that no right in natural oyster beds can be gained by prescription against the state. State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988).

§ 113-207. Taking shellfish from certain areas forbidden; penalty.

(a) To the extent that funds are available, the Department shall post oyster rocks or appropriate landing sites to forbid the taking of clams upon such rocks by use of rakes or tongs or any other device which will disturb or damage the oysters thereon. As used in this section, "oyster rocks" mean those rocks in the coastal fishing waters upon which oysters grow.

(b) It is unlawful for any person to take clams on oyster rocks posted by the Department by use of rakes, tongs, or any other device which will disturb or damage the oysters growing thereon. This section will not apply to the taking of clams by signing.

(c) It is unlawful for any person to take shellfish within 150 feet of any part of a publically owned pier beneath which the Division of Marine Fisheries has deposited clutch material.

(d) A person who violates this section is guilty of a Class 3 misdemeanor. (1977, c. 515, s. 1; c. 771, s. 4; 1989, c. 727, s. 103; 1993, c. 539, s. 841; 1994, Ex. Sess., c. 24, s. 14(c); 1999-143, s. 1.)

Effect of Amendments. — Session Laws 1999-143, s. 1, effective September 1, 1999, and applicable to violations occurring on or after that date, substituted "Taking shellfish from certain areas" for "Clamming on posted oyster rocks" in the catchline; rewrote subsection (a); in subsection (b), substituted "is" for "shall be" and deleted the former third sentence, which read, "A violation of this section shall constitute a Class 3 misdemeanor"; and added subsections (c) and (d).

§ 113-208. Protection of private shellfish rights.

(a) It is unlawful for any person, other than the holder of private shellfish rights, to take or attempt to take shellfish from any privately leased, franchised, or deeded shellfish bottom area without written authorization of the

holder and with actual knowledge it is a private shellfish bottom area. Actual knowledge will be presumed when the shellfish are taken or attempted to be taken:

(1) From within the confines of posted boundaries of the area as identified by signs, whether the whole or any part of the area is posted, or

(2) When the area has been regularly posted and identified and the person knew the area to be the subject of private shellfish rights.

A violation of this section shall constitute a Class A1 misdemeanor, which may include a fine of not more than five thousand dollars ($5,000). The written authorization shall include the lease number or deed reference, name and address of authorized person, date of issuance, and date of expiration, and it must be signed by the holder of the private shellfish right. Identification signs shall include the lease number or deed reference and the name of the holder.

(b) The prosecutor shall dismiss any case brought for a violation of this section if the defendant produces a notarized written authorization in conformance with subsection (a) which states that the defendant had permission to take oysters or clams from the leased area at the time of the alleged violation; except the prosecutor may refuse to dismiss the case if he has reason to believe that the written authorization is fraudulent. (1979, c. 537; 1987, c. 463; 1989, c. 281, s. 2; 1993, c. 539, s. 842; 1994, Ex. Sess., c. 24, s. 14(c); 1998-225, s. 3.7.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective December 1, 1998, and applicable to offenses committed on or after that date, in the paragraph immediately following subdivision (a)(2), substituted "Class A1" for "Class 2."

Legal Periodicals. — For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

§ 113-209. Taking polluted shellfish at night or with prior conviction forbidden; penalty.

(a) It is unlawful for any person between sunset and sunrise to willfully take or attempt to take shellfish from areas closed to harvest by statute, rule, or proclamation because of suspected pollution.

(b) It is unlawful for any person to willfully possess, sell or offer for sale shellfish taken between sunset and sunrise from areas closed to harvest by statute, rule, or proclamation because of suspected pollution.

(c) It is unlawful for any person who has been convicted of an offense under this Chapter within the preceding two years involving shellfish taken from areas closed because of suspected pollution to willfully take, attempt to take, possess, sell or offer for sale shellfish from areas closed to harvest by statute, rule, or proclamation because of suspected pollution.

(d) Any person violating any provisions of this section shall be guilty of a Class I felony which may include a fine no less than two thousand five hundred dollars ($2,500). Upon conviction of any person for a violation of this section, the court shall order the confiscation of all weapons, equipment, vessels, vehicles, conveyances, fish, and other evidence, fruit, and instrumentalities of the offense. The confiscated property shall be disposed of in accordance with G.S. 113-137. (1989, c. 275, s. 1; 1993, c. 539, s. 1301; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 113-210 through 113-220: Reserved for future codification purposes.

ARTICLE 17.

Administrative Provisions; Regulatory Authority of Marine Fisheries Commission and Department.

§ 113-221. Rules; proclamations; emergency Commission meetings.

(a) Chapter 150B of the General Statutes governs the adoption of rules under this Article, other than proclamations issued under this Article. Chapter 150B does not apply to proclamations issued under this Article.

(b) Upon purchasing a license, each licensee shall be given a copy of the rules concerning the activities authorized by the license.

(c) The Fisheries Director shall notify licensees of a new rule or change to a rule by sending each licensee either a newsletter containing the text of the rule or change or an updated codification of the rules of the Marine Fisheries Commission that contains the new rule or change.

(d) Unless there are overriding policy considerations involved, any rule of the Marine Fisheries Commission which will in the judgment of the Marine Fisheries Commission result in severe curtailment of the usefulness or value of equipment in which fishermen have any substantial investment should be given such a future effective date as to minimize undue potential economic loss to fishermen. Whether or not any provision may cause potential economic loss and whether or not a future effective date should be set is a matter within the complete discretion of the Marine Fisheries Commission. The Marine Fisheries Commission need not set any future effective date more than two years in advance of the passage of any rule.

(e) The Marine Fisheries Commission may delegate to the Fisheries Director the authority to issue proclamations suspending or implementing, in whole or in part, particular rules of the Commission which may be affected by variable conditions. Such proclamations are to be issued by the Fisheries Director or by a person designated by the Fisheries Director. All proclamations must state the hour and date upon which they become effective and must be issued at least 48 hours in advance of the effective date and time. In those situations in which the proclamation prohibits the taking of certain fisheries resources for reasons of public health, the proclamation can be made effective immediately upon issuance. Notwithstanding any other provisions of this subsection, a proclamation can be issued at least 12 hours in advance of the effective date and time to reopen the taking of certain fisheries resources closed for reason of public health through a prior proclamation made effective immediately upon issuance. Persons violating any proclamation which is made effective immediately shall not be charged with a criminal offense during the time between the issuance and 48 hours after such issuance unless such person had actual notice of the issuance of such proclamation. Fisheries resources taken or possessed by any person in violation of any proclamation may be seized regardless of whether such person had actual notice of the proclamation. A permanent file of the text of all proclamations shall be maintained in the office of the Fisheries Director. Certified copies of proclamations are entitled to judicial notice in any civil or criminal proceeding.

The Fisheries Director must make every reasonable effort to give actual notice of the terms of any proclamation to the persons who may be affected thereby. Reasonable effort includes press releases to communications media, posting of notices at docks and other places where persons affected may gather, personal communication by inspectors and other agents of the Fisheries Director, and such other measures designed to reach the persons who may be affected. It is a defense to an enforcement action for a violation of a proclamation that a licensee was prevented from receiving notice of the proclamation due to a natural disaster or other act of God occasioned exclusively by violence of nature without interference of any human agency and that could not have been prevented or avoided by the exercise of due care or foresight.

(e1) Pursuant to the request of five or more members of the Marine Fisheries Commission, its chairman may call an emergency meeting of the Commission to review: (1) a proposed issuance or issuance of proclamations under the authority delegated to the Fisheries Director pursuant to (e) of this section, except those proclamations issued for reasons of public health; or (2) the need to issue a proclamation to allow the taking of certain fisheries resources in areas not opened through proclamations issued by the Fisheries Director. At least 48 hours prior to any such meeting, a public announcement of the meeting shall be issued that describes the action requested by the members of the Commission; and the Department must make every reasonable effort to give actual notice of the meeting to persons who may be affected thereby. After its review is complete, the Marine Fisheries Commission, consistent with its duty to protect, preserve, and enhance the commercial and sports fisheries resources of the State, may (1) approve, cancel, or modify the proposed proclamation or issued proclamation under review; or (2) direct the Fisheries Director to issue a proclamation that allows the taking of certain fisheries resources.

The variable conditions that affect such resource management decisions require that these emergency meetings and any resulting orders by the Commission be exempt from the provisions of Articles 2 and 5 of Chapter 150B. The decisions of the Marine Fisheries Commission shall be the final decision of the State and shall not be set aside on judicial review unless found to be arbitrary and capricious.

(f) All persons who may be affected by them are under a duty to keep themselves informed of current rules of the Marine Fisheries Commission and proclamations of the Fisheries Director. It is no defense in any criminal prosecution for the defendant to show that he in fact received no notice of a particular rule or proclamation. In any prosecution for violation of the provisions of any rule or proclamation, or in which proof of matter contained in a rule or proclamation is involved, the Department is deemed to have complied with publication procedures and the burden is on the defendant to show by the greater weight of the evidence substantial failure of compliance by the Department with the required publication procedures.

(g) Every court must take judicial notice of any codification of rules issued by the Fisheries Director within two years preceding the date of the offense charged or transaction in issue. In the absence of any indication to the contrary, such codifications are to be deemed accurate and current statements of the text of the rules in question and it is incumbent upon any person asserting that a relevant portion of the codified text is inaccurate, or has been amended or deleted, to satisfy the court as to the text of the rules which is in fact properly applicable.

(h) Repealed by Session Laws 1983, c. 221, s. 1. (1915, c. 84, s. 21; 1917, c. 290, s. 7; C.S., s. 1878; 1925, c. 168, s. 2; 1935, c. 35; 1945, c. 776; 1953, cc. 774, 1134, 1251; 1963, c. 1097, s. 1; 1965, c. 957, s. 2; 1973, c. 1262, ss. 28, 86; c.

1331, s. 3; 1975, 2nd Sess., c. 983, s. 70; 1979, c. 388, s. 6; 1983, cc. 221, 619, 620; 1987, c. 641, ss. 7, 19; c. 827, s. 7; 1997-400, s. 4.3; 1998-225, s. 3.8.)

Editor's Note. — Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1998-225, s. 5.3 contained a similar provision.

Session Laws 1997-400, s. 6.13, is a severability clause.

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective November 5, 1998, in the second paragraph of subsection (e), substituted the present last sentence for the former, which read, "The Fisheries Director may determine, on a case by case basis and at the Fisheries Director's sole discretion, that a proclamation did not apply to an individual licensee when an act of God occurred that prevented the licensee from receiving notice of the proclamation."

§ 113-222. Arrest, service of process and witness fees of inspectors.

All arrest fees and other fees that may be charged in any bill of costs for service of process by inspectors must be paid to the county in which the trial is held. No witness fee may be taxed in any bill of costs by virtue of the appearance of an inspector as a witness in a criminal case within his enforcement jurisdiction. Acceptance by any inspector of any arrest fee, witness fee, or any other fee to which he is not entitled is a Class 1 misdemeanor. (1965, c. 957, s. 2; 1993, c. 539, s. 843; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-223. Reciprocal agreements by Department generally.

Subject to the specific provisions of G.S. 113-169.5 and G.S. 113-170.1 relating to reciprocal provisions as to landing and selling catch and as to licenses, the Department is empowered to make reciprocal agreements with other jurisdictions respecting any of the matters governed in this Subchapter. Pursuant to such agreements the Department may modify provisions of this Subchapter in order to effectuate the purposes of such agreements, in the overall best interests of the conservation of marine and estuarine resources. (1915, c. 84, s. 5; 1917, c. 290, s. 10; C.S., s. 1883; 1953, c. 1086; 1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 104; 1998-225, s. 4.22.)

Editor's Note. — Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, substituted "G.S. 113-169.5 and G.S. 113-170.1" for "G.S. 113-153 and G.S. 113-161."

§ 113-224. Cooperative agreements by Department.

The Department is empowered to enter into cooperative agreements with public and private agencies and individuals respecting the matters governed in this Subchapter. Pursuant to such agreements the Department may expend funds, assign employees to additional duties within or without the State,

assume additional responsibilities, and take other actions that may be required by virtue of such agreements, in the overall best interests of the conservation of marine and estuarine resources. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 105.)

§ 113-225. Inspectors not to have financial interest in fisheries.

Except as provided in this Subchapter respecting operations of demonstration and research projects by employees of the Department as part of their employment, no inspector may be financially interested in any fishing industry in the State of North Carolina. (1965, c. 957, s. 2.)

§ 113-226. Administrative authority of Department; administration of funds; delegation of powers.

(a) In the overall best interests of the conservation of marine and estuarine resources, the Department may lease or purchase lands, equipment, and other property; accept gifts and grants on behalf of the State; establish boating and fishing access areas; establish fisheries, fishery processing or storage plants, planted seafood beds, fish farms, and other enterprises related to the conservation of marine and estuarine resources as research or demonstration projects either alone or in cooperation with some individual or agency; sell the catch or processed fish or other marine and estuarine resources resulting from research fishing operations or demonstration projects; provide matching funds for entering into projects with some other governmental agency or with some scientific, educational, or charitable foundation or institution; condemn lands in accordance with the provisions of Chapter 40A of the General Statutes and other governing provisions of law; and sell, lease, or give away property acquired by it. Provided, that any private person selected to receive gifts or benefits by the Department be selected:

(1) With regard to the overall public interest that may result, and

(2) From a defined class upon such a rational basis open to all within the class as to prevent constitutional infirmity with respect to requirements of equal protection of the laws or prohibitions against granting exclusive privileges or emoluments.

(b) All money credited to, held by, or to be received by the Department in respect of the conservation of marine and estuarine resources must be deposited with the Department. In administering such funds and recommending expenditures, the Department must give attention to the sources of the revenues received so as to encourage disbursements to be made on an equitable basis; nevertheless, except as provided in this section, separate funds may not be established and particular projects and programs deemed to be of sufficient importance in the conservation of marine and estuarine resources may receive proportional shares of Department expenditures that are greater than the proportional shares of license and other revenues produced by such projects or programs for the Department.

(c) If as a precondition of receiving funds under any cooperative program there must be a separation of license revenues received from certain classes of licensees and utilization of such revenues for limited purposes, the Department is directed to make such arrangements for separate accounting or for separate funding as may be necessary to insure the use of the revenues for the required purposes and eligibility for the cooperative funds. In such instance, if required, such revenues may be retained by the Department until expended upon the limited purposes in question. This subsection applies whether the cooperative program is with a public or private agency and whether the

Department acts alone on behalf of the State or in conjunction with the Wildlife Resources Commission or some other State agency.

(d) Repealed by Session Laws 1973, c. 1262, s. 28. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1987, c. 827, s. 103; 1989, c. 727, s. 106.)

§ 113-227: Repealed by Session Laws 1973, c. 1262, s. 28.

§ 113-228. Adoption of federal regulations.

To the extent that the Department is granted authority in this Subchapter over subject matter as to which there is concurrent federal jurisdiction, the Marine Fisheries Commission in its discretion may by reference in its rules adopt relevant provisions of federal laws and regulations as State rules. To prevent confusion or conflict of jurisdiction in enforcement, the Marine Fisheries Commission is exempt from any conflicting limitations in G.S. 150B-21.6 so that it may provide for automatic incorporation by reference into its rules of future changes within any particular set of federal laws or regulations relating to some subject clearly within the jurisdiction of the Department. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1987, c. 641, s. 11; c. 827, s. 104; 1991 (Reg. Sess., 1992), c. 890, s. 7.)

§ 113-229. Permits to dredge or fill in or about estuarine waters or State-owned lakes.

(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or State-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department. Granting of the State permit shall not relieve any party from the necessity of obtaining a permit from the United States Army Corps of Engineers for work in navigable waters, if the same is required. The Department shall continue to coordinate projects pertaining to navigation with the United States Army Corps of Engineers.

(b) All applications for such permits shall include a plat of the areas in which the proposed work will take place, indicating the location, width, depth and length of any proposed channel, the disposal area, and a copy of the deed or other instrument under which the applicant claims title to the property adjoining the waters in question, (or any land covered by waters), tidelands, or marshlands, or if the applicant is not the owner, then a copy of the deed or other instrument under which the owner claims title plus written permission from the owner to carry out the project on his land.

(c) In lieu of a deed or other instrument referred to in subsection (b) of this section, the agency authorized to issue such permits may accept some other reasonable evidence of ownership of the property in question or other lawful authority to make use of the property.

(c1) The Coastal Resources Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider:

(1) The size of the development;
(2) The impact of the development on areas of environmental concern;
(3) How often the class of development is carried out;
(4) The need for on-site oversight of the development; and
(5) The need for public review and comment on individual development projects.

General permits may be issued by the Commission as rules under the provisions of G.S. 113A-107. Individual development carried out under the provisions of general permits shall not be subject to the mandatory notice

provisions of this section. The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues. The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit.

(d) An applicant for a permit, other than an emergency permit, shall send a copy of his application to the owner of each tract of riparian property that adjoins that of the applicant. The copy shall be served by certified mail or, if the owner's address is unknown and cannot be ascertained with due diligence or if a diligent but unsuccessful effort has been made to serve the copy by certified mail, by publication in accordance with the rules of the Commission. An owner may file written objections to the permit with the Department for 30 days after he is served with a copy of the application. In the case of a special emergency dredge or fill permit the applicant must certify that he took all reasonable steps to notify adjacent riparian owners of the application for a special emergency dredge and fill permit prior to submission of the application. Upon receipt of this certification, the Secretary shall issue or deny the permit within the time period specified in (e) of this section, upon the express understanding from the applicant that he will be entirely liable and hold the State harmless for all damage to adjacent riparian landowners directly and proximately caused by the dredging or filling for which approval may be given.

(e) Applications for permits except special emergency permit applications shall be circulated by the Department among all State agencies and, in the discretion of the Secretary, appropriate federal agencies having jurisdiction over the subject matter which might be affected by the project so that such agencies will have an opportunity to raise any objections they might have. The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted. Such permit may be conditioned upon the applicant amending his proposal to take whatever measures are reasonably necessary to protect the public interest with respect to the factors enumerated in this subsection. Permits may allow for projects granted a permit the right to maintain such project for a period of up to 10 years. The right to maintain such project shall be granted subject to such conditions as may be reasonably necessary to protect the public interest. The Coastal Resources Commission shall coordinate the issuance of permits under this section and G.S. 113A-118 to avoid duplication and to create a single, expedited permitting process. The Coastal Resources Commission may adopt rules interpreting and applying the provisions of this section and rules specifying the procedures for obtaining a permit under this section. Maintenance work as defined in this subsection shall be limited to such activities as are required to maintain the project dimensions as found in the permit granted. The Department shall act on an application for permit within 75 days after the completed application is filed, provided the Department may extend such deadline by not more than an additional 75 days if necessary properly to consider the application, except for applications for a special emergency permit, in which case the Department shall act within two working days after an application is filed, and failure to so act shall automatically approve the application.

(e1) The Secretary is empowered to issue special emergency dredge or fill permits upon application. Emergency permits may be issued only when life or

structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure. The Coastal Resources Commission may elaborate by rule upon what conditions the Secretary may issue a special emergency dredge or fill permit. The Secretary may condition the emergency permit upon any reasonable conditions, consistent with the emergency situation, he feels are necessary to reasonably protect the public interest. Where an application for a special emergency permit includes work beyond which the Secretary, in his discretion, feels necessary to reduce imminent dangers to life or property he shall issue the emergency permit only for that part of the proposed work necessary to reasonably reduce the imminent danger. All further work must be applied for by application for an ordinary dredge or fill permit. The Secretary shall deny an application for a special dredge or fill permit upon a finding that the detriment to the public which would occur on issuance of the permit measured by the five factors in G.S. 113-229(e) clearly outweighs the detriment to the applicant if such permit application should be denied.

(f) A permit applicant who is dissatisfied with a decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. Any other person who is dissatisfied with a decision to deny or grant a permit may file a petition for a contested case hearing only if the Coastal Resources Commission determines, in accordance with G.S. 113A-121.1(c), that a hearing is appropriate. A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the Commission makes a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of the permit.

(g) G.S. 113A-122 applies to an appeal of a permit decision under subsection (f).

(h) Repealed by Session Laws 1987, c. 827, s. 105.

(h1) All construction and maintenance dredgings of beach-quality sand may be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from another location shall be placed on the downdrift beaches.

(i) Subject to subsection (h1) of this section, all materials excavated pursuant to such permit, regardless of where placed, shall be encased or entrapped in such a manner as to minimize their moving back into the affected water.

(j) None of the provisions of this section shall relieve any riparian owner of the requirements imposed by the applicable laws and regulations of the United States.

(k) Any person, firm, or corporation violating the provisions of this section shall be guilty of a Class 2 misdemeanor. Each day's continued operation after notice by the Department to cease shall constitute a separate offense. A notice to cease shall be served personally or by certified mail.

(*l*) The Secretary may, either before or after the institution of proceedings under subsection (k) of this section, institute a civil action in the superior court in the name of the State upon the relation of the Secretary, for damages, and injunctive relief, and for such other and further relief in the premises as said court may deem proper, to prevent or recover for any damage to any lands or property which the State holds in the public trust, and to restrain any violation of this section or of any provision of a dredging or filling permit issued under this section. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from the penalty prescribed by this section for any violation of the same.

(m) This section shall apply to all persons, firms, or corporations, their employees, agents, or contractors proposing excavation or filling work in the

estuarine waters, tidelands, marshlands and State-owned lakes within the State, and the work to be performed by the State government or local governments. Provided, however, the provisions of this section shall not apply to the activities and functions of the Department and local health departments that are engaged in mosquito control for the protection of the health and welfare of the people of the coastal area of North Carolina as provided under G.S. 130A-346 through G.S. 130A-349. Provided, further, this section shall not impair the riparian right of ingress and egress to navigable waters.

(n) Within the meaning of this section:

(1) "State-owned lakes" include man-made as well as natural lakes.

(2) "Estuarine waters" means all the waters of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters agreed upon by the Department and the Wildlife Resources Commission, within the meaning of G.S. 113-129.

(3) "Marshland" means any salt marsh or other marsh subject to regular or occasional flooding by tides, including wind tides (whether or not the tidewaters reach the marshland areas through natural or artificial watercourses), provided this shall not include hurricane or tropical storm tides. Salt marshland or other marsh shall be those areas upon which grow some, but not necessarily all, of the following salt marsh and marsh plant species: Smooth or salt water Cordgrass *(Spartina alterniflora)*, Black Needlerush *(Juncus roemerianus)*, Glasswort *(Salicornia spp.)*, Salt Grass *(Distichlis spicata)*, Sea Lavender *(Limonium spp.)*, Bulrush *(Scirpus spp.)*, Saw Grass *(Cladium jamaicense)*, Cattail *(Typha spp.)*, Salt-Meadow Grass *(Spartina patens)*, and Salt Reed-Grass *(Spartina cynosuroides)*. (1969, c. 791, s. 1; 1971, c. 1159, s. 6; 1973, c. 476, s. 128; c. 1262, ss. 28, 86; c. 1331, s. 3; 1975, c. 456, ss. 1-7; 1977, c. 771, s. 4; 1979, c. 253, ss. 1, 2; 1983, c. 258, ss. 1-3; c. 442, s. 2; 1987, c. 827, s. 105; 1989, c. 727, s. 107; 1993, c. 539, s. 844; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 777, s. 6(a), (b); 1995, c. 509, s. 55.1(a)-(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 844, which amended this section, was effective October 1, 1994, and applicable to offenses occurring on or after that date.

Legal Periodicals. — For article on legal aspects of North Carolina coastal problems, see 49 N.C.L. Rev. 857 (1971).

For note on defining navigable waters and the application of the public trust doctrine in North Carolina, see 49 N.C.L. Rev. 888 (1971).

For note on preservation of the estuarine zone, see 49 N.C.L. Rev. 964 (1971).

For article, "Public Rights and Coastal Zone Management," see 51 N.C.L. Rev. 1 (1972).

For a note on the State's interest in wild animals, see 2 Campbell L. Rev. 151 (1980).

For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

The purpose of this section is to serve the overall purpose of the public interest in the preservation of the natural resources and to protect the rights of owners of riparian property that may be affected by such project. In re Milliken, 43 N.C. App. 382, 258 S.E.2d 856 (1979).

The purpose of this statute is to conserve our estuarine resources. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Subdivision (e)(2) Is Not Unlawful Delegation of Legislative Power. — There are adequate statutory guidelines and procedural safeguards relating to the authority of the Department of Natural Resources and Commu-

nity Development (now the Department of Environment, Health, and Natural Resources) and the review commission to deny an application for a permit to dredge or fill in estuarine waters pursuant to subdivision (2) in the second sentence of subsection (e) of this section upon finding "that there will be significant adverse effect on the value and enjoyment of the property of riparian owners," so that clause (2) does not constitute an unlawful delegation of legislative power in violation of N.C. Const., Art. I, § 6. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

And Is Constitutional Exercise of Police Power. — This statute, giving the Department of Natural Resources and Community Development (now the Department of Environment, Health, and Natural Resources) the authority to deny an application for a dredge or fill permit in estuarine waters upon finding "that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners," does not allow the State to favor private interests over public interests, and is a constitutional exercise of the police power since the denial of a permit where either the water or adjacent private property will be adversely affected is a matter of public interest and is therefore a proper subject for regulatory legislation, the permit application system created by this section is the most feasible and reasonable manner to control dredging and filling activities, and the restriction placed on a landowner is reasonable because it relates only to what the owner may do in the State's estuarine waters and does not interfere with the owner's right to use his own property. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Right to Trial by Jury. — The Coastal Area Management Act (CAMA) provides for a trial by jury only where a party owning land affected by a final decision of the Coastal Resources Commission petitions the superior court alleging a taking; there is no other statutory authority in CAMA, nor in the Dredge and Fill Act, granting a right to trial by jury. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

Trial court erred in granting defendant's demand for a jury trial in state-initiated proceeding seeking mandatory injunctive relief under Coastal Area Management Act (CAMA) and the Dredge and Fill Act for the removal of fill material on defendant's property; since such an action neither existed at common law nor by statute at the time of the adoption of the Constitution of 1868, N.C. Const., Art. I, § 25 did not apply. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

Permit Applications Reviewed Prospectively. — The statutory purpose can only be effected by reviewing a project prior to its completion. A request by the Department of the applicant to file an "after-the-fact" application for a permit defies the logic and purpose of the statute. Permit applications must be reviewed prospectively, taking into consideration the work already completed. In re Milliken, 43 N.C. App. 382, 258 S.E.2d 856 (1979).

Denial of permits under clause (2) of subsection (e) is proper only when there is evidence that the adjacent riparian landowners have been adversely affected in their enjoyment of those resources, and not when the adverse effect relates solely to the enjoyment and value of their own property. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

The restriction of clause (2) of subsection (e) of this section is not a restriction regarding what a landowner may do with his own land but is concerned with what a landowner adjacent to estuarine resources may do as far as dredging and filling in those waters when an adjacent landowner will be adversely affected in the enjoyment and value of his land. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

In determining whether to deny an application for a dredge and fill permit in estuarine waters on the ground that there would be a significant adverse effect on the value and enjoyment of the property of riparian owners, the review commission was not limited to a consideration only of the effects of the dredging and filling itself on adjacent landowners but could properly consider the effects of a boat ramp which was the ultimate purpose of the dredge and fill work. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

In determining whether to deny an application for a dredge and fill permit in estuarine waters on the ground that there would be a significant adverse effect on the value and enjoyment of the property of riparian owners, even if the review commission exceeded its statutory authority in considering the effects of a boat ramp which was the ultimate purpose of the dredge and fill work, the commission's denial of a dredge and fill permit would still be upheld where the application stated that the fill from the dredging operation would be placed on the roadbed leading to the boat ramp site; the riparian owners presented evidence that the roadbed has already suffered erosion, that erosion will continue unless adequate drainage measures which the applicant did not propose are taken, and that the erosion will affect the access area and the property of the riparian owners, since the adjacent owners' property will be adversely affected by the dredging and filling itself because of the further erosion that will occur. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

Burden of Proof Before Review Commission. — Placing the burden of proof at the hearing before the review commission on the party who lost before the Department of Natural Resources and Community Development (now the Department of Environment, Health, and Natural Resources) is simply a proper recognition that it is presumed that the Department will act in accordance with the law and the facts and the losing party should have the burden of showing that the Department erred. In re Broad & Gales Creek Community Ass'n, 300 N.C. 267, 266 S.E.2d 645 (1980).

If the record on appeal contains no narrative statement or transcript of the evidence offered before the Board [now Department], its conclusion is presumed to be correct. In re Seashell Co., 25 N.C. App. 470, 213 S.E.2d 374 (1975).

Cited in State ex rel. Cobey v. Simpson, 105 N.C. App. 95, 411 S.E.2d 616 (1992).

§ 113-230. Orders to control activities in coastal wetlands.

(a) The Secretary, with the approval of the Coastal Resources Commission, may from time to time, for the purpose of promoting the public safety, health, and welfare, and protecting public and private property, wildlife and marine fisheries, adopt, amend, modify, or repeal orders regulating, restricting, or prohibiting dredging, filling, removing or otherwise altering coastal wetlands. In this section, the term "coastal wetlands" shall mean any marsh as defined in G.S. 113-229(n)(3), as amended, and such contiguous land as the Secretary reasonably deems necessary to affect by any such order in carrying out the purposes of this section.

(b) The Secretary shall, before adopting, amending, modifying or repealing any such order, hold a public hearing thereon in the county in which the coastal wetlands to be affected are located, giving notice thereof to interested State agencies and each owner or claimed owner of such wetlands by certified or registered mail at least 21 days prior thereto.

(c) Upon adoption of any such order or any order amending, modifying or repealing the same, the Secretary shall cause a copy thereof, together with a plan of the lands affected and a list of the owners or claimed owners of such lands, to be recorded in the register of deeds office in the county where the land is located, and shall mail a copy of such order and plan to each owner or claimed owner of such lands affected thereby.

(d) Any person, firm or corporation that violates any order issued under the provisions of this section shall be guilty of a Class 2 misdemeanor.

(e) The superior court shall have jurisdiction in equity to restrain violations of such orders.

(f) Any person having a recorded interest in or registered claim to land affected by any such order may, within 90 days after receiving notice thereof, petition the superior court to determine whether the petitioner is the owner of the land in question, and in case he is adjudged the owner of the subject land, whether such order so restricts the use of his property as to deprive him of the practical uses thereof and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of a taking without compensation. If the court finds the order to be an unreasonable exercise of the police power, as aforesaid, the court shall enter a finding that such order shall not apply to the land of the petitioner; provided, however, that such finding shall not affect any other land than that of the petitioner. The Secretary shall cause a copy of such finding to be recorded forthwith in the register of deeds office in the county where the land is located. The method provided in this subsection for the determination of the issue of whether any such order constitutes a taking without compensation shall be exclusive, and such issue shall not be determined in any other proceeding.

(g) After a finding has been entered that such order shall not apply to certain land as provided in the preceding subsection, the Department of Administration, upon the request of the Coastal Resources Commission, shall

take the fee or any lesser interest in such land in the name of the State by eminent domain under the provisions of Chapter 146 of the General Statutes and hold the same for the purposes set forth in this section.

(h) This section shall not repeal the powers, duties and responsibilities of the Department under the provisions of G.S. 113-229. (1971, c. 1159, s. 7; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1979, c. 253, s. 4; 1989, c. 727, s. 108; 1993, c. 539, s. 845; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 113-231 through 113-240: Reserved for future codification purposes.

Article 18.

Commercial and Sports Fisheries Advisory Board.

§§ 113-241 through 113-250: Repealed by Session Laws 1973, c. 1262, ss. 28, 72.

Editor's Note. — Former sections 113-246 through 113-250 had been reserved for future codification purposes.

Article 19.

Marine Fisheries Compact and Commission.

§ 113-251. Definition of terms.

(a) As used in this Article, the word "Commission" refers to the Atlantic States Marine Fisheries Commission and the word "commissioner" refers to a member of that Commission.

(b) The reference in Article III of the Compact set out in G.S. 113-252 to the chairman of the committee on commercial fisheries shall be deemed to refer to the chairman of the Marine Fisheries Commission.

(c) The reference in Article III of the Compact set out in G.S. 113-252 to the Commissioner of Commercial Fisheries shall be deemed to refer to the Secretary.

(d) The reference in Article III of the Compact set out in G.S. 113-252 to the Board of the North Carolina Department of Conservation and Development shall be deemed to refer to the Secretary. (1965, c. 957, s. 2; 1973, c. 1262, s. 28; 1977, c. 771, s. 4; 1989, c. 727, s. 109.)

§ 113-252. Atlantic States Marine Fisheries Compact and Commission.

The Governor of this State is hereby authorized and directed to execute a compact on behalf of the State of North Carolina with any one or more of the states of Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia, and Florida and with such other states as may enter into the compact, legally joining therein in the form substantially as follows:

Atlantic States Marine Fisheries Compact

The contracting states solemnly agree:

Article I

The purpose of this Compact is to promote the better utilization of the fisheries, marine, shell and anadromous, of the Atlantic seaboard by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause. It is not the purpose of this Compact to authorize the states joining herein to limit the production of fish or fish products for the purpose of establishing or fixing the price thereof, or creating and perpetuating monopoly.

Article II

This agreement shall become operative immediately as to those states executing it whenever any two or more of the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, North Carolina, Georgia and Florida have executed it in the form that is in accordance with the laws of the executing state and the Congress has given its consent. Any state contiguous with any of the aforementioned states and riparian upon waters frequented by anadromous fish, flowing into waters under the jurisdiction of any of the aforementioned states, may become a party hereto as hereinafter provided.

Article III

Each state joining herein shall appoint three representatives to a commission hereby constituted and designated as the Atlantic States Marine Fisheries Commission. The Board of the North Carolina Department of Conservation and Development shall designate either the director of the Department, the chairman of the committee on commercial fisheries, or the Commissioner of Commercial Fisheries as one member of the Commission, and the Commission on Interstate Cooperation of the State shall designate a member of the North Carolina legislature as one of the members of said Commission, and the third member of said Commission, who shall be a citizen of the State having a knowledge of and interest in marine fisheries, shall be appointed by the Governor. This Commission shall be a body corporate, with the powers and duties set forth herein.

Article IV

The duty of the said Commission shall be to make inquiry and ascertain from time to time such methods, practices, circumstances and conditions as may be disclosed for bringing about the conservation and the prevention of the depletion and physical waste of the fisheries, marine, shell and anadromous, of the Atlantic seaboard. The Commission shall have power to recommend the coordination of the exercise of the police powers of the several states within their respective jurisdictions to promote the preservation of those fisheries and their protection against overfishing, waste, depletion or any abuse whatsoever and to assure a continuing yield from the fisheries resources of the aforementioned states.

To that end the Commission shall draft and, after consultation with the advisory committee hereinafter authorized, recommend to the governors and legislatures of the various signatory states legislation dealing with the conservation of the marine, shell and anadromous fisheries of the Atlantic seaboard. The Commission shall more than one month prior to any regular

meeting of the legislature in any signatory state, present to the governor of the state its recommendations relating to enactments to be made by the legislature of that state in furthering the intents and purposes of this Compact.

The Commission shall consult with and advise the pertinent administrative agencies in the states party hereto with regard to problems connected with the fisheries and recommend the adoption of such regulations as it deems advisable.

The Commission shall have power to recommend to the states party hereto the stocking of the waters of such states with fish and fish eggs, or joint stocking by some or all of the states party hereto, and when two or more of the states shall jointly stock waters the Commission shall act as the coordinating agency for such stocking.

Article V

The Commission shall elect from its number a chairman and a vice-chairman and shall appoint and at its pleasure remove or discharge such officers and employees as may be required to carry the provisions of this Compact into effect, and shall fix and determine their duties, qualifications and compensation. Said Commission shall adopt rules and regulations for the conduct of its business. It may establish and maintain one or more offices for the transaction of its business and may meet at any time or place but must meet at least once a year.

Article VI

No action shall be taken by the Commission in regard to its general affairs except by the affirmative vote of a majority of the whole number of compacting states present at any meeting. No recommendation shall be made by the Commission in regard to any species of fish except by the affirmative vote of a majority of the compacting states which have an interest in such species. The Commission shall define what shall be an interest.

Article VII

The Fish and Wildlife Service of the Department of the Interior of the government of the United States shall act as the primary research agency of the Atlantic States Marine Fisheries Commission, cooperating with the research agencies in each state for that purpose. Representatives of the said Fish and Wildlife Service shall attend the meetings of the Commission.

An advisory committee to be representative of the commercial fishermen and the saltwater anglers and such other interests of each state as the Commission deems advisable shall be established by the Commission as soon as practicable for the purpose of advising the Commission upon such recommendations as it may desire to make.

Article VIII

When any state other than those named specifically in Article II of this Compact shall become a party thereto for the purpose of conserving its anadromous fish in accordance with the provisions of Article II the participation of such state in the action of the Commission shall be limited to such species of anadromous fish.

Article IX

Nothing in this Compact shall be construed to limit the powers of any signatory state or to repeal or prevent the enactment of any legislation or the

enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries.

Article X

Continued absence of representation or of any representative on the Commission from any state party hereto shall be brought to the attention of the governor thereof.

Article XI

The states party hereto agree to make annual appropriations to the support of the Commission in proportion to the primary market value of the products of their fisheries, exclusive of cod and haddock, as recorded in the most recently published reports of the Fish and Wildlife Service of the United States Department of the Interior, provided no state shall contribute less than two hundred dollars ($200.00) per annum and the annual contribution of each state above the minimum shall be figured to the nearest one hundred dollars ($100.00).

The compacting states agree to appropriate initially the annual amounts scheduled below, which amounts are calculated in the manner set forth herein, on the basis of the catch record of 1938. Subsequent budgets shall be recommended by a majority of the Commission and the cost thereof allocated equitably among the states in accordance with their respective interests and submitted to the compacting states.

Schedule of Initial Annual State Contributions

Maine	$ 700
New Hampshire	200
Massachusetts	2300
Rhode Island	300
Connecticut	400
New York	1300
New Jersey	800
Delaware	200
Maryland	700
Virginia	1300
North Carolina	600
South Carolina	200
Georgia	200
Florida	1500

Article XII

This Compact shall continue in force and remain binding upon each compacting state until renounced by it. Renunciation of this Compact must be preceded by sending six months' notice in writing of intention to withdraw from the Compact to the other states party hereto. (1949, c. 1086, s. 1; 1965, c. 957, s. 18.)

State Government Reorganization. — The administration of the Fisheries Compact was transferred to the Department of Natural and Economic Resources by former § 143A-126, enacted by Session Laws 1971, c. 864. A transfer of functions was made to the Department of Natural Resources and Community Development by former § 143B-277. As to transfer of functions to the Department of Environment, Health, and Natural Resources, see § 143B-279.3.

§ 113-253. Amendment to Compact to establish joint regulation of specific fisheries.

The Governor is authorized to execute on behalf of the State of North Carolina an amendment to the Compact set out in G.S. 113-252 with any one or more of the states of Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, South Carolina, Georgia, and Florida or such other states as may become party to that Compact for the purpose of permitting the states that ratify this amendment to establish joint regulation of specific fisheries common to those states through the Atlantic States Marine Fisheries Commission and their representatives on that body. Notice of intention to withdraw from this amendment shall be executed and transmitted by the Governor and shall be in accordance with Article XII of the Atlantic States Marine Fisheries Compact and shall be effective as to this State with those states which similarly ratify this amendment. This amendment shall take effect as to this State with respect to such other of the aforesaid states as take similar action.

AMENDMENT NO. 1 OF THE ATLANTIC STATES
MARINE FISHERIES COMPACT

The states consenting to this amendment agree that any two or more of them may designate the Atlantic States Marine Fisheries Commission as a joint regulatory agency with such powers as they may jointly confer from time to time for the regulation of the fishing operations of the citizens and vessels of such designating states with respect to specific fisheries in which such states have a common interest. The representatives of such states on the Atlantic States Marine Fisheries Commission shall constitute a separate section of such Commission for the exercise of the additional powers so granted, provided that the states so acting shall appropriate additional funds for this purpose. The creation of such section as a joint regulatory agency shall not deprive the states participating therein of any of their privileges or powers or responsibilities in the Atlantic States Marine Fisheries Commission under the general compact. (1949, c. 1086, s. 2; 1965, c. 957, s. 18.)

§ 113-254. North Carolina members of Commission.

In pursuance of Article III of said Compact there shall be three members (hereinafter called commissioners) of the Atlantic States Marine Fisheries Commission (hereinafter called Commission) from the State of North Carolina. The first commissioner from the State of North Carolina shall be the Fisheries Director of the Division of Marine Fisheries of the Department, ex officio, and the term of such ex officio commissioner shall terminate at the time he ceases to hold such office, and his successor as commissioner shall be his successor as Fisheries Director of the Division of Marine Fisheries. The second commissioner from the State of North Carolina shall be a legislator and member of the Commission on Interstate Cooperation of the State of North Carolina, ex officio, designated by said Commission on Interstate Cooperation, and the term of any such ex officio commissioner shall terminate at the time he ceases to hold said legislative office or said office as Commissioner on Interstate Cooperation, and his successor as commissioner shall be named in like manner. The Governor (by and with the advice and consent of the Senate) shall appoint a citizen as a third commissioner who shall have a knowledge of and interest in the marine fisheries problem. The term of said Commissioner shall be three years and he shall hold office until his successor shall be appointed and qualified. Vacancies occurring in the office of such Commissioner from any

reason or cause shall be filled by appointment by the Governor (by and with the advice and consent of the Senate) for the unexpired term. The Fisheries Director of the Division of Marine Fisheries appointed pursuant to Article III as ex officio commissioner may delegate, from time to time, to any deputy or other subordinate of the Fisheries Director, the power to be present and participate, including voting, as his representative or substitute at any meeting of or hearing by or other proceedings of the Commission. The terms of each of the initial three members shall begin at the date of the appointment of the appointive commissioner, provided the said Compact shall then have gone into effect in accordance with Article II of the Compact; otherwise they shall begin upon the date upon which said Compact shall become effective in accordance with said Article II.

Any commissioner may be removed from office by the Governor upon charges and after a hearing. (1949, c. 1086, s. 3; 1965, c. 957, s. 18; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1987, c. 641, s. 9; 1989, c. 727, s. 110.)

§ 113-255. Powers of Commission and commissioners.

There is hereby granted to the Commission and the commissioners thereof all the powers provided for in the said Compact and all the powers necessary or incidental to the carrying out of said Compact in every particular. All officers of the State of North Carolina are hereby authorized and directed to do all things falling within their respective provinces and jurisdiction necessary or incidental to the carrying out of said Compact in every particular; it being hereby declared to be the policy of the State of North Carolina to perform and carry out the said Compact and to accomplish the purposes thereof. All officers, bureaus, departments and persons of and in the State government or administration of the State of North Carolina are hereby authorized and directed at convenient times and upon request of the said Commission to furnish the said Commission with information and data possessed by them or any of them and to aid said Commission by loan of personnel or other means lying within their legal rights respectively. (1949, c. 1086, s. 4; 1965, c. 957, s. 18.)

§ 113-256. Powers herein granted to Commission are supplemental.

Any powers herein granted to the Commission shall be regarded as in aid of and supplemental to and in no case a limitation upon any of the powers vested in said Commission by other laws of the State of North Carolina or by the laws of the states of Maine, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, South Carolina, Georgia and Florida or by the Congress or the terms of said Compact. (1949, c. 1086, s. 5; 1965, c. 957, s. 18.)

§ 113-257. Report of Commission to Governor and legislature; recommendations for legislative action; examination of accounts and books by Auditor.

The Commission shall keep accurate accounts of all receipts and disbursements and shall report to the Governor and the legislature of the State of North Carolina on or before the tenth day of December in each year, setting forth in detail the transactions conducted by it during the 12 months preceding December 1 of that year and shall make recommendations for any legislative action deemed by it advisable, including amendments to the statutes of the State of North Carolina which may be necessary to carry out the intent and purposes of the compact between the signatory states.

The Auditor of the State of North Carolina is hereby authorized and empowered from time to time to examine the accounts and books of the Commission, including its receipts, disbursements and such other items referring to its financial standing as such Auditor may deem proper and to report the results of such examination to the Governor of such State. (1949, c. 1086, s. 6; 1955, c. 236, s. 2; 1965, c. 957, s. 18.)

§ 113-258. Commission subject to provisions of Executive Budget Act.

The Atlantic States Marine Fisheries Commission of the State of North Carolina shall be subject to all the terms and provisions of the Executive Budget Act, Article 1 of Chapter 143 of the General Statutes of North Carolina. (1949, c. 1086, s. 7; 1955, c. 236, s. 1; 1965, c. 957, s. 18.)

ARTICLE 19A.

Fishery Management Councils.

§ 113-259. North Carolina members of the South Atlantic Fishery Management Council.

(a) In pursuance of Section 302 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq., there shall be at least two members of the South Atlantic Fishery Management Council from the State of North Carolina.

(b) The first Council member shall be the principal State official with marine fishery management responsibility and expertise in the State, which official is the Director of the Division of Marine Fisheries of the Department or his designee.

(c) Pursuant to the enabling legislation, other members from the state of North Carolina are selected by the United States Secretary of Commerce from a list of qualified individuals submitted by the Governor of the State. The list of nominees shall be compiled by the Marine Fisheries Commission and must be comprised of individuals who are knowledgeable and experienced with regard to the management, conservation, or commercial or recreational harvest of the fishery resources in the Atlantic Ocean seaward of the states of North Carolina, South Carolina, Georgia, and Florida. Prior to submission of the list of nominees, the Governor may consult with the Commission regarding additions to the list of nominees to be submitted. Should it be necessary for the Governor to submit additional nominees, the list of nominees shall be compiled by the Marine Fisheries Commission. (1987, c. 641, s. 18; 1989, c. 727, s. 111; 1998-225, s. 4.23.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective November 5, 1998, substituted the present Article heading for the former, which read, "South Atlantic Fishery Management Council"; inserted "South Atlantic Fishery Management" in the section heading; in subsection (a), substituted "Magnuson-Stevens" for "Magnuson"; in subsection (c),

inserted "or commercial"; and made stylistic changes.

§ 113-260. North Carolina members of the Mid-Atlantic Fishery Management Council.

(a) In pursuance of Section 302 of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801, et seq., there shall be at least two members of the Mid-Atlantic Fishery Management Council from the State of North Carolina.

(b) The first Council member shall be the principal State official with marine fishery management responsibility and expertise in the State, which official is the Director of the Division of Marine Fisheries of the Department or his designee.

(c) Pursuant to the enabling legislation, other members from the State of North Carolina are selected by the United States Secretary of Commerce from a list of qualified individuals submitted by the Governor of the State. The list of nominees shall be compiled by the Marine Fisheries Commission and must be comprised of individuals who are knowledgeable and experienced with regard to the management, conservation, or commercial or recreational harvest of the fishery resources in the Atlantic Ocean seaward of the states of New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, and North Carolina. Prior to submission of the list of nominees, the Governor may consult with the Commission regarding additions to the list of nominees to be submitted. Should it be necessary for the Governor to submit additional nominees, the list of nominees shall be compiled by the Marine Fisheries Commission. (1998-225, s. 4.23.)

Editor's Note. — Session Laws 1998-225, s. 5.6, made this section effective November 5, 1998.

Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

§§ 113-260.1 through 113-260.5: Reserved for future codification purposes.

Article 20.

Miscellaneous Regulatory Provisions.

§ 113-261. Taking fish and wildlife for scientific purposes; permits to take in normally unauthorized manner; cultural and scientific operations.

(a) The Department, the Wildlife Resources Commission, and agencies of the United States with jurisdiction over fish and wildlife are hereby granted the right to take marine, estuarine, and wildlife resources within the State, to conduct fish cultural operations and scientific investigations in the several waters of North Carolina, to survey fish and wildlife populations in the State,

to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife, to propagate animals, birds, and fish, and to erect fish hatcheries and fish propagating plants without regard to any licensing or permit requirements of this Subchapter.

(b) The Department with respect to fish in coastal fishing waters and the Wildlife Resources Commission with respect to wildlife may provide for the issuance of permits, on such terms as they deem just and in the best interest of conservation, authorizing persons to take such fish or wildlife through the use of drugs, poisons, explosives, electricity, or any other generally prohibited manner. Such permits need not be restricted solely to victims of depredations or to scientific or educational institutions, but should be issued only for good cause. No permit to take wildlife other than fish by means of poison may be issued, however, unless the provisions of Article 22A are met.

(c) The Department, the Wildlife Resources Commission, and agencies of the United States with jurisdiction over fish and wildlife may, as necessary in their legitimate operations, take fish and wildlife in a manner generally prohibited by this Subchapter or by rules made under the authority of this Subchapter. (1915, c. 84, s. 7; C.S., s. 1886; 1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-262. Taking fish or wildlife by poisons, drugs, explosives or electricity prohibited; exceptions; possession of illegally killed fish or wildlife prohibited.

(a) Except as otherwise provided in this Subchapter, or in rules permitting use of electricity to take certain fish, it is a Class 2 misdemeanor to take any fish or wildlife through the use of poisons, drugs, explosives, or electricity. This subsection does not apply to any person lawfully using any poison or pesticide under the Structural Pest Control Act of North Carolina of 1955, as amended, or the North Carolina Pesticide Law of 1971, as amended.

(b) Except under a valid permit it is unlawful to possess any fish or wildlife:

(1) Bearing evidence of having been taken in violation of subsection (a); or

(2) With knowledge or reason to believe that the fish or wildlife was taken in violation of subsection (a). (1883, c. 290; Code, s. 1094; Rev., s. 3417; C.S., ss. 1968, 2124; 1927, c. 107; 1935, c. 486, ss. 18-20; 1939, c. 235, s. 1; 1949, c. 1205, ss. 2, 3; 1953, c. 1134; 1955, c. 104; c. 1053, ss. 1, 3, 4; 1957, c. 1056; 1959, c. 207; c. 500; 1961, c. 1182; 1963, c. 381; c. 697, ss. 1, 3½; 1965, c. 904, s. 1; c. 957, s. 2; 1967, c. 728, s. 1; c. 858, s. 1; c. 1149, s. 1.5; 1969, c. 75; c. 140; 1971, c. 439, ss. 1-3; c. 449, s. 1; c. 461; c. 648, s. 1; c. 899, s. 1; 1973, c. 1096; c. 1210, ss. 1-3, 5; c. 1262, s. 18; 1975, c. 669; c. 728; 1977, c. 493; c. 794, s. 4; 1979, c. 830, s. 1; 1987, c. 827, s. 98; 1993, c. 539, s. 846; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-263. Inspecting plans and specifications of dams.

The Department and the Wildlife Resources Commission, in addition to other agencies primarily responsible, may inspect the plans and specifications of all dams proposed to be built, in North Carolina or elsewhere within the United States, the design or proposed mode of construction of which may have an adverse effect upon fish within the State. The Department or the Wildlife Resources Commission, as the case may be, may be heard before the appropriate agency charged with approving said plans and specifications, and due consideration shall be given to said Department or Wildlife Resources Commission in the approval or disapproval of the plans and specifications of

proposed dams by the agencies so charged with said duty. (1965, c. 957, s. 2; 1973, c. 1262, s. 18.)

§ 113-264. Regulatory power over property of agency; public hunting grounds; scheduling of managed big game hunts.

(a) The Department and the Wildlife Resources Commission are granted the power by rule to license, regulate, prohibit, or restrict the public as to use and enjoyment of, or harm to, any property of the Department or the Wildlife Resources Commission, and may charge the public reasonable fees for access to or use of such property. "Property" as the word is used in this section is intended to be broadly interpreted and includes lands, buildings, vessels, vehicles, equipment, markers, stakes, buoys, posted signs and other notices, trees and shrubs and artificial constructions in boating and fishing access areas, game lands, wildlife refuges, public waters, public mountain trout waters, and all other real and personal property owned, leased, controlled, or cooperatively managed by either the Department or the Wildlife Resources Commission.

(a1) Every wildlife protector and every law enforcement officer of this State and its subdivisions shall have the authority within his or her established jurisdiction to enforce the rules promulgated pursuant to the power granted by this section regarding the willful removal of, damage to, or destruction of any property of the Department or the Wildlife Resources Commission.

(a2) To the extent that subsection (a1) of this section conflicts with any provision of any local act, subsection (a1) of this section prevails.

(b) Unless a different level of punishment is elsewhere set out, willful removal of, damage to, or destruction of any property of the Department or the Wildlife Resources Commission is a Class 1 misdemeanor.

(c) The Wildlife Resources Commission may cooperate with private landowners in the establishment of public hunting grounds. It may provide for the posting of these areas and of restricted zones within them, require that authorized hunters obtain written permission from the owner to hunt, enforce general laws concerning trespass by hunters and concerning damage or injurious activities by hunters and by others carrying weapons on or discharging weapons across public hunting grounds or restricted zones.

(d) The Wildlife Resources Commission may schedule managed hunts for any species of wildlife to be held on game lands. Participants in such hunts shall be selected at random by computer from properly licensed applicants. A nonrefundable fee of five dollars ($5.00) will be required of each applicant to defray the cost of processing the applications. (1965, c. 957, s. 2; 1973, c. 1262, ss. 18, 28; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1983, c. 403; 1985 (Reg. Sess., 1986), c. 996, s. 2; 1987, c. 827, s. 98; 1989, c. 221; c. 642, s. 1; 1993, c. 539, s. 847; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-265. Obstructing or polluting flow of water into hatchery; throwing fish offal into waters.

(a) No person may obstruct, pollute, or diminish the natural flow of water into or through any fish hatchery in violation of the requirements of the Environmental Management Commission.

(b) It is unlawful for any person to throw or cause to be thrown into the channel of any navigable waters fish offal in any quantity likely to hinder or prevent the passage of fish along such channel. The Marine Fisheries Commission and the Wildlife Resources Commission may by rule impose further

restrictions upon the throwing of fish offal in any coastal fishing waters or inland fishing waters respectively.

(c) to (e) Repealed by Session Laws 1987, c. 636, s. 2. (1883, c. 137, s. 5; Code, ss. 3385, 3386, 3389, 3407, 3418; Rev., ss. 2444, 2465, 2478; C.S., ss. 1969, 1971, 1972; 1959, c. 405; 1965, c. 957, s. 2; 1971, c. 690, s. 4; 1973, c. 1262, ss. 18, 28; 1985 (Reg. Sess., 1986), c. 996, s. 3; 1987, c. 636, s. 2; c. 827, s. 98.)

Cross References. — As to robbing or injuring nets, seines, buoys, pots, etc., see now § 113-267. As to unlawful harassment of persons taking wildlife resources, see now § 113-295. As to fishing from bridges, see §§ 136-102.5, 153A-242 and 160A-302.1.

CASE NOTES

Cited in Stanley v. Department of Conservation & Dev., 284 N.C. 15, 199 S.E.2d 641 (1973).

§ 113-266. Interference with artificial reef marking devices.

It shall be a Class 1 misdemeanor for any person to destroy, injure, relocate, or remove any navigational aids, buoys, markers, or other devices lawfully set out by the Division of Marine Fisheries in connection with the marking of any artificial reef in the coastal waters of the State and in the Atlantic Ocean to the seaward extent of the State's jurisdiction as now or hereafter defined. (1985 (Reg. Sess., 1986), c. 996, s. 1; 1993, c. 539, s. 848; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-267. Replacement costs of marine, estuarine, and wildlife resources; rules authorized; prima facie evidence.

To provide information to the courts and other officials taking action under G.S. 15A-1343(b1)(5), under G.S. 143-215.3(a)(7), or under any other pertinent authority of law, the Marine Fisheries Commission and the Wildlife Resources Commission are authorized to adopt rules setting forth the factors that should be considered in determining the replacement costs of fish and wildlife and other marine, estuarine, and wildlife resources that have been taken, injured, removed, harmfully altered, damaged, or destroyed. The Marine Fisheries Commission and the Wildlife Resources Commission may make similar rules respecting costs of investigations required by G.S. 143-215.3(a)(7) or which are made pursuant to a court order. For common offenses resulting in the destruction of marine, estuarine, and wildlife resources the Marine Fisheries Commission and the Wildlife Resources Commission may adopt schedules of costs which reasonably state the likely replacement costs and necessary investigative costs when appropriate. Rules of the Marine Fisheries Commission and the Wildlife Resources Commission stating scheduled costs or cost factors must be treated as prima facie evidence of the actual costs, but do not prevent a court or jury from examining the reasonableness of the regulations or from assessing the special factors in a case which may make the true costs either higher or lower than the amount stated in the rules. The term "replacement costs" must be broadly construed to include indirect costs of replacement through habitat improvement or restoration, establishment of sanctuaries, and other recognized conservation techniques when direct stocking or replacement is not feasible. (1979, c. 830, s. 1; 1985, c. 509, s. 7; 1987, c. 827, s. 98.)

§ 113-268. Injuring, destroying, stealing, or stealing from nets, seines, buoys, pots, etc.

(a) It is unlawful for any person without the authority of the owner of the equipment to take fish from nets, traps, pots, and other devices to catch fish which have been lawfully placed in the open waters of the State.

(b) It is unlawful for any master or other person having the management or control of a vessel in the navigable waters of the State to willfully, wantonly, and unnecessarily do injury to any seine, net or pot which may lawfully be hauled, set, or fixed in such waters for the purpose of taking fish except that a net set across a channel may be temporarily moved to accommodate persons engaged in drift netting, provided that no fish are removed and no damage is done to the net moved.

(c) It is unlawful for any person to willfully steal, destroy, or injure any buoys, markers, stakes, nets, pots, or other devices on property lawfully set out in the open waters of the State in connection with any fishing or fishery.

(d) Violation of subsections (a), (b), or (c) is a Class A1 misdemeanor.

(e) The Department may, either before or after the institution of any other action or proceeding authorized by this section, institute a civil action for injunctive relief to restrain a violation or threatened violation of subsections (a), (b), or (c) of this section pursuant to G.S. 113-131. The action shall be brought in the superior court of the county in which the violation or threatened violation is occurring or about to occur and shall be in the name of the State upon the relation of the Secretary. The court, in issuing any final order in any action brought pursuant to this subsection may, in its discretion, award costs of litigation including reasonable attorney and expert-witness fees to any party. (1987, c. 636, s. 1; 1989, c. 727, s. 112; 1993, c. 539, s. 849; 1994, Ex. Sess., c. 24, s. 14(c); 1998-225, s. 3.9.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective December 1, 1998, and applicable to offenses committed on or after that date, substituted the present catchline for the former, which read, "Robbing or injuring nets, seines, buoys, pots, etc."; in subsection (c), inserted "steal,"; and in subsection (d), substituted "Class A1 misdemeanor" for "Class 2 misdemeanor for a first conviction, and a Class 1 misdemeanor for a second or subsequent conviction."

§ 113-269. Robbing or injuring hatcheries and other aquaculture operations.

(a) The definitions established in G.S. 106-758 are incorporated by reference into this section. For the purposes of this section, a shellfish lease issued pursuant to G.S. 113-202 is defined as an aquaculture facility only when it has been amended pursuant to G.S. 113-202.1 to authorize use of the water column and when it is or has been regularly posted and identified in accordance with the rules of the Marine Fisheries Commission.

(b) It is unlawful for any person without the authority of the owner of an aquaculture facility to take fish or aquatic species being cultivated or reared by the owner from an aquaculture facility.

(c) It is unlawful for any person to receive or possess fish or aquatic species stolen from an aquaculture facility while knowing or having reasonable grounds to believe that the fish or aquatic species are stolen.

(d) It is unlawful for any person to willfully destroy or injure an aquaculture facility or aquatic species being reared in an aquaculture facility.

(e) Violation of subsections (b) or (c) for fish or aquatic species valued at more than four hundred dollars ($400.00) is punishable under G.S. 14-72. Violation of subsections (b) or (c) for fish or aquatic species valued at four hundred dollars ($400.00) or less is a Class 1 misdemeanor.

(f) Violation of subsection (d) is a Class 1 misdemeanor.

(g) In deciding to impose any sentence other than an active prison sentence, the sentencing judge shall consider and may require, in accordance with G.S. 15A-1343, restitution to the victim for the amount of damage to the aquaculture facility or aquatic species or for the value of the stolen fish or aquatic species.

(h) The district attorney shall dismiss any case brought pursuant to subsections (b) and (c) if defendant produces a notarized written authorization for taking fish or aquatic species from the aquaculture facility or if the fish or aquatic species taken from a shellfish lease aquaculture facility was not a shellfish authorized for cultivation on the lease. (1989, c. 281, s. 1; 1993, c. 539, ss. 850, 851; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-270: Reserved for future codification purposes.

Article 21.

Licenses and Permits Issued by the Wildlife Resources Commission.

§ 113-270.1. License agents.

(a) The Wildlife Resources Commission may by rule provide for the annual appointment of persons as license agents to sell licenses which it is authorized to issue by this Subchapter or by any other provisions of law. To facilitate the convenience of the public, the efficiency of administration, the need to keep statistics and records affecting the conservation of wildlife resources, boating, water safety, and other matters within the jurisdiction of the Wildlife Resources Commission, and the need to issue licenses containing special restrictions, the Wildlife Resources Commission may issue licenses in any particular category through:

(1) License agents.
(2) The Wildlife Resources Commission's headquarters.
(3) Employees of the Wildlife Resources Commission.
(4) Two or more such sources simultaneously.

When there are substantial reasons for differing treatment, the Wildlife Resources Commission may issue a type of license by one method in one locality and by another method in another locality.

(b) License agents may deduct from the amount collected for each license a fee of six percent (6%).

(c) The Wildlife Resources Commission may provide qualifications and standards concerning license agents and delegate to the Executive Director the task of appointment and supervision. Annual appointments run from May 1 to April 30 each year. The Wildlife Resources Commission may require license

agents to post bonds, keep records and make reports concerning licenses and receipts, be subject to such audits and inspections as may be necessary, and pay a penalty of five percent (5%) on any worthless checks given the Wildlife Resources Commission. The minimum penalty for a worthless check, however, is five dollars ($5.00), and the maximum penalty is two hundred dollars ($200.00). The Wildlife Resources Commission shall require license agents to pay penalties of twenty-five percent (25%) of the agents' fees on any license fees remitted to the Commission after the fifteenth day of the month immediately following the month of sale.

(d) The Wildlife Resources Commission may make rules in implementing the authority granted in subsection (c), but it need not set out in its rules details as to forms of license, records and accounting procedures, and other reasonable requirements that may be administratively promulgated by employees of the Wildlife Resources Commission in implementation of the purposes of this Article in order for such administrative requirements to be deemed validly required. It is a Class 1 misdemeanor for a license agent:

(1) To withhold or misappropriate funds from the sale of licenses;
(2) To falsify records of licenses sold;
(3) Wilfully and knowingly to assist or allow a person to obtain a license for which he is ineligible;
(4) Wilfully to issue a backdated license;
(5) Wilfully on records or licenses to include false information or omit material information as to:
    a. A person's entitlement to a particular license; or
    b. The applicability or term of a particular license; or
(6) To refuse to return all consigned licenses, or to remit the net value of consigned licenses sold or unaccounted for, upon demand from an authorized employee of the Wildlife Resources Commission.

(e) The Executive Director may temporarily suspend, revoke, or refuse to renew a person's appointment as a license agent if he fails in a timely manner to submit required reports, remit moneys due the Wildlife Resources Commission, or otherwise comply with the qualifications and standards set by the Wildlife Resources Commission or with reasonable administrative directives of the Executive Director. The temporary suspension is effective immediately upon communication of that fact to the license agent or his representative handling the licenses. The communication as to suspension must state the grounds for suspension and that the license agent may request a hearing within five working days if he contests the grounds for suspension. If not in writing, the communication must be followed by written notice of suspension containing the same information. By personal service of an impoundment order upon a license agent or his representative handling the licenses, an employee or agent of the Wildlife Resources Commission may enter the premises and impound all licenses, moneys, record books, reports, license forms, and other documents, ledgers, and materials pertinent or apparently pertinent to the license agency being suspended. The Executive Director must make the impounded property, or copies of it, available to the licensee during the period of temporary suspension.

(f) If a hearing is requested, it is before the Executive Director or his designee to be held at Raleigh or some other place convenient to the parties specified by the Executive Director. The temporary suspension remains in effect until the hearing, and after the hearing may be rescinded or continued in effect, as the facts warrant, in the discretion of the Executive Director. A temporary suspension may not last longer than 30 days, but additional suspensions may be imposed if at the end of the suspension period the license agent is still not in compliance with appropriate standards, qualifications, and administrative directives. A license agent may at any time after a hearing appeal his suspension to the Wildlife Resources Commission.

(g) Notice of revocation or nonrenewal of the appointment may be sent the license agent in lieu of or in addition to temporary suspension. The notice must state the grounds for termination of the appointment and the license agent's right to a hearing if he has not previously been afforded one. If the appointment is to be revoked, the notice must state the effective date and hour of revocation. If the appointment is not to be renewed, the notice must state that the appointment expires at midnight on April 30. If he has not been previously afforded a hearing, a license agent is entitled to a hearing within 14 days before the Executive Director or his designee to be held at Raleigh or some other place convenient to the parties specified by the Executive Director. After the hearing, the Executive Director, applying appropriate standards, must take the action with respect to the appointment as license agent that the facts warrant. If the Executive Director upholds the decision to terminate the appointment, a license agent may appeal his termination to the Wildlife Resources Commission. Pending the hearing and any appeal from it, the termination is held in abeyance, but no license sales may be made once the license agent's bond has expired.

(h) Upon termination of the appointment, the former agent must return to the Wildlife Resources Commission all record books, reports, license forms, moneys, and other property pertaining to the license agency, and must allow agents of the Wildlife Resources Commission to conduct necessary inspections and audits required in terminating the license agency. Each day's refusal after termination to return, upon demand, the record books, reports, license forms, moneys, and other property pertaining to the license agency is a separate offense. Each instance of refusal, after termination, to allow agents of the Wildlife Resources Commission to conduct necessary inspections and audits during regular business hours is a separate offense. A violation of this subsection is a Class 2 misdemeanor. Before termination, violations by license agents are punishable under G.S. 113-135, subsection (d) above, or other provision of this Subchapter, as appropriate.

(i) No person denied appointment or whose appointment was terminated under this section is eligible to apply again for an appointment as a license agent for two years. Upon application, the executive director may not grant the appointment as license agent unless the applicant produces clear evidence, convincing to the Executive Director, that he meets all standards and qualifications and will comply with all requirements of statutes, rules, and reasonable administrative directives pertaining to license agents.

(j) The Executive Director or his designee holding any hearing under this section must keep a written record of evidence considered and findings made. Upon appeal to the Wildlife Resources Commission, the commission chairman or other presiding officer must cause such a written record of evidence and findings to be made and kept. Hearings and appeals under this section are internal matters concerning license agents of the Wildlife Resources Commission and are not governed by the North Carolina Administrative Procedure Act. (1961, c. 352, ss. 4, 9; 1979, c. 830, s. 1; 1985, c. 791, s. 34; 1987, c. 827, s. 98; 1993, c. 539, ss. 852, 853; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-270.1A. Hunter safety course required.

(a) Except as provided in subsection (a1) of this section, on or after July 1, 1991, a person, regardless of age, may not procure a hunting license or hunt in this State without producing a certificate of competency or a hunting license issued prior to July 1, 1991, or signing a statement on a form provided by the Wildlife Resources Commission that he had such a license.

(a1) A person who qualifies for a totally disabled resident combination hunting-fishing license under G.S. 113-270.1C(b)(3) need not comply with the

requirements of subsection (a) of this section in order to receive that license, so long as the person does not make use of the license unless:

(1) The person is accompanied by an adult of at least 21 years of age who is licensed to hunt; and

(2) The adult hunter maintains a proximity to the disabled hunter which enables the adult to take immediate control of the hunting device at all times.

(b) The Wildlife Resources Commission shall institute and coordinate a statewide course of instruction in hunter ethics, wildlife laws and regulations, and competency and safety in the handling of firearms, and in so doing, may cooperate with any political subdivision, or with any reputable organization having as one of its objectives the promotion of competency and safety in the handling of firearms, including local rod and gun clubs.

(1) The Wildlife Resources Commission shall designate those persons or agencies authorized to give the course of instruction, and this designation shall be valid until revoked by the Commission. Those designated persons shall submit to the Wildlife Resources Commission validated listings naming all persons who have successfully completed the course of instruction.

(2) The Wildlife Resources Commission may conduct the course in hunter safety, using Commission personnel or other persons at times and in areas where other competent agencies are unable or unwilling to meet the demand for instruction.

(3) The Wildlife Resources Commission shall issue a certificate of competency and safety to each person who successfully completes the course of instruction, and the certificate shall be valid until revoked by the Commission.

(4) Any similar certificate issued outside the State by a governmental agency, shall be accepted as complying with the requirements of subsection (a) above, if the privileges are reciprocal for North Carolina residents.

(5) The Wildlife Resources Commission shall adopt rules and regulations to provide for the course of instruction and the issuance of the certificates consistent with the purpose of this section.

(c) On or after July 1, 1991, any person who obtains a hunting license by presenting a fictitious certificate of competency or who attempts to obtain a certificate of competency or hunting license through fraud shall have his hunting privileges revoked by the Wildlife Resources Commission for a period not to exceed one year.

(d) Nothing in this section shall be construed to prohibit the sale of lifetime licenses as provided in G.S. 113-270.1D(b) or G.S. 113-270.2(c)(2). Pending satisfactory completion of the hunter safety course, persons who possess such licenses may exercise the privileges thereof when accompanied by an adult at least 21 years of age who is licensed to hunt in this State. For the purpose of this section, "accompanied" is defined as being able to take immediate control of the hunting device. (1989, c. 324, s. 1; 1991, c. 70, s. 1; 1997-365, s. 1; 1999-456, s. 27.)

Editor's Note. — Session Laws 1997-365, s. 2, provides: "Notwithstanding the provisions of Section 1 of this act, locations where hunting safety is taught shall not be relieved of their obligation to make the course accessible to persons with disabilities who wish to take the course."

Effect of Amendments. — Session Laws 1999-456, s. 27, effective August 13, 1999, substituted "G.S. 113-270.1D(b) or G.S. 113-270.2(c)(2)" for "G.S. 113-270.2(c)(1a)" in subsection (d).

§ 113-270.1B. License required to hunt, fish, or trap.

(a) Except as otherwise specifically provided by law, no person may hunt, fish, trap, or participate in any other activity regulated by the Wildlife Resources Commission for which a license is provided by law without having first procured a current and valid license authorizing the activity.

(b) Except as indicated otherwise, all licenses are annual licenses valid from the date of issue for a period of 12 months. (1993 (Reg. Sess., 1994), c. 684, s. 1.)

§ 113-270.1C. Combination hunting and fishing licenses.

(a) The combination hunting and fishing licenses set forth in subsection (b) of this section entitle the holder to take, except on game lands, all wild birds and wild animals, other than big game and waterfowl, by all lawful methods and in all open seasons, and to fish with hook and line in all inland and joint fishing waters, except public mountain trout waters.

(b) Combination hunting and fishing licenses issued by the Wildlife Resources Commission are:

(1) Resident Annual Combination Hunting and Fishing License — $20.00. This license shall be issued only to an individual resident of the State.

(2), (3) Repealed by Session Laws 1997-326, s. 2.

(4) Lifetime Combination Hunting and Fishing License for Disabled Residents — $10.00. This license shall be issued only to (i) an individual resident of the State who is a fifty percent (50%) or more disabled veteran as determined by the United States Department of Veterans Affairs, remaining valid for the lifetime of the individual so long as the individual remains fifty percent (50%) or more disabled; or (ii) an individual resident of the State who is totally disabled, remaining valid for the lifetime of the individual so long as the individual remains totally disabled. For purposes of this section, "totally disabled" means physically incapable of being gainfully employed. (1993 (Reg. Sess., 1994), c. 684, s. 1; 1997-326, ss. 2, 3.)

Editor's Note. — Session Laws 1997-326, s. 6, provides that all lifetime combination hunting and fishing licenses issued under subdivisions (b)(2) and (b)(3) prior to October 1, 1997, shall remain valid for the uses for which they were issued.

§ 113-270.1D. Sportsman licenses.

(a) Annual Sportsman License — $40.00. This license shall be issued only to an individual resident of the State and entitles the holder to take all wild animals and wild birds, including waterfowl, by all lawful methods in all open seasons, including the use of game lands, and to fish with hook and line for all fish in all inland and joint fishing waters, including public mountain trout waters.

(b) Lifetime Sportsman Licenses. Lifetime sportsman licenses are valid for the lifetime of the holders and entitle the holders to take all wild animals and wild birds by all lawful methods in all open seasons, including the use of game lands, and to fish with hook and line for all fish in all inland and joint fishing waters, including public mountain trout waters. Lifetime sportsman licenses issued by the Wildlife Resources Commission are:

(1) Infant Lifetime Sportsman License — $200.00. This license shall be issued only to an individual under one year of age.

(2) Youth Lifetime Sportsman License — $350.00. This license shall be issued only to an individual under 12 years of age.

(3) Adult Resident Lifetime Sportsman License — $500.00. This license shall be issued only to an individual resident of the State.
(4) Nonresident Lifetime Sportsman License — $1,000. This license shall be issued only to an individual nonresident of the State.
(5) Age 70 Resident Lifetime Sportsman License — $10.00. This license shall be issued only to an individual resident of the State who is at least 70 years of age.
(6) Disabled Resident Sportsman License — $100.00. This license shall be issued only to (i) an individual resident of the State who is a fifty percent (50%) or more disabled veteran as determined by the United States Department of Veterans Affairs, remaining valid for the lifetime of the individual so long as the individual remains fifty percent (50%) or more disabled; or (ii) an individual resident of the State who is totally disabled, remaining valid for the lifetime of the individual so long as the individual remains totally disabled. For purposes of this section, "totally disabled" means physically incapable of being gainfully employed. (1993 (Reg. Sess., 1994), c. 684, s. 1; 1997-326, s. 1; 1999-339, s. 4.)

Effect of Amendments. — Session Laws 1999-339, s. 4, effective July 1, 1999, substituted "including waterfowl" for "other than waterfowl" in subsection (a).

§ 113-270.2. Hunting licenses.

(a) The hunting licenses set forth in subdivisions (1), (3), and (6) of subsection (c) of this section entitle the holder to take, except on game lands, wild birds and wild animals, other than big game and waterfowl, by all lawful methods and in all open seasons. The comprehensive hunting licenses of subdivisions (2) and (5) of subsection (c) of this section further entitle the holder to take big game and waterfowl and to use game lands.
(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 684, s. 2.
(c) The hunting licenses issued by the Wildlife Resources Commission are as follows:
(1) Resident State Hunting License — $15.00. This license shall be issued only to an individual resident of the State.
(2) Lifetime Resident Comprehensive Hunting License — $250.00. This license shall be issued only to an individual resident of the State and is valid for the lifetime of the holder.
(3) Resident County Hunting License — $10.00. This license shall be issued only to an individual resident of the State and is valid only in the county of residence of the license holder.
(4) Controlled Hunting Preserve Hunting License — $15.00. This license shall be issued to an individual resident or nonresident to take only foxes and domestically raised game birds, other than wild turkey, only within a controlled hunting preserve licensed and operated in accordance with G.S. 113-273(g) and implementing rules of the Wildlife Resources Commission.
(5) Resident Annual Comprehensive Hunting License — $30.00. This license shall be issued only to an individual resident of the State.
(6) Nonresident State Hunting License. This license shall be issued only to a nonresident. The nonresident State hunting licenses issued by the Wildlife Resources Commission are:
a. Season License — $40.00.
b. Six-Day License — $25.00. This license is valid for the six consecutive dates indicated on the license.
(d) One dollar ($1.00) of the proceeds received from the sale of each nonresident hunting license sold pursuant to subdivision (6) of subsection (c) of

this section shall be set aside by the Wildlife Resources Commission and contributed to a proper agency or agencies in the United States for expenditure in Canada for the restoration and management of migratory waterfowl. (1935, c. 486, s. 12; 1937, c. 45, s. 1; 1945, c. 617; 1949, c. 1203, s. 1; 1957, c. 849, s. 1; 1959, c. 304; 1961, c. 384, s. 1; 1967, c. 790; 1969, c. 1030; c. 1042, ss. 1-5, 13; 1971, c. 242; c. 282, s. 1; c. 705, ss. 1, 2; 1973, c. 1262, s. 18; 1975, c. 197, ss. 1-4, 6, 8; c. 673, s. 2; 1977, c. 658; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1178, s. 1; 1981, c. 482, s. 4; 1981 (Reg. Sess., 1982), c. 1201, s. 1; 1983, c. 140, s. 1; 1987, c. 156, ss. 1, 2; 1987, c. 827, s. 98; 1989, c. 324, s. 2; c. 616, s. 2; 1989 (Reg. Sess., 1990), c. 909, s. 1; 1993 (Reg. Sess., 1994), c. 684, s. 2; 1999-339, s. 5.)

Cross References. — As to the Wildlife Endowment Fund, see § 143-250.1.

Editor's Note. — Session Laws 1989, c. 616, which amended subdivision (c)(5), provided in s. 6 that any provisions of this act inconsistent with the terms of any local act would be superseded by the provisions of the local act.

Effect of Amendments. — Session Laws 1999-339, s. 5, effective July 1, 1999, inserted "and waterfowl" in the second sentence in subsection (a).

CASE NOTES

Constitutionality of Enforcement on Indian Reservation. — Enforcement of North Carolina's fishing license requirement against non-Indian fishermen on the reservation of the Eastern Band of Cherokee Indians violates the federal preemption doctrine. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), cert. dismissed, 446 U.S. 960, 100 S. Ct. 2933, 64 L. Ed. 2d 818 (1980) (decided under former Article 7 of Subchapter III).

§ 113-270.2A. Voluntary contribution to hunters safety education program.

(a) A person applying for a hunting license may make a voluntary contribution of fifty cents (50¢) to the Wildlife Resources Commission for the purpose of funding a hunter safety education program.

(b) The Wildlife Resources Commission shall devise administrative procedure for the collection of all contributions donated pursuant to the provisions of this act and shall collect and use the contributions to fund and provide for a hunter safety education program. (1979, c. 764, ss. 1, 2; 1987, c. 827, s. 98.)

§ 113-270.2B. Voluntary migratory waterfowl conservation print.

(a) The Wildlife Resources Commission has exclusive production rights for the voluntary migratory waterfowl conservation print, and is authorized to adopt policy for the annual selection of an appropriate design for the print and to have the print produced for sale. This policy may include ownership rights of the original art selected; arrangements for the reproduction, distribution and marketing of prints; and provisions for sharing the resulting revenues.

(b) The proceeds accruing to the Commission from its share of the voluntary migratory waterfowl conservation prints shall be used by the Commission for the benefit of migratory waterfowl management in North Carolina. (1981 (Reg. Sess., 1982), c. 1269; 1987, c. 452, s. 1; c. 827, s. 98.)

§ 113-270.3. Special activity licenses; big game kill reports.

(a) In addition to any hunting, trapping, or fishing license that may be required pursuant to G.S. 113-270.1B(a), individuals engaging in specially

regulated activities must have the appropriate special activity license prescribed in this section before engaging in the regulated activity.

(b) The special activity licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident Big Game Hunting License — $10.00. This license shall be issued only to an individual resident of the State and entitles the holder to take big game by all lawful methods and during all open seasons.

(1a) Nonresident Bear Hunting License — $100.00. This license is valid for use only by an individual within the State and must be procured before taking any bear within the State. Notwithstanding any other provision of law, a nonresident individual may not take any bear within the State without procuring this license; provided, that those persons who have a nonresident lifetime sportsman combination license purchased prior to July 1, 1993, shall not have to purchase this license.

(2) Nonresident Big Game Hunting License. This license shall be issued only to an individual nonresident of the State and entitles the holder to take big game by all lawful methods and during all open seasons. The nonresident big game hunting licenses issued by the Wildlife Resources Commission are:

a. Season License — $40.00.

b. Six-Day License — $25.00. This license is only valid for the six consecutive dates indicated on the license.

(3) Game Land License — $15.00. This license shall be issued to an individual resident or nonresident of the State and entitles the holder to hunt and trap on game lands managed by the Wildlife Resources Commission. The Wildlife Resources Commission may, pursuant to G.S. 113-264(a), designate in its rules other activities on game lands that require purchase of this license and may charge additional fees for use of specially developed facilities.

(4) Falconry License — $10.00. This license shall be issued to an individual resident or nonresident of the State and must be procured before:

a. Taking, importing, transporting, or possessing a raptor; or

b. Taking wildlife by means of falconry.

The Wildlife Resources Commission may issue classes of falconry licenses necessary to participate in the federal/State permit system, require necessary examinations before issuing licenses or permits to engage in various authorized activities related to possession and maintenance of raptors and the sport of falconry, and regulate licenses as required by governing federal law and rules. To defray the costs of administering required examinations, the Wildlife Resources Commission may charge reasonable fees upon giving them. To meet minimum federal standards plus other State standards in the interests of conservation of wildlife resources, the Wildlife Resources Commission may impose all necessary controls, including those set out in the sections pertaining to collection licenses and captivity licenses, and may issue permits and require reports, but no collection license or captivity license is needed in addition to the falconry license.

(5) Migratory Waterfowl Hunting License — $10.00. This license shall be issued to an individual resident or nonresident of the State and entitles the holder to take migratory waterfowl in accordance with applicable laws and regulations. The Wildlife Resources Commission may implement this license requirement through the sale of an official waterfowl stamp which may be a facsimile, in an appropriate size, of

the waterfowl conservation print authorized by G.S. 113-270.2B. An amount not less than one-half of the annual proceeds from the sale of this license shall be used by the Commission for cooperative waterfowl habitat improvement projects through contracts with local waterfowl interests, with the remainder of the proceeds to be used by the Commission in its statewide programs for the conservation of waterfowl.

(c) Any individual who kills any species of big game must report the kill to the Wildlife Resources Commission. The Commission may by rule prescribe the method of making the report, prescribe its contents, and require positive identification of the carcass of the kill, by tagging or otherwise. The Wildlife Resources Commission may administratively provide for the annual issuance of big game tags or other identification for big game authorized by this section to holders of lifetime sportsman licenses and lifetime comprehensive hunting licenses.

(d) Any individual who possesses any of the lifetime sportsman licenses established by G.S. 113-270.1D(b) may engage in specially regulated activities without the licenses required by subdivisions (1), (2), (3), and (5) of subsection (b) of this section. Any individual possessing an annual sportsman license established by G.S. 113-270.1D(a) or a lifetime or annual comprehensive hunting license established by G.S.113-270.2(c)(2) or (5) may engage in specially regulated activities without the licenses required by subdivisions (1) and (3) of subsection (b) of this section.

(e) When the Wildlife Resources Commission establishes a primitive weapons season pursuant to G.S. 113-291.2(a), all of the combination hunting and fishing licenses established in G.S.113-270.1C, sportsman licenses established in G.S. 113-270.1D, and hunting licenses established in G.S. 113-270.2(c)(1), (2), (3), (5), and (6) entitle the holder to participate. For purposes of this section, "primitive weapons" include bow and arrow, muzzle-loading firearm, and any other primitive weapon specified in the rules of the Wildlife Resources Commission. (1969, c. 1042, s. 7; 1973, c. 1097, s. 1; 1975, c. 171; c. 197, ss. 5, 7; c. 673, s. 1; 1977, c. 746, s. 1; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 2, 5; 1981, c. 482, s. 7; c. 620, s. 1; 1981 (Reg. Sess., 1982), c. 1201, s. 2; 1983, c. 140, ss. 2-3; 1987, c. 156, ss. 3-5; c. 452, ss. 2, 3; c. 745, s. 2; c. 827, s. 98; 1991, c. 671, s. 1; 1993 (Reg. Sess., 1994), c. 557, s. 2; 1993 (Reg. Sess., 1994), c. 684, s. 3; 1999-339, s. 6.)

Editor's Note. — Subdivisions (c)(1) and (c)(2) of G.S. 113-270.2, referred to above, are repealed effective July 1, 1995. Subdivisions (c)(3) and (c)(5), referred to above, are redesignated as (c)(1) and (c)(4), and provisions regarding nonresident licenses be found in subdivision (c)(6) respectively, effective July 1, 1995.

Effect of Amendments. — Session Laws 1999-339, s. 6, effective July 1, 1999, substituted "$10.00" for "$5.00" in subdivision (b)(5).

§ 113-270.4. Hunting and fishing guide license.

(a) No one may serve for hire as a hunting or fishing guide without having first procured a current and valid hunting and fishing guide license. This license is valid only for use by an individual meeting the criteria set by the Wildlife Resources Commission for issuance of the license subject to the limitations set forth in this section. Possession of the hunting and fishing guide license does not relieve the guide from meeting other applicable license requirements. A nonresident may be licensed pursuant to this section only upon the same or similar terms that a North Carolina resident may be licensed in the nonresident's state of residence. The Wildlife Resources Commission may enter into such reciprocal agreements with other states as are necessary to obtain a hunting and fishing guide license in North Carolina subject to the foregoing provisions.

(b) The hunting and fishing guide license is an annual license issued upon payment of ten dollars ($10.00) beginning July 1 of each year running until the following June 30.

(c) The Wildlife Resources Commission may by rule provide for the qualifications and duties of hunting and fishing guides. In implementing this section, the Wildlife Resources Commission may delegate to the Executive Director and his subordinates administrative responsibilities concerning the selection and supervision of hunting and fishing guides, except that provisions relating to revocation of hunting and fishing guide licenses must be substantially set out in the rules of the Wildlife Resources Commission. (1935, c. 486, s. 12; 1937, c. 45, s. 1; 1945, c. 617; 1949, c. 1203, s. 1; 1957, c. 849, s. 1; 1959, c. 304; 1961, c. 834, s. 1; 1967, c. 790; 1969, c. 1030; c. 1042, ss. 1-5; 1971, c. 242, c. 282, s. 1; c. 705, ss. 1, 2; 1973, c. 1262, s. 18; 1975, c. 197, ss. 1-4; 1977, c. 658; 1979, c. 830, s. 1; 1981 (Reg. Sess., 1982), c. 1201, s. 3; 1983, c. 140, s. 4; 1987, c. 156, s. 6; c. 827, s. 98; 1991 (Reg. Sess., 1992), c. 989, s. 1; 1993, c. 553, s. 32.1.)

§ 113-270.5. Trapping licenses.

(a) Except as otherwise specifically provided by law, no one may take fur-bearing animals by trapping, or by any other authorized special method that preserves the pelt from injury, without first having procured a current and valid trapping license. When the trapping license is required, it serves in lieu of a hunting license in the taking of fur-bearing animals. If fur-bearing animals are taken as game, at the times and by the hunting methods that may be authorized, hunting license requirements apply. All trapping licenses are annual licenses issued beginning July 1 each year running until the following June 30.

(b) The trapping licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident State Trapping License — $25.00. This license is valid only for use by an individual resident of the State.

(2) Resident County Trapping License — $10.00. This license is valid only for use by an individual resident of the State within the county in which he resides.

(3) Nonresident State Trapping License — $100.00. This license is valid for use by an individual within the State. (1929, c. 278, s. 3; 1969, c. 1042, s. 6; 1973, c. 1262, s. 18; 1975, c. 197, ss. 9-11; 1979, c. 830, s. 1; 1981 (Reg. Sess., 1982), c. 1201, s. 4; 1983, c. 140, s. 5; 1987, c. 156, s. 7; c. 827, s. 98.)

§ 113-271. Hook-and-line licenses in inland fishing waters.

(a) All the hook-and-line fishing licenses set forth in subdivisions (1), (3), (7), and (9) of subsection (d) of this section entitle the holder to fish with hook and line in public mountain trout waters.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 684, s. 4.

(c) Repealed by Session Law 1979, c. 830, s. 1.

(d) The hook-and-line fishing licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident Annual Comprehensive Fishing License — $20.00. This license shall be issued only to an individual resident of the State.

(2) Resident State Fishing License — $15.00. This license shall be issued only to an individual resident of the State.

(3) Lifetime Resident Comprehensive Fishing License — $250.00. This license shall be issued only to an individual resident of the State and is valid for the lifetime of the holder.

(4) Resident County Fishing License — $10.00. This license shall be issued only to an individual resident of the State and is valid only within the county of residence of the license holder.

(5) Nonresident State Fishing License — $30.00. This license shall be issued to an individual nonresident of the State.

(6) Short-Term Fishing Licenses. Short-term fishing licenses are valid only for the date or consecutive dates indicated on the licenses. Short-term fishing licenses issued by the Wildlife Resources Commission are:

a. Resident one day — $5.00. This license shall be issued only to a resident of the State.

b. Nonresident one day — $10.00. This license shall be issued only to a nonresident of the State.

c. Nonresident three day — $15.00. This license shall be issued only to a nonresident of the State.

(7) Lifetime Fishing License for the Legally Blind — No charge. This license shall be issued only to an individual resident of the State who has been certified by the Department of Health and Human Services as a person whose vision with glasses is insufficient for use in ordinary occupations for which sight is essential. This license is valid for the life of the individual so long as he remains legally blind.

(8) Adult Care Home Resident Fishing License — No charge. This license shall be issued only to an individual resident of the State who resides in an adult care home as defined in G.S. 131D-2(a)(3) or G.S. 131E-101(4). This license is valid for the life of the individual so long as the individual remains a resident of an adult care home.

(9) Special Guest Fishing License — $50.00. This license shall be issued only to the owner or lessee of private property bordering inland or joint fishing waters, including public mountain trout waters, and entitles persons to fish from the shore or any pier or dock originating from the property without any additional fishing license. This license is applicable only to private property and private docks and piers and is not valid for any public property, pier, or dock nor for any private property, pier, or dock operated for any commercial purpose whatsoever. The guest fishing license shall not be in force unless displayed on the premises of the property and only entitles fishing without additional license to persons fishing from the licensed property and then only when fishing within the private property lines. The guest fishing license is not transferable as to person or location. (1929, c. 335, ss. 1-4; 1931, c. 351; 1933, c. 236; 1935, c. 478; 1945, c. 529, ss. 1, 2; c. 567, ss. 1-4; 1949, c. 1203, s. 2; 1953, c. 1147; 1955, c. 198, s. 1; 1957, c. 849, s. 2; 1959, c. 164; 1961, c. 312; c. 834, ss. 3-6; 1965, c. 957, s. 2; 1969, c. 761; c. 1042, s. 9; 1973, c. 476, s. 143; c. 504; 1975, c. 197, s. 15; 1979, c. 737, ss. 1, 2; c. 748, s. 6; c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 3, 5; 1981, c. 482, s. 5; 1981 (Reg. Sess., 1982), c. 1201, s. 5; 1983, c. 140, s. 6; 1987, c. 156, ss. 8, 9; c. 827, s. 98; 1989 (Reg. Sess., 1990), c. 909, s. 2; c. 926; 1993 (Reg. Sess., 1994), c. 684, s. 4; 1995, c. 535, s. 6.1; 1997-443, s. 11A.118(a); 1999-456, s. 28.)

Local Modification. — Transylvania: 1995, c. 314, s. 1; city of Mebane: 1989 (Reg. Sess., 1990), c. 843.

Cross References. — As to the Wildlife Endowment Fund, see § 143-250.1.

Editor's Note. — Section 131D-2(a)(3), referred to in this section, is repealed.

Session Law 1995, c. 535, which amended this section, in s. 37 provides: "Rules adopted by the Department of Human Resources, the Medical Care Commission, and the Social Services Commission regulating domiciliary care homes prior to the effective date of this act remain in effect for adult care homes until amended or repealed."

Effect of Amendments. — Session Laws

1999-456, s. 28, effective August 13, 1999, in subsection (a), deleted "subsection (b) of this section entitle the holder to fish with hook and line in the inland and joint waters of the State, but not in public mountain trout waters. The licenses set forth in" following "licenses set forth in" and deleted "further" following "section."

§ 113-272. Special trout license.

(a) Except as provided in G.S. 113-270.1D and G.S. 113-271(a), no one may fish in public mountain trout waters without having first procured a current and valid special trout license in addition to a hook-and-line fishing license required in G.S. 113-271. When public mountain trout waters occur on game lands, this license entitles the holder to use game lands only for the purpose of access to public mountain trout waters to fish with hook and line.

(b) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 684, s. 5, effective July 1, 1995.

(c) Public mountain trout waters are those waters so designated by the Wildlife Resources Commission which are managed and regulated to sustain a mountain trout fishery.

(d) Special Trout License — $10.00. This license shall be issued to an individual resident or nonresident of the State and entitles the holder to fish with hook and line in public mountain trout waters. (1953, cc. 432, 828; 1955, c. 198, s. 2; 1961, c. 834, s. 2; 1965, c. 957, s. 2; 1969, c. 1042, s. 10; 1973, c. 1262, s. 18; 1975, c. 197, s. 16; 1979, c. 748, s. 7; c. 830, s. 1; 1979, 2nd Sess., c. 1178, ss. 4, 5; 1981, c. 482, s. 6; 1981 (Reg. Sess., 1982), c. 1201, s. 6; 1983, c. 140, s. 7; 1987, c. 156, s. 10; c. 827, s. 98; 1993 (Reg. Sess., 1994), c. 684, s. 5.)

Cross References. — As to the Wildlife Endowment Fund, see § 143-250.1.

§ 113-272.1: Repealed by Session Laws 1979, c. 830, s. 1.

§ 113-272.2. Special device licenses.

(a) Except as otherwise specifically provided by law, no one may fish in inland fishing waters with any special device without having first procured a current and valid special device license. Special devices are all devices used in fishing other than hook and line.

(b) All special device licenses are annual licenses issued beginning July 1 each year running until the following June 30.

(c) The special device licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident Noncommercial Special Device License — $10.00. Except as rules of the Wildlife Resources Commission provide for use of equipment by more than one person, this license is valid only for use by an individual resident of the State. It authorizes the taking of nongame fish from inland fishing waters with no more than three special devices authorized by the rules of the Wildlife Resources Commission for use in specified waters. The Wildlife Resources Commission may restrict the user of the license to specified registered equipment, require tagging of items of equipment, charge up to one dollar ($1.00) per tag issued, and require periodic catch data reports. Unless specifically prohibited, nongame fish lawfully taken under this license may be sold.

(1a) Resident Commercial Special Device License — $100.00. Except as rules of the Wildlife Resources Commission provide for use of equipment by more than one person, this license is valid only for use by an

individual resident of the State. It authorizes the taking of nongame fish from inland fishing waters with four or more special devices authorized by the rules of the Wildlife Resources Commission for use in specified waters. The Wildlife Resources Commission may restrict the user of the license to specified registered equipment, require tagging of items of equipment, charge up to one dollar ($1.00) per tag issued, and require periodic catch data reports. Nongame fish lawfully taken under this license may be sold.

(2) Nonresident Noncommercial Special Device License — $50.00. Except as rules of the Wildlife Resources Commission provide for use of equipment by more than one person, this license is valid for use only by an individual within the State. It is otherwise subject to the terms and conditions set out in subdivision (1) of this subsection.

(2a) Nonresident Commercial Special Device License — $100.00 or the amount the nonresident's state of residence charges a North Carolina resident to engage in the activity authorized by this license, whichever is higher. Except as rules of the Wildlife Resources Commission provide for use of equipment by more than one person, this license is valid only for use by an individual within the State. It is otherwise subject to the terms and conditions set out in subdivision (1a) of this subsection.

(3), (4) Repealed by Session Laws 1987, c. 156, s. 11.

(d) Repealed by Session Laws 1995, c. 36, s. 2. (1979, c. 830, s. 1; 1981, c. 620, s. 2; 1981 (Reg. Sess., 1982), c. 1201, s. 7; 1983, c. 140, s. 8; 1987, c. 156, ss. 11, 12; c. 827, s. 98; 1993 (Reg. Sess., 1994), c. 778, s. 1; 1995, c. 36, s. 2.)

§ 113-272.3. Special provisions respecting fishing licenses; grabbling; taking bait fish; use of landing nets; lifetime licenses issued from Wildlife Resources Commission headquarters; personalized lifetime sportsman combination licenses.

(a) The Wildlife Resources Commission by rule may define the meaning of "hook and line" and "special device" as applied to fishing techniques. Any technique of fishing that may be lawfully authorized which employs neither the use of any special device nor hook and line must be pursued under the appropriate hook-and-line fishing license.

(b) In accordance with established fishing customs and the orderly conservation of wildlife resources, the Wildlife Resources Commission may by rule provide for use of nets or other special devices which it may authorize as an incident to hook-and-line fishing or for procuring bait fish without requiring a special device license. In this instance, however, the individual fishing must meet applicable hook-and-line license requirements.

(c) Lifetime licenses are issued from the Wildlife Resources Commission headquarters. Each application for an Infant Lifetime Sportsman or Youth Lifetime Sportsman License must be accompanied by a certified copy of the birth certificate of the individual to be named as the license holder.

(d) In issuing lifetime sportsman combination licenses, the Wildlife Resources Commission is authorized to adopt rules to establish a personalized series and to charge a five dollar ($5.00) administrative fee, to be deposited in the Wildlife Fund, to defray the cost of issuance of the personalized license. (1979, c. 830, s. 1; 1981, c. 482, s. 8; c. 620, s. 3; 1987, c. 827, s. 98; 1993 (Reg. Sess., 1994), c. 684, s. 6.1.)

§ 113-272.4. Collection licenses.

(a) In the interest of the orderly and efficient conservation of wildlife resources, the Wildlife Resources Commission may provide for the licensing of qualified individuals to take any of the wildlife resources of the State under a collection license that may serve in lieu of any other license required in this Article. This license authorizes incidental transportation and possession of the wildlife resources necessary to implement the authorized purposes of the taking, but the Wildlife Resources Commission in its discretion may additionally impose permit requirements under subsection (d) below and G.S. 113-274.

(b) The Wildlife Resources Commission may delegate to the Executive Director the authority to impose time limits during which the license is valid and restrictions as to what may be taken and method of taking and possession, in the interests of conservation objectives. The Executive Director through his responsible agents must determine whether a particular license applicant meets the standards and qualifications for licensees set by the Wildlife Resources Commission. Methods of taking under a collection license need not be restricted to those applicable to ordinary hunting, trapping, or fishing, but the licensee must observe the restrictions as to taking, transportation, and possession imposed by the Executive Director upon the granting of the license.

(c) When a more limited duration period is not set by the Executive Director in implementing the rules of the Wildlife Resources Commission, collection licenses are valid from January 1 through December 31 in any year. This license is issued upon payment of five dollars ($5.00), but the Wildlife Resources Commission may provide for issuance without charge to licensees who represent educational or scientific institutions or some governmental agency.

(d) As necessary, the Executive Director may administratively impose on licensees under this section restrictions upon individuals taking, transporting, or possessing under the license which will permit ready identification and control of those involved in the interest of efficient administration of laws pertaining to wildlife resources. Restrictions may include requirements as to record keeping, tagging, marking packages, cages, or containers and exhibition of additional limited-purpose and limited-time permits that may be issued without charge to cover particular activities and other actions that may be administratively required in the reasonable implementation of the objectives of this Subchapter.

(e) If the Executive Director deems it administratively appropriate and convenient to do so, in the interests of simplifying the administration of licensing requirements, he may grant particular licensees under this section the privilege of utilizing assistants in taking, transporting, or possessing wildlife resources who themselves are not licensed. Any assistants so taking, transporting, or possessing wildlife resources must have readily available for inspection a written authorization from the licensee to engage in the activity in question. The written authorization must contain information administratively required by the Executive Director, and a copy of the authorization must be placed in the mail addressed to the Executive Director or his designated agent before any assistant acts under the authorization. In his discretion the Executive Director may refuse to issue, refuse to renew, or revoke the privilege conferred in this subsection. If this is done, each individual engaged in taking, transporting, or possessing wildlife resources under this section must meet all applicable licensing and permit requirements. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-272.5. Captivity license.

(a) In the interests of humane treatment of wild animals and wild birds that are crippled, tame, or otherwise unfit for immediate release into their natural

habitat, the Wildlife Resources Commission may license qualified individuals to hold at a specified location one or more of any particular species of wild animal or wild bird alive in captivity. Before issuing this license, the Executive Director must satisfy himself that issuance of the license is appropriate under the objectives of this Subchapter, and that the wild animal or wild bird was not acquired unlawfully or merely as a pet. Upon refusing to issue the captivity license, the Executive Director may either take possession of the wild animal or wild bird for appropriate disposition or issue a captivity permit under G.S. 113-274(c)(1b) for a limited period until the holder makes proper disposition of the wild animal or wild bird.

(b) Unless a shorter time is set for a license upon its issuance under the provisions of subsection (c), captivity licenses are annual licenses issued beginning January 1 each year and running until the following December 31. This license is issued upon payment of five dollars ($5.00) to the Wildlife Resources Commission.

(c) The Wildlife Resources Commission may require standards of caging and care and reports to and supervision by employees of the Wildlife Resources Commission as necessary to insure humane treatment and furtherance of the objectives of this Subchapter. The Executive Director in implementing the provisions of this section may administratively impose through responsible agents and employees restrictions upon the mode of captivity that he deems necessary, including prescribing methods of treatment and handling designed, if possible, to enable the wild animal or wild bird to become self-sufficient and requiring that the wild animal or wild bird be set free when self-sufficiency is attained. To this end, the Executive Director may issue the captivity license with an expiration date earlier than December 31 and may also act to terminate any captivity license earlier than the expiration date for good cause.

(d) Any substantial deviation from reasonable requirements imposed by rule or administratively under the authority of this section renders possession of the wild animal or wild bird unlawful.

(e) No captivity license may be issued for any cougar (Felis concolor), except to:

(1) A bona fide publicly supported zoo.
(2) An educational or scientific research institution.
(3) An individual who lawfully possessed the cougar on June 29, 1977. The license may not be granted, however, for possession of a cougar within a municipality which prohibits such possession by ordinance.
(4) An individual who holds a cougar without caging under conditions simulating a natural habitat, the development of which is in accord with plans and specifications developed by the holder and approved by the Wildlife Resources Commission.

(f) The licensing provisions of this section apply to black bears held in captivity, but, to the extent that it differs from this section, Article 2 of Chapter 19A of the General Statutes governs the keeping of black bears in captivity. (1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 3; 1981, c. 575, s. 1; 1987, c. 827, s. 98.)

§ 113-273. Dealer licenses.

(a) "Dealer" Defined; All Licenses Annual. — As used in this section, the word "dealer" includes all persons or individuals required to be licensed under the terms of this section. Except when indicated otherwise, dealer licenses are annual licenses issued beginning January 1 each year running until the following December 31.

(b) License Required; Rules Governing Licensee. — Except as otherwise provided, no person may engage in any activity for which a dealer license is

provided under this section without first having procured a current and valid dealer license for that activity. In implementing the provisions of this section, the Wildlife Resources Commission may by rule govern every aspect of the licensee's dealings in wildlife resources. Specifically, these rules may require dealers to:

(1) Implement a system of tagging or otherwise identifying and controlling species regulated under the license and pay a reasonable fee, not to exceed two dollars and twenty-five cents ($2.25), for each tag furnished by the Wildlife Resources Commission;
(2) Keep records and statistics in record books furnished by the Wildlife Resources Commission, and pay a reasonable charge to defray the cost of furnishing the books;
(3) Be subject to inspection at reasonable hours and audit of wildlife resources and pertinent records and equipment;
(4) Make periodic reports;
(5) Post performance bonds payable to the Wildlife Resources Commission conditioned upon faithful compliance with provisions of law; and
(6) Otherwise comply with reasonable rules and administrative requirements that may be imposed under the authority of this section.

(c) Repealed by Session Laws 1993, c. 18, s. 3.

(d) Repealed by Session Laws 1979, c. 830, s. 1.

(e) Repealed by Session Laws 1993, c. 18, s. 3.

(f) Fur-Dealer License. — Except as otherwise provided in this subsection, any individual in this State who deals in furs must obtain an appropriate fur-dealer license. For the purposes of this subsection, "dealing in furs" is engaging in the business of buying or selling fur-bearing animals or other wild animals that may lawfully be sold, the raw furs, pelts, or skins of those animals, or the furs, pelts, or skins of wild animals which may not themselves be sold but whose fur, pelt, or skin may lawfully be sold. A hunter or trapper who has lawfully taken wild animals whose fur, pelt, or skin is permitted to be sold under this subsection is not considered a fur dealer if he exclusively sells the animals or the furs, pelts, and skins, as appropriate, to licensed fur dealers. All fur-dealer licenses are annual licenses issued beginning July 1 each year running until the following June 30. Fur-dealer licenses issued by the Wildlife Resources Commission are as follows:

(1) Resident fur-dealer license, sixty dollars ($60.00). Authorizes an individual resident of the State to deal in furs in accordance with the rules of the Wildlife Resources Commission.
(2) Nonresident fur-dealer license, three hundred dollars ($300.00). Authorizes an individual within the State to deal in furs in accordance with the rules of the Wildlife Resources Commission.
(3) Fur-dealer station license, one hundred twenty dollars ($120.00). Authorizes a person or individual to deal in furs at an established location where fur dealings occur under the supervision of a responsible individual manager named in the license. Individual employees of the business dealing in furs solely at the established location under the supervision of the manager need not acquire an individual license. Any employee who also deals in furs outside the established location must obtain the appropriate individual license. Individuals dealing in furs at an established location may elect to do so under their individual licenses.

The Executive Director may administratively provide for reissuance of a station license without charge for the remainder of the year when either a business continues at an established location under a new supervising manager or the business changes to a new location. Before reissuing the license, however, the Executive Director must

satisfy himself that there is a continuation of essentially the same business previously licensed and that any new supervising manager meets the qualifications imposed by rules of the Wildlife Resources Commission. The supervising manager must file the names of all employees of the business covered by a fur-dealer station license, whether temporary or permanent, including employees who process or skin the animals.

The Executive Director must furnish supervising managers and individual licensees with forms or record books for recording required information as to purchase, sale, importation, exportation, and other dealings, and make a reasonable charge to cover the costs of any record books furnished. It is unlawful for anyone dealing in furs to fail to submit reports required by rules or reasonable administrative directives.

(g) Controlled Hunting Preserve Operator License. — The Wildlife Resources Commission is authorized by rule to set standards for and to license the operation of controlled hunting preserves operated by private persons. Controlled hunting preserves are of two types: one is an area marked with appropriate signs along the outside boundaries on which only domestically raised game birds other than wild turkeys are taken; the other is an area enclosed with a dog-proof fence on which foxes may be hunted with dogs only. A controlled fox hunting preserve operated for private use may be of any size; a controlled hunting preserve operated for commercial purposes shall be an area of not less than 500 acres or of such size as set by regulation of the Wildlife Resources Commission, which shall take into account differences in terrain and topography, as well as the welfare of the foxes.

Operators of controlled fox hunting preserves may purchase live foxes from licensed trappers who live-trap foxes during any open season for trapping them and may, at any time, take live foxes from their preserves for sale to other licensed operators. The controlled hunting preserve operator license may be purchased for a fee of fifty dollars ($50.00), and is an annual license issued beginning August 1 each year running until the following July 1.

(h) Game Bird Propagation License. — No person may propagate game birds in captivity or possess game birds for propagation without first procuring a license under this subsection. The Wildlife Resources Commission may by rule prescribe the activities to be covered by the propagation license, which species of game birds may be propagated, and the manner of keeping and raising the birds, in accordance with the overall objectives of conservation of wildlife resources. Except as limited by this subsection, propagated game birds may be raised and sold for purposes of propagation, stocking, food, or taking in connection with dog training as authorized in G.S. 113-291.1(d). Migratory game bird operations authorized under this subsection must also comply with any applicable provisions of federal law and rules. The Wildlife Resources Commission may impose requirements as to shipping, marking packages, banding, tagging, or wrapping the propagated birds and other restrictions designed to reduce the change of illicit game birds being disposed of under the cover of licensed operations. The Wildlife Resources Commission may make a reasonable charge for any bands, tags, or wrappers furnished propagators. The game bird propagation license is issued by the Wildlife Resources Commission upon payment of a fee of five dollars ($5.00). It authorizes a person or individual to propagate and sell game birds designated in the license, in accordance with the rules of the Wildlife Resources Commission, except:

(1) Wild turkey and ruffed grouse may not be sold for food.

(2) Production and sale of pen-raised quail for food purposes is under the exclusive control of the Department of Agriculture and Consumer Services. The Wildlife Resources Commission, however, may regulate the possession, propagation, and transportation of live pen-raised quail.

Wild turkey acquired or raised under a game bird propagation license shall be confined in a cage or pen approved by the Wildlife Resources Commission and no such wild turkey shall be released for any purpose or allowed to range free. It is a Class 3 misdemeanor to sell wild turkey or ruffed grouse for food purposes, to sell quail other than lawfully acquired pen-raised quail for food purposes, or to release or allow wild turkey to range free.

(i) Furbearer Propagation License. — No person may engage in propagation in captivity or possess any species of furbearers for propagation for the purpose of selling the animals or their pelts for use as fur without first procuring a license under this subsection. The furbearer propagation license is issued by the Wildlife Resources Commission upon payment of a fee of twenty-five dollars ($25.00). It authorizes the propagation or sale of the pelts or carcasses of the species of furbearing animals named therein, including bobcats, opossums and raccoons, or red and silver foxes (Vulpes vulpes), for use as fur. The Wildlife Resources Commission may by rule prescribe the activities covered by the license, the manner of keeping and raising the animals and the manner of killing them prior to sale, in accordance with overall objectives of conservation of wildlife resources and humane treatment of wild animals raised in captivity. The Wildlife Resources Commission may require tagging of the pelts or carcasses of the animals prior to sale in accordance with the provisions of G.S. 113-276.1(5) and G.S. 113-291.4(g). It is unlawful for any person licensed under this subsection to sell any pelt or carcass of any furbearing animal or fox to any other person who is not lawfully authorized to buy and possess the same, or to sell or deliver a live specimen of any such animal to any person who is not authorized to buy or receive and to hold the animal in captivity.

(j) [Reserved.]

(k) Taxidermy License. — Any individual who engages in taxidermy involving wildlife for any compensation, including reimbursement for the cost of materials, must first procure a taxidermy license. This license is an annual license issued by the Wildlife Resources Commission for ten dollars ($10.00). The Wildlife Resources Commission must require a licensee to keep records concerning any wildlife taken or possessed by him; to keep records of the names and addresses of persons bringing him wildlife, the names and addresses of persons taking the wildlife if different, and other information concerning the origin of the wildlife; to inspect any applicable licenses or permits pertaining to the taking and possession of wildlife brought to him; to restrict him to taxidermy upon lawfully acquired wildlife; and to keep other pertinent records. No taxidermist subject to license requirements may sell any game or game fish in which he deals except that a taxidermist may acquire a valid possessory lien upon game or game fish under the terms of Chapter 44A of the General Statutes and, with a permit from the Executive Director, may sell the game or game fish under the procedure authorized in Chapter 44A. Wildlife acquired by a taxidermist is deemed "personal property" for the purposes of Chapter 44A. (1929, c. 333, ss. 1-7; c. 198, ss. 1, 2, 4; 1933, c. 337, ss. 1-4; c. 430, s. 1; 1935, c. 471, ss. 1-3; c. 486, ss. 4, 12, 21; 1937, c. 45, s. 1; 1945, c. 617; 1949, c. 1203, s. 1; 1957, cc. 386, 841; c. 849, s. 1; 1959, c. 304; 1961, c. 311; c. 834, s. 1; c. 1056; 1965, c. 957, s. 2; 1967, c. 790; 1969, c. 1030; c. 1042, ss. 1-5; 1971, c. 242; c. 282, s. 1; c. 515, s. 5; c. 705, ss. 1, 2; 1973, c. 1098; c. 1262, ss. 18, 86; 1975, c. 197, ss. 1-4, 13, 14; 1977, c. 658; 1979, c. 830, s. 1; 1981, c. 620, ss. 4-6; 1983, c. 140, s. 9; 1985, c. 476, s. 1; 1987, c. 133; c. 827, s. 98; 1989, c. 616, s. 3; 1993, c. 18, s. 3; c. 539, s. 854; 1994, Ex. Sess., c. 24, s. 14(c); 1997-261, s. 81.)

Cross References. — As to regulation of pen-raised quail by Department of Agriculture and Wildlife Resources Commission, see § 106-549.94.

Editor's Note. — Session Laws 1989, c. 616, which amended this section, in s. 6 provided that any provisions of the act inconsistent with the terms of any local act would be superseded by the provisions of the local act.

§ 113-274. Permits.

(a) As used in this Article, the word "permit" refers to a written authorization issued without charge by an employee or agent of the Wildlife Resources Commission to an individual or a person to conduct some activity over which the Wildlife Resources Commission has jurisdiction. When sale of wildlife resources is permitted, rules or the directives of the Executive Director may require the retention of invoices or copies of invoices in lieu of a permit.

(b) Except as otherwise specifically provided, no one may engage in any activity for which a permit is required without having first procured a current and valid permit.

(c) The Wildlife Resources Commission may issue the following permits:

(1) Repealed by Session Laws 1979, c. 830, s. 1.

(1a) Depredation Permit. — Authorizes the taking, destruction, transfer, removal, transplanting, or driving away of undesirable, harmful, predatory, excess, or surplus wildlife or wildlife resources. The permit must state the manner of taking and the disposition of wildlife or wildlife resources authorized or required and the time for which the permit is valid, plus other restrictions that may be administratively imposed in accordance with rules of the Wildlife Resources Commission. No depredation permit or any license is needed for the owner or lessee of property to take wildlife while committing depredations upon the property. The Wildlife Resources Commission may regulate the manner of taking and the disposition of wildlife taken without permit or license, including wildlife killed accidentally by motor vehicle or in any other manner.

(1b) Captivity Permit. — Authorizes the possession of live wildlife that may lawfully be permitted to be retained alive, in accordance with governing rules of the Wildlife Resources Commission. This permit may not substitute for any required collection license or captivity license, but may be temporarily issued for possession of wild animals or wild birds pending action on a captivity license or following its denial or termination. If this permit is issued for fish to be held indefinitely, the Wildlife Resources Commission may provide for periodic renewals of the permit, at least once each three years, to insure a review of the circumstances and conditions under which fish are kept. Wild animals and wild birds kept temporarily in captivity under this permit must be humanely treated and in accordance with any stipulations in the permit, but the standards of caging and care applicable to species kept under the captivity license do not apply unless specified in the permit. Any substantial deviation from reasonable requirements imposed by rule or administratively under the authority of this section renders the possession of the wildlife unlawful.

(1c) Possession Permit. — Authorizes the possession of dead wildlife or other wildlife resources lawfully acquired. The Wildlife Resources Commission may by rule implement the issuance and supervision of this permit, in accordance with governing laws and rules respecting the possession of wildlife. Any substantial deviation from reasonable requirements imposed by rule or administratively under the authority of this section renders the possession of the wildlife unlawful.

(2) Transportation Permit. — The Wildlife Resources Commission may require the use of transportation permits by persons required to be

licensed under this Article, or by persons and individuals exempt from license requirements, while transporting wildlife resources within the State — as necessary to discourage unlawful taking or dealing in wildlife resources and to control and promote the orderly and systematic transportation of wildlife resources within, into, through, and out of the State. Transportation permits may be issued for wildlife transported either dead or alive, in accordance with restrictions that may be reasonably imposed. When convenient, rules or administrative directives may require the retention and use of an invoice or memorandum of sale, or the license or permit authorizing the taking or acquisition of the wildlife resources, as a transportation permit. When circumstances warrant, however, a separate additional transportation permit may be required. Any substantial deviation from reasonable requirements imposed by rule or administratively under the authority of this section renders the transportation of the wildlife resources unlawful.

(3) Exportation or Importation Permit. — Authorizes the exportation or importation of wildlife resources from or into the State or from county to county. The Wildlife Resources Commission may by rule implement the issuance and supervision of this permit, in accordance with governing laws and rules respecting the exportation and importation of wildlife resources. Any substantial deviation from reasonable requirements imposed by rule or administratively under the authority of this section renders the importation or exportation of the wildlife resources unlawful.

(3a) Trophy Wildlife Sale Permit. — Authorizes the owner of lawfully taken and possessed dead wildlife specimens or their parts that are mounted, stuffed, or otherwise permanently preserved to sell identified individual specimens that may lawfully be sold under applicable laws and rules.

(3b) Repealed by Session Laws 1993, c. 18, s. 4.

(4) Other Permits. — In implementing the provisions of this Subchapter, the Wildlife Resources Commission may issue permits for taking, purchase, or sale of wildlife resources if the activity is lawfully authorized, if there is a need for control of the activity, and no other license or permit is applicable. In addition, if a specific statute so provides, a permit under this subdivision may be required in addition to a license when there is a need for closer control than provided by the license. (1935, c. 486, ss. 4, 22; 1941, c. 231, s. 1; 1965, c. 957, s. 2; 1971, c. 423, s. 2; c. 809, s. 1; 1973, c. 1262, s. 18; 1977, c. 794, s. 1; 1979, c. 830, s. 1; 1987, c. 827, s. 98; 1993, c. 18, s. 4.)

§ 113-275. General provisions respecting licenses and permits.

(a) The Wildlife Resources Commission is authorized to make agreements with other jurisdictions as to reciprocal honoring of licenses in the best interests of the conservation of wildlife resources.

(a1) Notwithstanding the fees specified for nonresident individuals by G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, 113-272.2, and 113-273, if the Wildlife Resources Commission finds that a state has a nonresident license fee related to wildlife resources that exceeds the fee for a comparable nonresident license in North Carolina, the Wildlife Resources Commission may, by resolution in official session, increase the nonresident license fee applicable to citizens of that state to an amount equal to the fee a North Carolina resident is required to pay in that state.

The action of the Wildlife Resources Commission to increase a fee pursuant to this subsection is not subject to the provisions of Article 2 of Chapter 150B of the General Statutes. Notwithstanding the provisions of G.S. 150B-59(a), the action of the Wildlife Resources Commission to increase a fee pursuant to this subsection becomes effective on the date specified by the Wildlife Resources Commission.

(b) Every license issued under the provisions of this Article is effective beginning upon its date of issuance unless the license expressly provides to the contrary, in accordance with rules of the Wildlife Resources Commission and such administrative authority to set future effective dates in particular types of cases as may be delegated by the Wildlife Resources Commission to responsible employees or agents.

(b1) No hunting or fishing license issued to a resident under the provisions of G.S. 113-270.1C, 113-270.1D, 113-270.2, 113-270.3, 113-271, or 113-272 becomes invalid for use during the term for which it is issued by reason of a removal of the residence of the licensee to another state.

(c) Every license issued under the provisions of this Article must be sold for the full prescribed amount notwithstanding that a portion of the prescribed license period may have elapsed prior to the license application.

(c1) Upon receipt of a proper application together with a fee of two dollars ($2.00), the Wildlife Resources Commission may issue a new license or permit to replace one that has been lost or destroyed before its expiration. The application must be on a form of the Wildlife Resources Commission setting forth information in sufficient detail to allow ready identification of the lost or destroyed license or permit and ascertainment of the applicant's continued entitlement to it.

(d) In implementing the sale and distribution of licenses issued under this Article, the Wildlife Resources Commission may require license applicants to disclose such information as necessary for determining the applicant's eligibility for a particular license. Such information as deemed desirable to assist in enforcement of license requirements may be required to be recorded on the face of any license. Fixing the form of the license may be by reasonable administrative directive, and requirements as to such form need not be embodied in rules of the Wildlife Resources Commission in order to be validly required.

(e) Where employees of the Wildlife Resources Commission sell licenses of a type also sold through license agents, such employees must sell the licenses for the full amount and remit such full amount to the Wildlife Resources Commission without any deduction of the stipulated license agent's fee.

(f) Except as otherwise specifically provided by statute or except as the Wildlife Resources Commission may by rule prescribe to the contrary:

(1) All licenses and permits under this Article must be kept ready at hand by or about the person of individual licensees and permittees while engaged in the regulated operations;

(2) All licenses and permits under this Article are nontransferable; and

(3) All individuals engaged in operations subject to license or permit requirements must have an individual license or permit — except where such individuals are in the employ of and under the supervision of someone who has the license or permit or acceptable evidence of the same at hand and the activity is one for which a person not an individual may acquire a license.

(g) It is unlawful to buy, sell, lend, borrow, or in any other way transfer or receive or attempt to do any such things with respect to any nontransferable license or permit for the purpose of circumventing the requirements of this Article.

(h) It is unlawful for any person engaged in regulated operations under this Article to refuse to exhibit or display any required license, permit, or identi-

fication upon the request of any employee or agent of the Wildlife Resources Commission or of any officer authorized to enforce the provisions of this Article.

(i) It is unlawful to refuse to comply with any provisions of this Article or of rules and administrative requirements reasonably promulgated under the authority of this Article.

(j) It is a Class 1 misdemeanor for any person:

(1) Knowingly to engage in any activity regulated under this Article with an improper, false, or altered license or permit;

(2) Knowingly to make any application for a license or permit to which he is not entitled;

(3) Knowingly to make any false, fraudulent, or misleading statement in applying for a license or permit under this Article; or

(4) To counterfeit, alter, or falsify any application, license, or permit under this Article.

(k) A person may use a bow and arrow to take nongame fish in inland and joint fishing waters subject to any applicable rule of the Wildlife Resources Commission regarding seasons, creel limits, type of weapon or subsidiary gear, or any other restriction necessary for the conservation of wildlife under the authority of the following licenses:

(1) All of the combination hunting and fishing licenses issued pursuant to G.S. 113-270.1C;

(2) All of the sportsman licenses issued pursuant to G.S. 113-270.1D;

(3) The hunting licenses issued pursuant to G.S. 113- 270.2(c)(1), (2), (3), (5), and (6);

(4) The hook-and-line fishing licenses issued pursuant to G.S. 113-271(d)(1), (2), (3), (4), (5), (6), (8), and (9); and

(5) All of the special device fishing licenses issued pursuant to G.S. 113-272.2. (1929, c. 335, ss. 6, 10, 11; 1945, c. 567, ss. 5, 6; 1961, c. 329; 1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1981, c. 620, ss. 7, 8; 1987, c. 745, s. 1; c. 827, s. 98; 1993, c. 539, s. 855; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 684, s. 7; 1995, c. 36, s. 1.)

§ 113-276. Exemptions and exceptions to license and permit requirements.

(a), (b) Repealed by Session Laws 1979, c. 830, s. 1.

(c) Except as otherwise provided in this Subchapter, every landholder, his spouse, and dependents under 18 years of age residing with him may take wildlife upon the land held by the landholder without any license required by G.S. 113-270.1B or G.S. 113-270.3(a), except that such persons are not exempt from the falconry license described in G.S. 113-270.3(b)(4).

(d) Except as otherwise provided in this Subchapter, individuals under 16 years of age are exempt from the hunting and trapping license requirements of G.S. 113-270.1B(a) and G.S. 113-270.3(a), except the falconry license described in G.S. 113-270.3(b)(4), and the fishing license requirement of G.S. 113-272, if:

(1) He is accompanied by a responsible adult who is in compliance with applicable license requirements; or

(2) He is carrying a current and valid license appropriate to the activity which has been issued to one of his parents or to his guardian.

Individuals under 16 years of age are exempt from the fishing license requirements of G.S. 113-270.1B and G.S. 113-271.

(e) A resident individual fishing with hook and line in the county of his residence using natural bait is exempt from the hook-and-line fishing-license requirements of G.S. 113-270.1B(a). "Natural bait" is bait which may be beneficially digested by fish. Where a municipality is bounded by a boundary

river or stream, residents of the county in which the municipality is located may fish in the boundary river or stream from those banks of such river or stream in any adjoining county lying directly opposite to the banks of the municipality in question and be deemed fishing within their county for the purposes of the exemption contained in this subsection. The same is deemed true of fishing from the banks of any island in the boundary river or stream within the area opposite the banks of the municipality or municipalities. For the purposes of this section, a boundary river or stream is such portion of a river or stream which either forms a county boundary line or follows the course of such a line. Such line may follow the middle, thread, some former channel, the edge, or some other course in, along, under, or touching the waters of such river or stream so long as the course of the river or stream substantially represents or follows the course of such boundary line.

(f) A special device license is not required when a landing net is used:

(1) To take nongame fish in inland fishing waters; or

(2) To assist in taking fish in inland fishing waters when the initial and primary method of taking is by the use of hook and line — so long as applicable hook-and-line fishing-license requirements are met.

As used in this subsection, a "landing net" is a net with a handle not exceeding eight feet in length and with a hoop or frame to which the net is attached not exceeding 60 inches along its outer perimeter.

(g) Bow nets covered by a special device license may be used in waters and during the seasons authorized in the rules of the Wildlife Resources Commission by an individual other than the licensee with the permission of the licensee. The individual using another's bow net must also secure the net owner's special device license and keep it on or about his person while fishing in inland fishing waters.

(h) Repealed by Session Laws 1979, c. 830, s. 1.

(i) A food server may prepare edible wildlife lawfully taken and possessed by a patron for serving to the patron and any guest he may have. The Executive Director may provide for the keeping of records by the food server necessary for administrative control and supervision with respect to wildlife brought in by patrons.

(j) A migrant farm worker who has in his possession a temporary certification of his status as such by the Rural Employment Service of the North Carolina Employment Security Commission on a form provided by the Wildlife Resources Commission is entitled to the privileges of a resident of the State and of the county indicated on such certification during the term thereof for the purposes of:

(1) Purchasing and using the resident fishing licenses provided by G.S. 113-271(d)(2), (4), and (6)a.; and

(2) Utilizing the natural-bait exemption in subsection (e) above.

(k) A person may participate in a field trial for beagles without a hunting license if approved in advance by the Executive Director, conducted without the use or possession of firearms, and on an area of not more than 100 acres of private land which is completely and permanently enclosed with a metal fence through which rabbits may not escape or enter at any time.

(*l*) The fishing license provisions of this Article do not apply upon the lands held in trust by the United States for the Eastern Band of the Cherokee Indians.

(m) Notwithstanding any other provision of law, the fourth day of July of each year is declared a free fishing day to promote the sport of fishing and no hook-and-line fishing license is required to fish in any of the public waters of the State on this day. All other laws and rules pertaining to hook-and-line fishing still apply. (1929, c. 335, ss. 1, 10; 1935, c. 486, s. 12; 1937, c. 45, s. 1; 1945, c. 567, ss. 1, 6; c. 617; 1949, c. 1203, s. 1; 1951, c. 1112, s. 2; 1957, c. 849,

s. 1; 1959, c. 304; 1961, cc. 312, 329; c. 834, s. 1; 1963, c. 170; 1965, c. 957, s. 2; 1967, cc. 127, 654, 790; 1969, c. 1030; c. 1042, ss. 1-5; 1971, c. 242; c. 282, s. 1; c. 705, ss. 1, 2; c. 1231, s. 1; 1973, c. 1262, s. 18; 1975, c. 197, ss. 1-4; 1977, c. 191, s. 1; c. 658; 1979, c. 830, s. 1; 1987, c. 827, s. 98; 1993 (Reg. Sess., 1994), c. 684, ss. 6, 8, 9; 1999-456, ss. 29, 30.)

Effect of Amendments. — Session Laws 1999-456, s. 29, effective August 13, 1999, substituted "G.S. 113-270.1B(a)" for "G.S. 113-271" in subsection (e).

Session Laws 1999-456, s. 30, effective August 13, 1999, substituted "G.S. 113-271(d)(2), (4), and (6)a" for "G.S. 113-271(d)(2a), (3), and (4)" in subdivision (j)(1).

§ 113-276.1. Regulatory authority of Wildlife Resources Commission as to license requirements and exemptions.

In its discretion and in accordance with the best interests of the conservation of wildlife resources, the Wildlife Resources Commission may implement the provisions of this Article with rules that:

(1) [Reserved.]

(2) Regulate license requirements and exemptions applying to the taking of wildlife on particular waters forming or lying across a county boundary where there may be confusion as to the location of the boundary, hardship imposed as to the location of the boundary, or difficulty of administering or enforcing the law with respect to the actual boundary location.

(3) Require persons subject to license requirements, and persons exempt from license requirements, to carry, display, or produce identification that may be necessary to substantiate the person's entitlement to a particular license or to a particular exemption from license requirements.

(4) Require individuals aboard vessels or carrying weapons or other gear that may be used to take wildlife resources, and in an area at a time wildlife resources may be taken, to exhibit identification that includes the individual's name and current address. More than one piece of identification, including a vehicle driver license, may be required to be exhibited, if available.

(5) Implement a system of tagging and reporting fur-bearing animals and big game. Upon the implementation of a tagging system for any species of fur-bearing animal, the Wildlife Resources Commission may charge a reasonable fee to defray its costs, not to exceed two dollars twenty-five cents ($2.25) per tag, for each tag furnished. The price of the big game hunting license includes the cost of big game tags. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-276.2. Licensees and permittees subject to administrative control; refusal to issue or reissue, suspension, and revocation of their licenses and permits; court orders of suspension.

(a) This section applies to the administrative control of:

(1) Persons, other than individual hunters and fishermen taking wildlife as sportsmen, holding permits under this Article;

(2) Individuals holding special device licenses under G.S. 113-272.2(c)(1), (1a), (2), and (2a);

(3) Individuals holding collection licenses under G.S. 113-272.4;

(4) Individuals holding captivity licenses under G.S. 113-272.5; and

(5) Persons holding dealer licenses under G.S. 113-273.

(b) Before issuing any license or permit to persons subject to administrative control under this section, the Executive Director must satisfy himself that the person meets the qualifications set by statute, rule, or his administrative guidelines. If the person fails to meet the qualifications or if the Executive Director learns of some other cause for believing that issuing the license or permit would be contrary to the best interests of the conservation of wildlife resources, he must refuse to issue the license or permit.

(c) Before reissuing any license or permit to any person subject to administrative control, the Executive Director must review all available information and apply the same standards that governed initial issuance of the license or permit before he may reissue it.

(d) Upon refusing to issue or reissue a license or permit under this section, the Executive Director must notify the person in writing of the reasons for his action and inform him that if he is dissatisfied with the Executive Director's decision he may commence a contested case on the refusal by filing a petition under G.S. 150B-23 within 10 days of receiving the notice. The notice must be personally served by a law enforcement officer or an agent of the Wildlife Resources Commission or sent by mail with return receipt requested.

(e) The Executive Director shall revoke a license or permit issued to a person subject to administrative control if he finds that the person does not meet the qualifications for the license or permit, has committed a substantial criminal violation of this Subchapter or a rule adopted under the Subchapter, or has seriously or persistently failed to comply with the terms and conditions upon which the license or permit was issued. Before revoking a license or permit, the Executive Director shall notify the licensee or permittee of his findings and his intention to revoke the license or permit. The notice must be personally served by a law enforcement officer or an agent of the Wildlife Resources Commission or sent by mail with return receipt requested. A licensee or permittee who disagrees with the Executive Director's findings may commence a contested case on revocation by filing a petition under G.S. 150B-23 within 10 days of receiving the notice. Revocation or suspension of a license or permit by a court under G.S. 113-277 runs concurrently with a revocation under this section.

(f) Repealed by Session Laws 1987, c. 827, s. 8.

(g) Upon revocation of a license or permit, the Executive Director or his agent must request return of the license or permit and all associated forms, tags, record books, inventories, invoice blanks, and other property furnished by the Wildlife Resources Commission or required to be kept by the Commission solely in connection with the license or permit. If the person needs to retain a copy of the property returned to the Wildlife Resources Commission for tax purposes or other lawful reason, the person may copy items returned if the copies are clearly marked in a manner that they could not be mistaken for the originals. In securing property to be returned or in otherwise closing out the affairs conducted under the license or permit, agents of the Wildlife Resources Commission may enter at reasonable hours the premises of the person in which wildlife resources or items of property pertaining to the license or permit are kept, or reasonably believed to be kept, to inspect, audit, inventory, remove, or take other appropriate action. Any wildlife resources in the possession of the person which he may no longer possess must be disposed of in accordance with the most nearly appropriate provision of G.S. 113-137. If a person fails to return to an agent of the Wildlife Resources Commission all wildlife resources and other property covered by this subsection; refuses to allow entry by the agent to inspect, audit, remove property, or perform other duties; or otherwise obstructs an agent of the Wildlife Resources Commission in performing his

duties under this subsection, he is guilty of a Class 2 misdemeanor. Each day's violation is a separate offense.

(h) No person refused issuance or reissuance of a license or permit under this section, or whose license or permit was revoked, is eligible to apply again for that or any similar license or permit for two years. Upon application, the Executive Director may not grant the license or permit unless the person produces clear evidence, convincing to the Executive Director, that he meets all standards and qualifications and will comply with all requirements of statutes, rules, and reasonable administrative directives pertaining to the license or permit.

(i) The Executive Director is required to make necessary investigations and cause necessary disclosure of information by all persons subject to administrative control, and all applicants for a license or permit that would place them in this category, to determine that the real party in interest is seeking or has been issued the license or permit. Any attempt to circumvent the provisions of this section is a Class 1 misdemeanor.

(j) If the Executive Director determines that the effective conservation of wildlife resources would be seriously impaired by continued unfettered operations or by continued possession of property by the person subject to administrative control, the Executive Director may apply to the appropriate court for an order:

(1) Placing special reporting and inspection requirements on the person; or

(2) Impounding some or all of the records or other property associated with the license or permit; or

(3) Limiting the scope of operations under the license or permit; or

(4) If there is clear evidence of a serious threat to the conservation of wildlife resources, suspending the operations of the person under the license or permit; or

(5) Placing other appropriate restrictions, prohibitions, or requirements upon the person. (1979, c. 830, s. 1; 1987, c. 827, ss. 8, 98; 1993, c. 539, ss. 856, 857; 1994, Ex. Sess., c. 24, s. 14(c); 1999-456, s. 31.)

Effect of Amendments. — Session Laws 1999-456, s. 31, effective August 13, 1999, substituted "G.S. 113-272.2(c)(1), (1a), (2), and (2a)" for "G.S. 113-272.2(c)(1) and (2)" in subdivision (a)(2).

§ 113-276.3. Mandatory suspension of entitlement to license or permit for fixed period upon conviction of specified offenses.

(a) Upon conviction of a suspension offense under this section, the defendant's entitlement to any license or permit applicable to the type of activity he was engaging in that resulted in the conviction is suspended for the period stated in subsection (d). The period of suspension begins:

(1) Upon the surrender to an authorized agent of the Wildlife Resources Commission of all applicable licenses and permits; or

(2) If no licenses or permits are possessed, the defendant fails or refuses to surrender all licenses or permits, or any license or permit is lost or destroyed, upon the Executive Director's placing in the mail the notification required by subsection (c).

(b) If the defendant does not wish to appeal, the presiding judge may order surrender of all applicable licenses and permits to an agent of the Wildlife Resources Commission. If the presiding judge does not order the surrender, or if there is for any other reason a failure by the defendant to surrender all applicable licenses and permits, an authorized agent of the Wildlife Resources

Commission must demand surrender. Each day's failure or refusal to surrender a license or permit upon demand, in the absence of satisfactorily accounting for the failure to do so, is a separate offense. A charge under this subsection does not affect the power of the court to institute contempt proceedings if a failure or refusal to surrender a license or permit also violates a court order. Any agent of the Wildlife Resources Commission accepting surrender of licenses and permits, in the courtroom or at a subsequent time and place, must transmit them to the Executive Director with a written notation of the date of surrender and a report of other pertinent circumstances required by the Executive Director.

(c) The Executive Director must institute a procedure for the systematic reporting to him by protectors or other authorized agents of the Wildlife Resources Commission of all convictions of suspension offenses under this section. Upon obtaining information concerning conviction of a suspension offense and receiving any surrendered licenses and permits, the Executive Director must determine if all appropriate licenses and permits possessed by the defendant have been surrendered; if not, the Executive Director must notify the appropriate agent of the Wildlife Resources Commission to demand surrender or renew a demand for surrender under the terms of subsection (b) if it is feasible to do so. Upon satisfying himself that he has received all licenses and permits for which surrender may feasibly be obtained, if any, the Executive Director must mail the defendant a notice of the suspension of his entitlement to possess or procure any license or permit of the type applicable to the activity engaged in that resulted in conviction of the suspension offense. The notice must specify the commencement and termination dates of the period of suspension that apply under the terms of this section.

(d) Any violation of this Subchapter or of any rule adopted by the Wildlife Resources Commission under the authority of this Subchapter which is subject to a penalty greater than the one provided in G.S. 113-135(a)(1) is a suspension offense. Conviction of any of the following suspension offenses results in a suspension for a period of two years:

(1) A violation of G.S. 113-294(b).

(2) A violation of G.S. 113-294(c).

(2a) A violation of G.S. 113-294(c1).

(3) A violation of G.S. 113-294(e).

(4) Repealed by Session Laws 1999-120, s. 2, effective October 1, 1999.

A conviction of any other suspension offense results in a suspension for a period of one year.

(e) Unless otherwise provided in the judgment, any action by a court under G.S. 113-277 to suspend entitlement to a license or permit or to suspend or revoke a license or permit supersedes any suspension of entitlement to a license or permit mandated by this section. If the judgment of the court after a conviction for suspension offense does not include any suspension or revocation action, the provisions of this section apply. (1979, c. 830, s. 1; 1981, c. 424, s. 1; 1987, c. 827, s. 98; 1999-120, s. 2.)

Effect of Amendments. — Session Laws 1999-120, s. 2, effective October 1, 1999, added subdivision (d)(2a), and deleted subdivision (d)(4), relating to violation of G.S. 113-294(k).

§ 113-277. Suspension and revocation of licenses and permits in the discretion of the court; suspension of entitlement; court's power concurrent; definition of "conviction"; penalties.

(a) Upon conviction of any licensee or permittee under this Article of a violation of any law or rule administered by the Wildlife Resources Commis-

sion under the authority of this Subchapter, the court in its discretion may order surrender of that license or permit plus any other license or permit issued by the Wildlife Resources Commission. The court may order suspension of any license or permit for some stipulated period or may order revocation of any license or permit for the remainder of the period for which it is valid. A period of suspension may extend past the expiration date of a license or permit, but no period of suspension longer than two years may be imposed. During any period of suspension or revocation, the licensee or permittee is not entitled to purchase or apply for any replacement, renewal, or additional license or permit regulating the same activity covered by the suspended or revoked license or permit. The Wildlife Resources Commission may by administrative action and by rule devise procedures designed to implement license or permit suspensions and revocations that may be ordered by the courts.

(a1) Upon conviction of any person who is not a licensee or permittee under this Article of a violation of any law or rule administered by the Wildlife Resources Commission under the authority of this Subchapter, the court in its discretion may suspend the entitlement of the defendant to possess or procure any specified licenses and permits issued by the Wildlife Resources Commission for a period not to exceed two years.

(a2) A suspension or revocation by a court under this section may be ordered to run concurrently or consecutively with any suspension under G.S. 113-276.3 or any action under G.S. 113-276.2. If no provision is made, G.S. 113-276.3(e) applies, but action by the Executive Director or the Wildlife Resources Commission under G.S. 113-276.2 may not be preempted.

(a3) As used in this Article, the term "conviction" has the same meaning assigned to it in G.S. 113-171.

(a4) The Wildlife Resources Commission shall order the surrender of any license or permit issued under this Article to a person whose licensing privileges have been forfeited under G.S. 15A-1331A for the period specified by the court.

(b) It is a Class 1 misdemeanor for any person during a period of suspension or revocation under the terms of this Article:

(1) To engage in any activity licensed in this Article without the appropriate license or permit;

(2) Knowingly to make any application for a license or permit to which he is not entitled;

(3) Knowingly to make any false, fraudulent, or misleading statement in applying for a license or permit under this Article;

(4) To counterfeit, alter, or falsify any application, license, or permit under this Article;

(5) Knowingly to retain and use any license or permit which has been ordered revoked or suspended under the terms of this Article; or

(6) Willfully to circumvent the terms of suspension or revocation in any manner whatsoever. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1981, c. 424, s. 2; 1987, c. 827, s. 98; 1993, c. 539, s. 858; 1994, Ex. Sess., c. 20, s. 4; c. 24, s. 14(c); 1998-225, s. 3.10.)

Editor's Note. — Session Laws 1998-225, s. 5.3, provides: "Unless otherwise expressly provided, every agency to which this act applies shall adopt rules to implement the provisions of this act only in accordance with the provisions of Chapter 150B of the General Statutes. This act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1. Every agency to which this act applies that is authorized to adopt rules to implement the provisions of this act may adopt temporary rules to implement the provisions of this act. This section shall continue in effect until all rules necessary to implement the provisions of this act have become effective as either temporary rules or permanent rules."

Session Laws 1998-225, s. 5.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, in subsec-

tion (a3), substituted "G.S. 113-171" for "G.S. 113-166(a)."

§§ 113-278 through 113-280: Reserved for future codification purposes.

Article 21A.

Regulating Hunting and Fishing on the Registered Property of Another.

§ 113-281. Definitions.

In addition to the definitions in Article 12 of this Chapter, the following definitions apply in this Article:

(1) Entry Permit. — The permit described in G.S. 113-283.

(2) Posted Property. — Registered property that is posted in substantial compliance with G.S. 113-282(d).

(3) Registered Property. — Property that has been accepted for registration by the Wildlife Resources Commission as provided in G.S. 113-282, and has not been deleted from registration.

(4) Registrant. — A current applicant of record for a tract of registered property. (1981, c. 854, s. 1.)

§ 113-282. Registration and posting of property.

(a) A person who controls the hunting, fishing, or hunting and fishing rights to a tract of property and wishes to register it under this Article must apply to the Wildlife Resources Commission in accordance with this section.

(b) The registration application must contain:

(1) A statement under oath by the applicant that he has the right to control hunting or fishing, or both, on the tract of property to be registered. If the applicant is not a landholder, he must file a copy of his lease or other document granting him control of hunting, fishing, or hunting and fishing rights on the tract.

(2) Three copies of a description of the tract that will allow law-enforcement officers to determine in the field, and prove in court, whether an individual is within the boundaries of the tract. This description may take the form of a map, plat, aerial photograph showing boundaries, diagram keyed to known landmarks, or any other document or description that graphically demarks the boundaries with sufficient accuracy for use by officers in court and in the field. Any amendment of the boundaries of a registered tract must be accomplished by a new registration application meeting the requirements of this subsection.

(3) An agreement by the applicant to post the tract in accordance with the requirements of this section and to make a continuing effort to maintain posted notices for the tract.

(4) An agreement by the applicant to issue or cause issuance of an entry permit to all individuals to whom he or his authorized agent gives permission to hunt or fish on the tract. The applicant must file the name and signature of any agent authorized by him to issue the entry permit, and a registrant must amend his application to rescind the agent's authority and to substitute or add an authorized agent.

(5) A fee of ten dollars ($10.00) to cover the administrative costs of processing the registration application.

(c) The Executive Director must examine any submitted application to determine whether the requirements of subsection (b) have been fully met. If he determines that these requirements have been met and if his inquiries of persons with knowledge of the locality of the tract corroborate the truthfulness and accuracy of the information in the application, he must register the tract of property and notify the registrant of his action. Registration consists of filing the application in a central registry open to the public with an indication whether the property is registered as to hunting, fishing, or both. Upon registration, the Executive Director must send, for the information of protectors and other law-enforcement officers, the two duplicate copies of the description of the tract as follows: (i) to the sheriff of the county in which the tract is located, or to the chief of the county police department if such a department is the primary agency enforcing the criminal laws in a county; and (ii) to an appropriate protector stationed in the area where the tract is located. The Executive Director must also furnish officers with copies of the signatures of registrants and their authorized agents and other pertinent information for enforcement of this Article.

(d) A registrant must post his registered property as soon as practicable after receiving notice that the tract was accepted for registration. Posted notices must measure at least 120 square inches; contain the word "POSTED" in letters at least three inches high; state that the property is registered with the Wildlife Resources Commission and that hunting or fishing, or both, are prohibited without an entry permit; and set out the name and address and, if feasible, the telephone number of the person to contact for an entry permit. At least one notice must be conspicuously posted on the registered property not more than 200 yards apart close to and along the boundaries. In any event at least one notice must be placed on each side of the registered property, one at each corner, and one at each point of entry. A point of entry is where a roadway, trail, path, or other way likely to be used by entering sportsmen leads into the tract. If registered property is posted only with respect to fishing, it is sufficient if the notices prohibit fishing without permission, and are posted at intervals of not more than 200 yards along the stream or shoreline and at points of entry likely to be used by fishermen. Notices posted along the boundaries of a tract must face in the direction that they will be most likely seen by persons entering the tract. Notices posted along a stream or shoreline must face in the direction that they will most likely be seen by anyone intending to fish. With respect to any particular hunter or fisherman, or person who has entered to hunt or fish, there is substantial compliance with this subsection, notwithstanding that one or more of the required notices may be absent, illegible, or improperly placed, if any notice is or has been reasonably visible to him while he was within or approaching the registered tract.

(e) If a registrant loses his proprietary interest or his control of the hunting, fishing, or hunting and fishing rights as to which he has registered the property, he must within 20 days notify the Executive Director. If a new person who controls those rights wishes to continue the registration of the tract, he must make application under the terms of subsection (b), except that no copies of the tract's description need be filed if there is no change of boundaries. When the Executive Director receives the notice under this subsection, or otherwise learns that a registrant has lost his proprietary control of the applicable hunting, fishing, or hunting and fishing rights, and there is no pending application to continue registration of the tract, the Executive Director must immediately delete registration of the tract, notify the presently responsible landholder, and require him to remove any remaining posted notices.

(f) A person who controls the hunting, fishing, or hunting and fishing rights to registered property may apply to the Wildlife Resources Commission in

writing to delete the registration of the tract. If he is not the registrant, he must satisfy the Executive Director of his present right to control the applicable hunting and fishing rights. If he is the registrant, his statement that he still controls the applicable rights on the tract is sufficient unless the Executive Director has reason to require further evidence on this point. Upon determination that an application to delete is proper, the Executive Director must immediately delete registration of the tract, notify the presently responsible landholder, and require him to remove any remaining posted notices.

(g) Any law-enforcement officer or any employee of the Wildlife Resources Commission who determines that a registrant has failed to keep registered property posted in compliance with subsection (d) must so notify the registrant or his agent. If within a reasonable time after notice the registrant fails to take steps to post or repost the tract, or if without regard to notice a registrant is inexcusably or repeatedly negligent in failing to keep the tract properly posted, the Executive Director must immediately delete registration of the tract, notify the presently responsible landholder, and require him to remove any remaining posted notices.

(h) A landholder's failure to cause the removal of all posted signs within a reasonable time after receipt of notice that the tract has been deleted from registration is a misdemeanor punishable as provided in G.S. 113-135. (1981, c. 854, s. 1.)

§ 113-283. Entry permits furnished by Wildlife Resources Commission.

(a) Upon registration of property, the Executive Director must furnish the registrant with a reasonable number of standardized permit forms to be carried by individuals given permission to hunt or fish on the registered property. The Executive Director must establish a procedure for resupplying registrants with entry permits for their registered property as needed.

(b) To be valid, the entry permit must be issued and dated within the previous 12 months and signed by the registrant or an authorized agent whose signature is on file with the Wildlife Resources Commission. (1981, c. 854, s. 1.)

§ 113-284. Affirmative duty of sportsmen to determine if property is registered and posted.

Every individual who enters the property of another to hunt or fish without first having obtained permission from an authorized person in control of hunting and fishing rights or his agent is under a duty to look for posted notices. In the apparent absence of such notices, the individual intending to enter is nevertheless under a duty to determine if practicable whether the property is registered under the terms of this Article. (1981, c. 854, s. 1.)

§ 113-285. Hunting or fishing on registered property of another without permission.

(a) No one may hunt or fish, or enter to hunt or fish, on the registered and posted property of another without having in possession a valid entry permit issued to him.

(b) No one may hunt or fish, or enter to hunt or fish, on the registered property of another without having in possession a valid entry permit issued to him if he has reason to know the property had been posted.

(c) A violation of this section is a misdemeanor punishable as provided in G.S. 113-135. (1981, c. 854, s. 1.)

§ 113-286. Removal, destruction, or mutilation of posted notices.

Unauthorized removal, destruction, or mutilation of posted notices on registered property is a Class 2 misdemeanor. (1981, c. 854, s. 1; 1993, c. 539, s. 859; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-287. General provisions pertaining to enforcement of Article.

(a) If property is registered, the original or a true copy of the application and all supporting items are admissible in evidence. The registrant's affidavit that he has the right to control hunting, fishing, or hunting and fishing on the registered property constitutes prima facie evidence of the facts so asserted. The description filed with the application constitutes prima facie evidence of the boundaries of the registered property.

(b) If an individual hunts or fishes, or enters to hunt or fish, on registered property that is or had been posted, any registrant or his agent, any landholder of that property, and any protector or other law-enforcement officer may request that the individual produce a valid entry permit.

(c) In addition to protectors, it is the duty of sheriffs and their deputies, county police officers, and other law-enforcement officers with general enforcement jurisdiction to investigate reported violations of this Article and to initiate prosecutions when they determine that violations have occurred.

(d) Any entry permit issued to an individual does not substitute for any required hunting or fishing license. (1981, c. 854, s. 1.)

§§ 113-288, 113-289: Reserved for future codification purposes.

ARTICLE 21B.

Criminally Negligent Hunting.

§ 113-290. Unlawful use of firearms.

It is unlawful for any person, while hunting or taking wild animals or wild birds as those terms are defined in G.S. 113-129 and G.S. 113-130, to discharge a firearm:

(1) Carelessly and heedlessly in wanton disregard for the safety of others; or

(2) Without due caution or circumspection, and in a manner so as to endanger any person or property;

and resulting in property damage or bodily injury. (1991, c. 748, s. 1.)

§ 113-290.1. Penalties.

(a) A person who violates the provisions of this Article is guilty of a misdemeanor punishable as follows:

(1) If property damage only results from the unlawful activity, a Class 2 misdemeanor, and the court shall order the payment of restitution to the property owner;

(2) If bodily injury not leading to the disfigurement or total or partial permanent disability of another person results from the unlawful activity, a Class 1 misdemeanor; if property damage also results from

the unlawful activity, the court shall order the payment of restitution to the property owner;

(3) If bodily injury leading to the disfigurement or total or partial permanent disability of another person results from the unlawful activity, a Class 1 misdemeanor; if property damage also results from the unlawful activity, the court shall order the payment of restitution to the property owner;

(4) If death results from the unlawful activity, a Class 1 misdemeanor; if property damage also results from the unlawful activity, the court shall order the payment of restitution to the property owner.

(b) The fact that a person was impaired at the time of a violation of this Article shall be an aggravating factor and the court shall impose an additional fine and/or imprisonment in accordance with (a)(2) above in cases not resulting in bodily injury and in accordance with (a)(4) above in cases resulting in bodily injury. For purposes of this section, "impaired" means being under the influence of an impairing substance, or having consumed sufficient alcohol so that the person has, at any relevant time after the offense, an alcohol concentration of .10 or above.

(c) In addition to the penalties provided in (a), upon conviction of a violation of this Article, the Wildlife Resources Commission shall suspend all hunting privileges of:

(1) A person convicted under (a)(1) for one year;

(2) A person convicted under (a)(2) for three years; and

(3) A person convicted under (a)(3) or (a)(4) for five years.

(d) A person convicted of hunting or taking wild animals or wild birds while his hunting license is suspended under this section shall be guilty of a Class 1 misdemeanor, and shall have all hunting privileges suspended for an additional five years. The person shall not be issued another hunting license until he has satisfactorily completed the hunter safety course established in G.S. 113-270.1A.

(e) This Article shall be enforced by law enforcement officers of the Wildlife Resources Commission, by sheriffs and deputy sheriffs, and by peace officers with general subject matter jurisdiction.

(f) A violation of this Article resulting in the death of another person constitutes a separate and distinct offense from, and is not a lesser included offense of, the crime of involuntary manslaughter. (1991, c. 748, s. 1; 1993, c. 539, ss. 860, 861; 1994, Ex. Sess., c. 24, s. 14(c).)

Article 22.

Regulation of Wildlife.

§ 113-291. General restrictions.

Except as specifically permitted in this Subchapter or in rules made under the authority of this Subchapter, no person may take, possess, buy, sell, or transport any wildlife — whether dead or alive, in whole or in part. Nor may any person take, possess, buy, sell, or transport any nests or eggs of wild birds except as so permitted. No person may take, possess, buy, sell, or transport any wildlife resources in violation of the rules of the Wildlife Resources Commission. (1965, c. 957, s. 2; 1979, c. 830, s. 1; 1987, c. 827, s. 98.)

Local Modification. — (As to Article 22) Davidson: 1989 (Reg. Sess., 1990), c. 852, s. 1; Davie: 1989 (Reg. Sess., 1990), c. 929, s. 1.

§ 113-291.1. Manner of taking wild animals and wild birds.

(a) Except as otherwise provided, game may only be taken between a half hour before sunrise and a half hour after sunset and only by one or a combination of the following methods:

(1) With a rifle, except that rifles may not be used in taking wild turkeys.
(2) With a shotgun not larger than number 10 gauge.
(3) With a bow and arrow of a type prescribed in the rules of the Wildlife Resources Commission.
(4) With the use of dogs.
(5) By means of falconry.

Fur-bearing animals may be taken at any time during open trapping season with traps authorized under G.S. 113-291.6 and as otherwise authorized pursuant to this subsection, and rabbits may be box-trapped in accordance with rules of the Wildlife Resources Commission. The Wildlife Resources Commission may adopt rules prescribing the manner of taking wild birds and wild animals not classified as game. Use of pistols in taking wildlife is governed by subsection (g). The Wildlife Resources Commission may prescribe the manner of taking wild animals and wild birds on game lands and public hunting grounds.

(b) No wild animals or wild birds may be taken:

(1) From or with the use of any vehicle; vessel, other than one manually propelled; airplane; or other conveyance except that the use of vehicles and vessels is authorized:
a. As hunting stands, subject to the following limitations. No wild animal or wild bird may be taken from any vessel under sail, under power, or with the engine running or while still in motion from such propulsion. No wild animal or wild bird may be taken from any vehicle if it is in motion, the engine is running, or the passenger area of the vehicle is occupied. The prohibition of occupying the passenger area of a vehicle does not apply to a disabled individual whose mobility is restricted.
b. For transportation incidental to the taking.
(2) With the use or aid of any artificial light, net, trap, snare, electronic or recorded animal or bird call, or fire, except as may be otherwise provided by statute[;] provided, however, that crows and coyotes may be taken with the aid of electronic calling devices. No wild birds may be taken with the use or aid of salt, grain, fruit, or other bait. No bear or wild boar may be taken with the use or aid of any salt, salt lick, grain, fruit, honey, sugar-based material, animal parts or products, or other bait, and no wild turkey may be taken from an area in which bait has been placed until the expiration of 10 days after the bait has been consumed or otherwise removed. The taking of wild animals and wild birds with poisons, drugs, explosives, and electricity is governed by G.S. 113-261, G.S. 113-262, and Article 22A of this Subchapter. Any person who unlawfully takes bear or wild boar with the use or aid of any type of bait is punishable as provided by G.S. 113-294(c1).

(c) It is a Class 1 misdemeanor for any person taking wildlife to have in his possession any:

(1) Firearm equipped with a silencer or any device designed to silence, muffle, or minimize the report of the firearm. The firearm is considered equipped with the silencer or device whether it is attached to the firearm or separate but reasonably accessible for attachment during the taking of the wildlife.
(2) Weapon of mass death and destruction as defined in G.S. 14-288.8.

The Wildlife Resources Commission may prohibit individuals training dogs or taking particular species from carrying axes, saws, tree-climbing equip-

ment, and other implements that may facilitate the unlawful taking of wildlife, except tree-climbing equipment may be carried and used by persons lawfully taking raccoons and opossums during open season.

(d) In accordance with governing rules of the Wildlife Resources Commission imposing further restrictions that may be necessary, hunters may conduct field trials with dogs in areas and at times authorized with the use of approved weapons and ammunition. The Wildlife Resources Commission may authorize organized retriever field trials, utilizing domestically raised pheasants or waterfowl, to be held under its permit.

(d1) Except in areas closed to protect sensitive wildlife populations, hunters may train dogs during the closed season:

(1) With the use of approved weapons and ammunition; and

(2) If reasonable control is exercised to prevent the dogs from running unsupervised at large and from killing wild animals and wild birds.

(e) Raccoons and opossum may be taken at night with dogs during seasons set by rules of the Wildlife Resources Commission with the use of artificial lights of a type designed or commonly used to aid in taking raccoon and opossum. No conveyance may be used in taking any raccoon or opossum at night, but incidental transportation of hunters and dogs to and from the site of hunting is permitted. The Wildlife Resources Commission may by rule prescribe restrictions respecting the taking of frogs, or other creatures not classified as wildlife which may be found in areas frequented by game, with the use of an artificial light, and may regulate the shining of lights at night in areas frequented by deer as provided in subsection (e1).

(e1) After hearing sufficient evidence and finding as a fact that an area frequented by deer is subject to substantial unlawful night deer hunting or that residents in the area have been greatly inconvenienced by persons shining lights on deer, the Wildlife Resources Commission may by rule prohibit the intentional sweeping of that area with lights, or the intentional shining of lights on deer, during the period either:

(1) From 11:00 p.m. until one-half hour before sunrise; or

(2) From one-half hour after sunset until one-half hour before sunrise.

Before adopting this rule, the Wildlife Resources Commission must propose it at a public hearing in the area to be closed and seek the reactions of the local inhabitants. The rule must exempt necessary shining of lights by landholders, motorists engaged in normal travel on the highway, and campers and others legitimately in the area, who are not attempting to attract wildlife. This subsection does not limit the right of hunters to take raccoon and opossum with dogs lawfully at night with a light under the terms of subsection (e).

(e2) If the Wildlife Resources Commission has enacted a rule under the authority of subsection (e1) prohibiting the shining of lights from 11:00 p.m. until one-half hour before sunrise in any county or area of a county, the Wildlife Resources Commission is authorized, without holding an additional public hearing, to extend the applicability of that rule to the period one-half hour after sunset to one-half hour before sunrise upon receipt of a resolution from the board of commissioners of the county requesting extension of the period.

(f) To keep North Carolina provisions respecting migratory birds in substantial conformity with applicable federal law and rules, the Wildlife Resources Commission may by rule expand or modify provisions of this Article if necessary to achieve such conformity. In particular, the Commission may prohibit the use of rifles, unplugged shotguns, live decoys, and sinkboxes in the taking of migratory game birds; vary shooting hours; adopt specific distances, not less than 300 yards, hunters must maintain from areas that have been baited, and fix the number of days afterwards during which it is still unlawful to take migratory game birds in the area; and adopt similar provisions with regard to the use of live decoys. In the absence of rules of the Wildlife

Resources Commission to the contrary, the rules of the United States Department of the Interior prohibiting the use of rifles, unplugged shotguns, toxic shot and sinkboxes in taking migratory game birds in North Carolina shall apply, and any violation of such federal rules is unlawful.

(g) If a season is open permitting such method of taking for the species in question, a hunter may take rabbits, squirrels, opossum, raccoons, fur-bearing animals, and nongame animals and birds open to hunting with a pistol of .22 caliber with a barrel not less than six inches in length and loaded with long-rifle ammunition. In addition, a hunter or trapper lawfully taking a wild animal or wild bird by another lawful method may use a knife, pistol, or other swift method of killing the animal or bird taken. The Wildlife Resources Commission may, however, restrict or prohibit the carrying of firearms during special seasons or in special areas reserved for the taking of wildlife with primitive weapons or other restricted methods.

(g1) The Wildlife Resources Commission may by rule prescribe the types of handguns and handgun ammunition that may be used in taking big game animals other than wild turkey. During the regular gun seasons for taking bear, deer and wild boar these animals may be taken with types of handguns and handgun ammunition that shall be approved for such use by the rules of the Wildlife Resources Commission. The Commission shall not provide any special season for the exclusive use of handguns in taking wildlife.

(h) In the interests of enhancing the enjoyment of sportsmen, and if consistent with conservation objectives, the Wildlife Resources Commission may by rule relax requirements of this section on controlled shooting preserves and in other highly controlled situations.

(i) The intentional destruction or substantial impairment of wildlife nesting or breeding areas or other purposeful acts to render them unfit is unlawful. These prohibitions include cutting down den trees, shooting into nests of wild animals or birds, and despoliation of dens, nests, or rookeries.

(j) It is unlawful to take deer swimming or in water above the knees of the deer. (C.S., s. 2124; 1935, c. 486, s. 20; 1939, c. 235, s. 1; 1949, c. 1205, s. 3; 1955, c. 104; 1959, cc. 207, 500; 1961, c. 1182; 1963, c. 381; c. 697, ss. 1, 3½; 1967, c. 858, s. 1; c. 1149, s. 1.5; 1969, cc. 75, 140; 1971, c. 439, ss. 1-3; c. 899, s. 1; 1973, c. 1096; c. 1262, s. 18; 1975, c. 669; 1977, c. 493; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, ss. 4-6; 1983, c. 137, ss. 1, 2; c. 492; 1985, c. 360; c. 554, ss. 1, 2; 1987, cc. 97, 134, 827, s. 98; 1993, c. 539, s. 862; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 64, s. 1; 1999-120, s. 1.)

Local Modification. — Alamance: 1981, c. 410; 1981 (Reg. Sess., 1982), c. 1180; Beaufort: 1997-132, s. 7; 1999-86, s. 1 (expires June 1, 2001); Davidson: 1981, c. 410; 1981 (Reg. Sess., 1982), c. 1180; Hyde: 1997-132, s. 7; 1999-86, s. 1 (expires June 1, 2001); Randolph, Rockingham, Rowan and Wilkes: 1981, c. 410; 1981 (Reg. Sess., 1982), c. 1180.

Effect of Amendments. — Session Laws 1999-120, s. 1, effective October 1, 1999, in subdivision (b)(2), inserted "and coyotes" in the first sentence, deleted "except as may be otherwise provided by statute" following "bait" in the second sentence, added "and no wild turkey ... or otherwise removed" at the end of the third sentence, and substituted "G.S. 113-294(c1)" for "G.S. 113-294(c)" in the last sentence.

CASE NOTES

Editor's Note. — *The cases cited in the following annotation were decided under former § 113-104, similar to this section, and the first sentence of former § 113-109(b), similar to § 113-294(e).*

Constitutionality. — Former § 113-104 and the first sentence of former § 113-109(b) (similar to present § 113-294(e)), protecting and managing wildlife, were within the legitimate interests of the State and in the public interest and were constitutional. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

Purpose. — Former § 113-104 and the first

sentence of former § 113-109(b) (similar to present § 113-294(e)) had the purpose of controlling and managing the use and methods of taking wildlife. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

Pursuit of Deer by Aid of Artificial Light. — One violated former § 113-104 when he pursued or attempted to kill a deer by aid of or with the use of any artificial light, because this activity fell within the statutory definitions of "taking" and "game animal." State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

Warrant Sufficient. — Warrants charging that defendants unlawfully and willfully attempted to take deer with the aid of an artificial light between the hours of sunset and sunrise in an area known to be inhabited and frequented by deer, were sufficient to charge the offense defined by former § 113-104, the words "in an area known to be inhabited and frequented by deer" were mere surplusage and could be disregarded. State v. Lassiter, 9 N.C. App. 255, 175 S.E.2d 689 (1970).

In a prosecution charging defendants with the unlawful hunting of deer by artificial light, it was incumbent upon the defendants to ask for a bill of particulars if they desired to know in what area of the county the offense took place. State v. Lassiter, 9 N.C. App. 255, 175 S.E.2d 689 (1970).

§ 113-291.2. Seasons and bag limits on wild animals and birds; including animals and birds taken in bag; possession and transportation of wildlife after taking.

(a) In accordance with the supply of wildlife and other factors it determines to be of public importance, the Wildlife Resources Commission may fix seasons and bag limits upon the wild animals and wild birds authorized to be taken that it deems necessary or desirable in the interests of the conservation of wildlife resources. The authority to fix seasons includes the closing of seasons completely when necessary and fixing the hours of hunting. The authority to fix bag limits includes the setting of season and possession limits. Different seasons and bag limits may be set in differing areas; early or extended seasons and different or unlimited bag limits may be authorized on controlled shooting preserves, game lands, and public hunting grounds; and special or extended seasons may be fixed for those engaging in falconry, using primitive weapons, or taking wildlife under other special conditions.

Unless modified by rules of the Wildlife Resources Commission, the seasons, shooting hours, bag limits, and possession limits fixed by the United States Department of Interior or any successor agency for migratory game birds in North Carolina must be followed, and a violation of the applicable federal rules is hereby made unlawful. When the applicable federal rules require that the State limit participation in seasons and/or bag limits for migratory game birds, the Wildlife Resources Commission may schedule managed hunts for migratory game birds. Participants in such hunts shall be selected at random by computer from properly licensed applicants, and each applicant shall provide proof satisfactory to the Wildlife Resources Commission that the applicant is the lawful holder of a North Carolina hunting license that has the applicable migratory game bird hunting privilege. A nonrefundable fee of ten dollars ($10.00) shall be required of each applicant to defray the cost of processing the applications.

Where there is a muzzle-loading firearm season for deer, with a bag limit of five or more, one antlerless deer may be taken. Dogs may not be used for hunting deer during such season.

(a1) When the Executive Director of the Wildlife Resources Commission receives a petition from the State Health Director declaring a rabies emergency for a particular county or district pursuant to G.S. 130A-201, the Executive Director of the Wildlife Resources Commission shall develop a plan to reduce the threat of rabies exposure to humans and domestic animals by

foxes, raccoons, skunks, or bobcats in the county or district. The plan shall be based upon the best veterinary and wildlife management information and techniques available. The plan may involve a suspension or liberalization of any regulatory restriction on the taking of foxes, raccoons, skunks, or bobcats, except that the use of poisons, other than those used with dart guns, shall not be permitted under any circumstance. If the plan involves a suspension or liberalization of any regulatory restriction on the taking of foxes, raccoons, skunks, or bobcats, the Executive Director of the Wildlife Resources Commission shall prepare and adopt temporary rules setting out the suspension or liberalization pursuant to G.S. 150B-21.1(a) (1). The Executive Director shall publicize the plan and the temporary rules in the major news outlets that serve the county or district to inform the public of the actions being taken and the reasons for them. Upon notification by the State Health Director that the rabies emergency no longer exists, the Executive Director of the Wildlife Resources Commission shall cancel the plan and repeal any rules adopted to implement the plan. The Executive Director of the Wildlife Resources Commission shall publicize the cancellation of the plan and the repeal of any rules in the major news outlets that serve the county or district.

(b) Any individual hunter or trapper who in taking a wild animal or bird has wounded or otherwise disabled it must make a reasonable effort to capture and kill the animal or bird. All animals and birds taken that can be retrieved must be retrieved and counted with respect to any applicable bag limits governing the individual taking the animal or bird.

(c) An individual who has lawfully taken game within applicable bag, possession, and season limits may, after the game is dead, possess and personally transport it for his own use by virtue of his hunting license, and without any additional permit, subject to tagging and reporting requirements that may apply to the fox and big game, as follows:

(1) In an area in which the season is open for the species, the game may be possessed and transported without restriction.

(2) The individual may possess and transport the game lawfully taken on a trip:
   a. To his residence;
   b. To a preservation or processing facility that keeps adequate records as prescribed in G.S. 113-291.3(b)(3) or a licensed taxidermist;
   c. From a place authorized in subparagraph b to his residence.

(3) The individual may possess the game indefinitely at his residence, and may there accumulate lawfully-acquired game up to the greater of:
   a. The applicable possession limit for each species; or
   b. One half of the applicable season limit for each species.

The above subdivisions apply to an individual hunter under 16 years of age covered by the license issued to his parent or guardian, if he is using that license, or by the license of an adult accompanying him. An individual who has lawfully taken game as a landholder without a license may possess and transport the dead game, taken within applicable bag, possession, and season limits, to his residence. He may indefinitely retain possession of such game, within aggregate possession limits for the species in question, in his residence.

(d) Except in the situations specifically provided for above, the Wildlife Resources Commission may by rule impose reporting, permit, and tagging requirements that may be necessary upon persons:

(1) Possessing dead wildlife taken in open season after the close of that season.

(2) Transporting dead wildlife from an area having an open season to an area with a closed season.

(3) Transporting dead wildlife lawfully taken in another state into this State.

(4) Possessing dead wildlife after such transportation.

The Wildlife Resources Commission in its discretion may substitute written declarations to be filed with agents of the Commission for permit and tagging requirements.

(e) Upon application of any landholder or agent of a landholder accompanied by a fee of fifty dollars ($50.00), the Executive Director may require a survey of the deer population on the land of such landholder. If as a result of the survey it is determined that there is an overpopulation of deer in relation to the carrying capacity of the land, that the herd is substantially dependent on such land for its food and cover, and that the imbalance in the deer population is not readily correctable by an either-sex deer season of reasonable length, the Executive Director may issue to such landholder or agent a number of special antlerless deer tags that in the judgment of the Executive Director is sufficient to correct or alleviate the population imbalance. Subject to applicable hunting license requirements, the special deer tags may be used by any person or persons selected by the landholder or his agent as authority to take antlerless deer, including male deer with "buttons" or spikes not readily visible, on the tract of land concerned during any established deer hunting season. Each antlerless deer killed shall be affixed immediately with a special antlerless deer tag and shall be reported immediately in the wildlife cooperator tagging book supplied with the special antlerless deer tags. This tagging book and any unused tags shall be returned to the Commission within 15 days of the close of the season. Antlerless deer taken under this program and tagged with the special antlerless tags provided shall not count as part of the daily bag, possession, and season limits of the person taking the deer. (1935, c. 486, ss. 16, 17; 1949, c. 1205, s. 1; 1973, c. 1262, s. 18; 1977, c. 499, s. 1; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 7; 1981, c. 681, s. 1; 1987, c. 38; c. 827, s. 98; 1989, c. 642, s. 2; 1995, c. 181, s. 1; 1997-402, s. 2; 1999-339, s. 7.)

Local Modification. — Anson County: 1987, c. 231, s. 3; 1995, c. 55, s. 1; Beaufort, Hyde: 1997-132, ss. 1-3; 1999-86, s. 1 (expires June 1, 2001).

Effect of Amendments. — Session Laws 1999-339, s. 7, effective July 1, 1999, in subsection (a), designated the former fifth through eighth sentences as a second paragraph of that subsection, and in the second paragraph, added "and each applicant ... bird hunting privilege" at the end of the third sentence and substituted "ten dollars ($10.00)" for "five dollars ($5.00)" in the fourth sentence.

§ 113-291.3. Possession, sale, and transportation of wildlife.

(a) Live wildlife and the nests and eggs of wild birds may be taken, possessed, transported, bought, sold, imported, exported, or otherwise acquired or disposed of only as specifically authorized in this Subchapter or its implementing rules. The Wildlife Resources Commission may impose necessary reporting, permit, and tagging requirements in regulating activities involving live wildlife and the nests and eggs of wild birds. The Wildlife Resources Commission may charge a reasonable fee to defray the cost of any tagging procedure.

(b) With respect to dead wildlife:

(1) Lawfully taken wildlife may be possessed and transported as provided in G.S. 113-291.2. Wildlife possessed under any dealer license may be possessed and transported in accordance with the provisions of law and rules applicable to the license, and wildlife may be sold to qualified persons if authorized under provisions governing the license. In other situations, except as this Subchapter may expressly provide, possession and transportation of wildlife may be regulated by the Wildlife Resources Commission.

(2) Unless there is a specific restriction on the transfer of the species in question, an individual may accept the gift of wildlife lawfully taken within North Carolina if taking possession does not cause him to exceed applicable possession limits. If he notes and preserves in writing the name and address of the donor and under what license or exemption from license requirements the wildlife was taken, he may possess that wildlife without a permit in the places possession without a permit would be authorized in G.S. 113-291.2 had he taken the wildlife.

(3) A licensed taxidermist or other licensed dealer taking temporary possession of wildlife of another may possess the wildlife that he is authorized to handle under his license in accordance with the rules of the Wildlife Resources Commission. A person not a dealer operating a preservation or processing facility, whether commercially or not, may possess the wildlife owned by another without any permit or license if he ascertains that the wildlife was lawfully taken within the State and keeps a written record of:

a. The name and address of the owner of the wildlife and an adequate description of the wildlife left with him. If the description of the wildlife changes as the result of processing, the new description must be recorded.

b. The date, serial number, and type of the license under which the wildlife was taken or the applicable exemption from license requirements which the taker met.

c. The date all wildlife left with him is received and returned to the owner. If the receiving or returning of possession is to an agent or common carrier or otherwise occurs under circumstances in which permit requirements may apply, the type and date of the permit which authorizes the transaction must also be recorded.

(4) The sale of rabbits and squirrels and their edible parts not for resale is permitted. If the Wildlife Resources Commission finds that affected game populations would not be endangered, it may authorize the sale of heads, antlers, horns, hides, skins, plumes, feet, and claws of one or more game animals or birds. In addition, it may authorize the sale of bobcats, opossums, and raccoons, and their parts, following their taking as game animals. No part of any bear or wild turkey may be sold under the above provisions, however, and no part of any fox taken in North Carolina may be sold except as provided in G.S. 113-291.4. In regulating sales, the Wildlife Resources Commission may impose necessary permit requirements.

(5) Lawfully taken fur-bearing animals and their parts, including furs and pelts, may, subject to any tagging and reporting requirements, be possessed, transported, bought, sold, given or received as a gift, or otherwise disposed of without restriction. The Wildlife Resources Commission may regulate the importation of wildlife from without the State by fur dealers, and may regulate the sale of fox fur and other wildlife hides taken within the State if sale of them is authorized. Fox furs lawfully taken without the State may be imported, possessed, transported, bought, sold, and exported in accordance with reasonable rules of the Wildlife Resources Commission. Processed furs acquired through lawful channels within or without the State by persons other than fur dealers are not subject to rule.

(6) Nongame animals and birds open to hunting and nongame fish lawfully taken, except as this Subchapter and its implementing rules expressly provide otherwise, may be possessed, transported, bought, sold, given or received as a gift, or otherwise disposed of without restriction.

(7) The possession and disposition of wild animals and wild birds killed accidentally or to prevent or halt depredations to property are governed by G.S. 113-274(c)(1a).

(8) The edible parts of deer raised domestically in another state may be transported into this State and resold as a meat product for human consumption when the edible parts have passed inspection in the other state by that state's inspection agency or the United States Department of Agriculture.

(c) The Wildlife Resources Commission may make reasonable rules governing the marking of packages, crates, and other containers in which wildlife may be shipped.

(d) Any person hiring a hunter or trapper to take game is deemed to be buying game. Any hunter or trapper who may be hired is deemed to be selling game. (1935, c. 486, ss. 19, 22; 1941, c. 231, s. 1; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 8; 1987, c. 827, s. 98; 1997-142, s. 15; 1997-456, s. 44.)

CASE NOTES

A charge that the accused violated the game laws "by taking and possessing" a game animal during closed season did not charge the offense of possessing a dead game animal in violation of former § 113-103. State v. Cole, 33 N.C. App. 48, 234 S.E.2d 191 (1977), rev'd on other grounds and action dismissed, 294 N.C. 304, 240 S.E.2d 355 (1978).

§ 113-291.4. Regulation of foxes; study of fox and fur-bearer populations.

(a) All of the regulatory powers granted the Wildlife Resources Commission generally with respect to game, wild animals, and wildlife apply to foxes unless there are specific overriding restrictions in this section.

(b) Except for any closed season under subsection (h), foxes may be taken with dogs both night and day on a year-round basis.

(c) Foxes may not be taken with firearms except:

(1) As provided in subsection (f) or (i) of this section or G.S. 113-291.4A(a).

(2) As an incidental method of humanely killing them following any lawful method of taking that does not result in death.

(3) When they are lawfully shot under laws and rules pertaining to the destruction of animals committing depredations to property.

(d) Foxes may not be taken with the aid of any electronic calling device.

(e) The Wildlife Resources Commission is directed to improve its capabilities for studying fox and fur-bearer populations generally and, on the basis of its present knowledge and future studies, to implement management methods and impose controls designed to produce optimum fox and fur-bearer populations in the various areas of the State.

(f) If, on the basis of its studies and other information available, the Wildlife Resources Commission determines the population of foxes in an area is fully adequate to support a harvesting of that population, the Wildlife Resources Commission may, upon passage of local legislation permitting same, open a season for taking foxes by trapping. When the season is open for trapping, foxes may also be taken by the use of methods lawful for taking game animals, including the use of firearms. Any bag, possession, or season limits imposed on foxes taken from the area in question will apply in the aggregate to all foxes killed without regard to the method of taking.

(f1) In those counties in which open seasons for taking foxes with weapons and by trapping were established between June 18, 1982, and July 1, 1987, in accordance with the procedure then set forth in subsection (f) of this section,

the Wildlife Resources Commission is authorized to continue such seasons from year to year so long as the fox populations of such counties remain adequate to support the resulting harvest. The counties referred to in this subsection are as follows: Caswell, Clay, Graham, Henderson, Hyde, Macon, Stokes and Tyrrell.

(g) The Wildlife Resources Commission may provide for the sale of foxes lawfully taken in areas of open season as provided in subsection (f), under a system providing strict controls. The Wildlife Resources Commission must implement a system of tagging foxes and fox furs with a special fox tag, and the Commission may charge two dollars and twenty-five cents ($2.25) for each tag furnished to hunters, trappers, and fur dealers. The fox tag or tags must be procured before taking foxes by any method designed to kill foxes or when the intent is to harvest foxes. The number of tags furnished to any individual may be limited as to area and as to number in accordance with area, bag, possession, or season limits that may be imposed on foxes. No person may continue to hunt or trap foxes under this fox harvesting provision unless he still has at least one valid unused fox tag lawful for use in the area in question. A person hunting foxes with dogs not intending to kill them need not have any fox tag, but any fox accidentally killed by that hunter must be disposed of without sale as provided below, and no foxes not tagged may be sold. The Wildlife Resources Commission may by rule provide reporting and controlled-disposition requirements, not including sale, of foxes killed accidentally by dog hunters, motor vehicles, and in other situations; it may also impose strict controls on the disposition of foxes taken by owners of property under the laws and rules relating to depredations, and authorize sale under controlled conditions of foxes taken under depredation permits.

(h) In any area of the State in which the Wildlife Resources Commission determines that hunting of foxes with dogs has an appreciably harmful effect upon turkey restoration projects, it may declare a closed season for an appropriate length of time upon the taking with dogs of all species of wild animals and birds. Except as otherwise provided in G.S. 113-291.1(d) or (d1), this subsection does not prohibit lawful field trials or the training of dogs.

(i) Upon notification by the State Health Director of the presence of a contagious animal disease in a local fox population, the Commission is authorized to establish such population control measures as are appropriate until notified by public health authorities that the problem is deemed to have passed. (1979, c. 830, s. 1; 1981 (Reg. Sess., 1982), c. 1203, ss. 1-3; 1985, c. 476, s. 2; 1987, c. 726, s. 1; c. 827, s. 98; 1989, c. 504, s. 2; c. 616, s. 4; c. 727, s. 113; 1991, c. 483, s. 1(a), (b); 1993, c. 208, s. 4.)

Editor's Note. — Session Laws 1987, c. 726, which added subsection (f1) and was applicable to the counties of Alexander, Anson, Avery, Brunswick, Camden, Caswell, Clay, Currituck, Edgecombe, Graham, Granville, Henderson, Hyde, Johnston, Macon, Moore, Northampton, Perquimans, Sampson, Stanly, Stokes and Tyrrell, provided in s. 3 that the act would expire July 1, 1989. Session Laws 1989, c. 504, amended subsection (f1) by extending the expiration date to July 1, 1991, for the counties of Brunswick, Caswell, Clay, Graham, Henderson, Hyde, Johnston, Macon, Sampson, Stokes, and Tyrrell. Session Laws 1991, c. 483, s. 1, effective July 2, 1991, deleted the expiration provision for the counties of Brunswick, Caswell, Clay, Graham, Henderson, Hyde, Macon, Stokes, and Tyrrell.

Session Laws 1989, c. 616, which amended subdivision (c)(1), provided in s. 6 that any provisions of the act inconsistent with the terms of any local act would be superseded by the provisions of the local act.

§ 113-291.4A. Open seasons for taking foxes with firearms.

(a) There is an open season for the taking of foxes with firearms in all areas of the State east of Interstate Highway 77 and in Mitchell and Caldwell

Counties from the beginning of the season established by the Wildlife Resources Commission for the taking of rabbits and quail through January 1 of each year. The selling, buying, or possessing for sale of any fox or fox part taken pursuant to this subsection is prohibited, and is punishable as provided by G.S. 113-294(a) or (j).

(b) The Wildlife Resources Commission shall establish appropriate bag and season limits that may be imposed upon the taking of foxes pursuant to this act, and may make reasonable rules governing the possession of foxes killed by motor vehicles or other accidental means. (1989, c. 616, s. 1; 1989 (Reg. Sess., 1990), c. 811; 1995, c. 32, s. 1; 1999-456, s. 32.)

Editor's Note. — Session Laws 1989, c. 616, s. 6 provides that any provisions of this act inconsistent with the terms of any local act are superseded by the provisions of the local act.

Effect of Amendments. — Session Laws 1999-456, s. 32, effective August 13, 1999, substituted "G.S. 113-294(a) or (j)" for "G.S. 113-294(a) or (k)" in subsection (a).

§ 113-291.5. Regulation of dogs used in hunting; limitations on authority of Wildlife Resources Commission; control of dogs on game lands; control of dogs chasing deer; other restrictions.

(a) Except as provided in G.S. 113-291.4, in the area described below, the Wildlife Resources Commission may regulate the use of dogs taking wildlife with respect to seasons, times, and places of use. The area covered by this subsection is that part of the State in and west of the following counties or parts of counties: Rockingham; Guilford; that part of Alamance and Orange lying south of Interstate Highway 85; Chatham; that part of Wake lying south of N.C. Highway 98; Lee; Randolph; Montgomery; Stanly; Union; and that part of Anson lying west of N.C. Highway 742.

(b) In the area of the State lying east of that described in subsection (a), the Wildlife Resources Commission may not restrict or prohibit the use of dogs in hunting or the training of dogs, in season or out, except during the breeding and raising seasons for game during the period April 15 through June 15.

(c) On game lands, wildlife refuges, and public hunting grounds the Wildlife Resources Commission may regulate the possession and use of dogs and may impound dogs found running at large without supervision or, if unsupervised, without means of identification.

(d) The Wildlife Resources Commission may not by its rules anywhere in the State restrict the number of dogs used in hunting or require that any particular breed of dog be used in hunting.

(e) It is unlawful to allow dogs not under the control of the owner or the individual in possession of the dogs to run or chase deer during the closed deer season.

(f) Nothing in this section is intended to require the leashing or confining of pet dogs. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-291.6. Regulation of trapping.

(a) No one may take wild animals by trapping upon the land of another without having in his possession written permission issued and dated within the previous year by the owner of the land or his agent. This subsection does not apply to public lands on which trapping is not specifically prohibited, including tidelands, marshlands, and any other untitled land.

(b) No one may take wild animals by trapping with any steel-jaw, leghold, or connibear trap unless it:

(1) Has a jaw spread of not more than seven and one-half inches.

(2) Is horizontally offset with closed jaw spread of at least three sixteenths of an inch for a trap with a jaw spread of more than five and one-half inches. This subdivision does not apply if the trap is set in the water with quick-drown type of set.
(3) Is smooth edged and without teeth or spikes.
(4) Has a weather-resistant permanent tag attached legibly giving the trapper's name and address.

A steel-jaw or leghold trap set on dry land with solid anchor may not have a trap chain longer than eight inches from trap to anchor unless fitted with a shock-absorbing device approved by the Wildlife Resources Commission.

(c) No person may set or otherwise use a trap so that animals or birds when caught will be suspended. No hook of any type may be used to take wild animals or wild birds by trapping.

(d) Trap number 330 of the connibear type or size may only be set in the water and in areas in which beaver and otter may be lawfully trapped. For the purposes of this section:

(1) A water-set trap is one totally covered by water with the anchor secured in water deep enough to drown the animal trapped quickly.
(2) In areas of tidal waters, the mean high water is considered covering water.
(3) In reservoir areas, covering water is the low water level prevailing during the preceding 24 hours.
(4) Marshland, as defined in G.S. 113-229(n)(3), is not considered dry land.

(e) With respect to any lawfully placed trap of another set in compliance with the provisions of this section, no one without the express permission of the trapper may:

(1) Remove or disturb any trap; or
(2) Remove any fur-bearing animal from the trap.

This subsection does not apply to wildlife protectors or other law-enforcement officers acting in the performance of their duties.

(f) Nothing in this section prohibits the use of steel- or metal-jaw traps by county or State public health officials or their agents to control the spread of disease when the use of these traps has been declared necessary by the State Health Director.

(g) The Wildlife Resources Commission must include the trapping requirements of this section in its annual digest of hunting and trapping rules provided to each person upon purchase of a license. (1977, c. 933, ss. 2, 7; 1979, c. 830, s. 1; 1981, c. 729; 1987, c. 827, s. 98; 1989, c. 727, s. 114; 1997-418, s. 5.)

Local Modification. — Camden: 1981, c. 436.

Cross References. — For the Beaver Damage Control Advisory Board, see § 113-291.10.

§ 113-291.7. Regulation of bears; limited retention of local acts closing bear seasons.

Local acts closing the season on bears are exempted from the provisions of G.S. 113-133.1(b) until July 1, 1981. After that date any local acts setting a year-round closed season on bears which have not by their terms expired are temporarily retained until the Wildlife Resources Commission supersedes them by adopting rules either opening a season in the county affected or carrying forward the closed-season provision. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-291.8. Requirement to display hunter orange.

(a) Any person hunting game animals other than foxes, bobcats, raccoons, and opossum, or hunting upland game birds other than wild turkeys, with the use of firearms, must wear a cap or hat on his head made of hunter orange material or an outer garment of hunter orange visible from all sides. Hunter orange material is a material that is a daylight fluorescent orange color.

This section does not apply to a landholder, his spouse, or children, who are hunting on land held by the landholder. This subsection shall be enforced by warning ticket only until October 1, 1992, with respect to those hunting rabbit, squirrel, grouse, pheasant, and quail.

(b) Any person violating this section during the 1987 big game hunting season shall be given a warning of violation only. Thereafter, any person violating this section has committed an infraction and shall pay a fine of twenty-five dollars ($25.00). An infraction is an unlawful act that is not a crime. The procedure for charging and trying an infraction is the same as for a misdemeanor, but conviction of an infraction has no consequence other than payment of a fine. A person convicted of an infraction may not be assessed court costs.

Wildlife Enforcement Officers are authorized to charge persons with the infraction created by this section.

(c) Failure to wear hunter orange material in violation of this section shall not constitute negligence per se or contributory negligence per se. (1987, c. 72, s. 1; 1991, c. 71, s. 1.)

§ 113-291.9. Taking of beaver.

(a) Notwithstanding any other law, there is an open season for taking beaver with firearms during any open season for the taking of wild animals, provided that permission has been obtained from the owner or lessee of the land on which the beaver is being taken.

(b) Notwithstanding any other law, it is lawful to use or sell beaver parts taken under a depredation permit issued by the Wildlife Resources Commission.

(c) Notwithstanding G.S. 113-291.6(d) or any other law, it is lawful to set traps number 330 of the connibear type or size, if at least one-half of the trap is covered by water, when trapping beaver during the season for trapping beaver as established by the Wildlife Resources Commission.

(d) Notwithstanding G.S. 113-291.1(b)(2) or any other law, it is lawful to use snares when trapping beaver during the season for trapping beaver as established by the Wildlife Resources Commission.

(e) Repealed by Session Laws 1993, c. 33, s. 1.

(f) Notwithstanding any other provision of law, landowners whose property is or has been damaged or destroyed by beaver may take beaver on their property by any lawful method without obtaining a depredation permit from the Wildlife Resources Commission, and may obtain assistance from other persons in taking the depredating beaver by giving those persons permission to take beaver on the landowner's property.

(g) Repealed by Session Laws 1997-456, s. 53. (1991, c. 483, s. 3; 1993, c. 33, s. 1; 1995, c. 509, s. 56; 1997-97, s. 1; 1997-456, s. 53.)

Editor's Note. — The subsection designations for present subsections (f) and (g) were assigned by the Revisor of Statutes, the subsection designations in Session Laws 1993, c. 33, s. 1 having been (e) and (f), respectively.

§ 113-291.10. Beaver Damage Control Advisory Board.

(a) There is established the Beaver Damage Control Advisory Board. The Board shall consist of nine members, as follows:

(1) The Executive Director of the North Carolina Wildlife Resources Commission, or his designee, who shall serve as chair;
(2) The Commissioner of Agriculture and Consumer Services, or a designee;
(3) The Director of the Division of Forest Resources of the Department of Environment and Natural Resources, or a designee;
(4) The Director of the Soil and Water Conservation Division of the Department of Environment and Natural Resources, or a designee;
(5) The Director of the North Carolina Cooperative Extension Service, or a designee;
(6) The Secretary of Transportation, or a designee;
(7) The State Director of the Wildlife Services Division of the Animal and Plant Health Inspection Service, U.S. Department of Agriculture, or a designee;
(8) The President of the North Carolina Farm Bureau Federation, Inc., or a designee, representing private landowners; and
(9) A representative of the North Carolina Forestry Association.

(b) The Beaver Damage Control Advisory Board shall develop a statewide program to control beaver damage on private and public lands. The Beaver Damage Control Advisory Board shall act in an advisory capacity to the Wildlife Resources Commission in the implementation of the program. In developing the program, the Board shall:

(1) Orient the program primarily toward public health and safety and toward landowner assistance, providing some relief to landowners through beaver control and management rather than eradication;
(2) Develop a priority system for responding to complaints about beaver damage;
(3) Develop a system for documenting all activities associated with beaver damage control, so as to facilitate evaluation of the program;
(4) Provide educational activities as a part of the program, such as printed materials, on-site instructions, and local workshops; and
(5) Provide for the hiring of personnel necessary to implement beaver damage control activities, administer the program, and set salaries of personnel.

No later than March 15 of each year, the Board shall issue a report to the Wildlife Resources Commission, the Senate and House Appropriations Subcommittees on Natural and Economic Resources, and the Fiscal Research Division on the results of the program during the preceding year.

(c) The Wildlife Resources Commission shall implement the program, and may enter a cooperative agreement with the Wildlife Services Division of the Animal and Plant Health Inspection Service, United States Department of Agriculture, to accomplish the program.

(d) Notwithstanding G.S. 113-291.6(d) or any other law, it is lawful to use snares when trapping beaver pursuant to the beaver damage control program developed pursuant to this section. The provisions of Chapter 218 of the 1975 Session Laws; Chapter 492 of the 1951 Session Laws, as amended by Chapter 506 of the 1955 Session Laws; and Chapter 1011 of the 1983 Session Laws do not apply to trapping carried out in implementing the beaver damage control program developed pursuant to this section.

(e) In case of any conflict between G.S. 113-291.6(a) and G.S. 113-291.6(b) and this section, this section prevails.

(f) Each county that volunteers to participate in this program for a given fiscal year shall provide written notification of its wish to participate no later

than September 30 of that year and shall commit the sum of four thousand dollars ($4,000) in local funds no later than September 30 of that year. (1991 (Reg. Sess., 1992), c. 1044, s. 69; 1993, c. 561, s. 111; 1993 (Reg. Sess., 1994), c. 769, s. 27.3; 1995, c. 358, s. 7; c. 437, s. 5; c. 467, s.4; c. 507, s. 26.6; 1996 Second Ex. Sess., c. 18, s. 27.15; 1997-256, s. 10; 1997-347, s. 6; 1997-401, s. 6; 1997-418, s. 5; 1997-443, c. 15.44; 1998-23, s. 16; 1998-212, s. 14.18(a)-(c), (e); 1999-237, s. 15.1(b), (c).)

Editor's Note. — Session Laws 1998-212, s. 14.18(c), effective July 1, 1998, provided that the Revisor of Statutes should codify c. 1044, s. 69 of the 1991 Session Laws, as amended, in Chapter 113 of the North Carolina General Statutes.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999'."

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — Session Laws 1999-237, ss. 15.1(b) and (c), effective July 1, 1999, substituted "Wildlife Services" for "Animal Damage Control" in subdivision (a)(7) and subsection (c).

§ 113-292. Authority of the Wildlife Resources Commission in regulation of inland fishing and the introduction of exotic species.

(a) The Wildlife Resources Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict all fishing in inland fishing waters, and the taking of inland game fish in coastal fishing waters, with respect to:

(1) Time, place, character, or dimensions of any methods or equipment that may be employed in taking fish;

(2) Seasons for taking fish;

(3) Size limits on and maximum quantities of fish that may be taken, possessed, bailed to another, transported, bought, sold, or given away.

(b) The Wildlife Resources Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict:

(1) The opening and closing of inland fishing waters, whether entirely or only as to the taking of particular classes of fish, use of particular equipment, or as to other activities within the jurisdiction of the Wildlife Resources Commission; and

(2) The possession, cultivation, transportation, importation, exportation, sale, purchase, acquisition, and disposition of all inland fisheries resources and all related equipment, implements, vessels, and conveyances as necessary to implement the work of the Wildlife Resources Commission in carrying out its duties.

To the extent not in conflict with provisions enforced by the Department, the Wildlife Resources Commission may exercise the powers conferred in this subsection in coastal fishing waters pursuant to its rule of inland game fish in such waters.

(c) The Wildlife Resources Commission is authorized to make such rules pertaining to the acquisition, disposition, transportation, and possession of fish in connection with private ponds as may be necessary in carrying out the provisions of this Subchapter and the overall objectives of the conservation of wildlife resources.

(c1) The Wildlife Resources Commission is authorized to issue proclamations suspending or extending the hook-and-line season for striped bass in the

inland and joint waters of coastal rivers and their tributaries, and the Commission may delegate this authority to the Executive Director. Each proclamation shall state the hour and date upon which it becomes effective, and shall be issued at least 48 hours prior to the effective date and time. A permanent file of the text of all proclamations shall be maintained in the office of the Executive Director. Certified copies of proclamations are entitled to judicial notice in any civil or criminal proceeding.

The Executive Director shall make reasonable effort to give notice of the terms of any proclamation to persons who may be affected by it. This effort shall include press releases to communications media, posting of notices at boating access areas and other places where persons affected may gather, personal communication by agents of the Wildlife Resources Commission, and other measures designed to reach persons who may be affected. Proclamations under this subsection shall remain in force until rescinded following the same procedure established for enactment.

(d) The Wildlife Resources Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict anywhere in the State the acquisition, importation, possession, transportation, disposition, or release into public or private waters or the environment of exotic zoological or botanical species or specimens that may create a danger to or an imbalance in the environment inimical to the conservation of wildlife resources. This subsection is not intended to give the Wildlife Resources Commission the authority to supplant, enact any conflicting rules, or otherwise take any action inconsistent with that of any other State agency acting within its jurisdiction.

(e) It is unlawful for any person to:

(1) Release or place exotic species of wild animals or wild birds in an area for the purpose of stocking the area for hunting or trapping;

(2) Release or place species of wild animals or wild birds not indigenous to that area in an area for the purpose of stocking the area for hunting or trapping;

(3) Take by hunting or trapping any animal or bird released or placed in an area in contravention of subdivisions (1) and (2) of this subsection, except under a permit to hunt or trap which may be issued by the Wildlife Resources Commission for the purpose of eradicating or controlling the population of any species of wildlife that has been so released or placed in the area. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1983, cc. 555, 615; 1987, c. 827, s. 98; 1991, c. 104, s. 1; c. 636, s. 8.)

CASE NOTES

Commission May Prohibit Certain Method of Taking Fish. — The Commission may seek to prohibit by regulation and in the public interest a reprehensible method of taking or attempting to take fish. This they have the authority to do, but only if they use language which specifically defines and describes the act or equipment they seek to prohibit. State v. Martin, 7 N.C. App. 532, 173 S.E.2d 47 (1970).

A regulation of the Commission making it unlawful "to snag fish," with no definition of the term "snag," is void for vagueness and uncertainty. State v. Martin, 7 N.C. App. 532, 173 S.E.2d 47 (1970).

§ 113-293. Obstructing rivers or creeks; keeping open fishways in dams.

(a), (b) Repealed by Session Laws 1979, c. 830, s. 1.

(c) It is unlawful for any person in inland fishing waters:

(1) To set a net of any description across the main channel of any river or creek;

(2) To erect so as to extend more than three fourths of the distance across any river or creek any stand, dam, weir, hedge, or other obstruction to the passage of fish;
(3) To erect any stand, dam, weir, or hedge in any part of a river or creek required to be left open for the passage of fish; or,
(4) Having erected any dam where the same was allowed, to fail to make and keep open such slope or fishway as may be required by law to be kept open for the free passage of fish.

The provisions of this section may not be construed to conflict in any way with the laws and rules of any other agency with jurisdiction over the activity or subject matter in question. (Code, ss. 3387-3389; Rev., s. 2457; 1909, c. 466, s. 1; 1915, c. 84, s. 21; 1917, c. 290, s. 7; C.S., ss. 1878, 1974; 1925, c. 168, s. 2; 1935, c. 35; 1945, c. 776; 1951, c. 1045, s. 1; 1953, cc. 774, 1251; 1963, c. 1097, s. 1; 1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-294. Specific violations.

(a) Any person who unlawfully sells, possesses for sale, or buys any wildlife is guilty of a Class 2 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(b) Any person who unlawfully sells, possesses for sale, or buys any deer or wild turkey is guilty of a Class 2 misdemeanor, punishable by a fine of not less than two hundred fifty dollars ($250.00) in addition to such other punishment prescribed for the offense in question.

(c) Any person who unlawfully takes, possesses, or transports any wild turkey is guilty of a Class 2 misdemeanor, punishable by a fine of not less than two hundred fifty dollars ($250.00) in addition to such other punishment prescribed for the offense in question.

(c1) Any person who unlawfully takes, possesses, transports, sells, possesses for sale, or buys any bear or bear part is guilty of a Class 1 misdemeanor, punishable by a fine of not less than two thousand dollars ($2,000) in addition to such other punishment prescribed for the offense in question. Each of the acts specified shall constitute a separate offense.

(c2) Any person who unlawfully takes, possesses, transports, sells, possesses for sale, or buys any cougar (Felis concolor) is guilty of a Class 1 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(d) Any person who unlawfully takes, possesses, or transports any deer is guilty of a Class 3 misdemeanor, punishable by a fine of not less than one hundred dollars ($100.00) in addition to such other punishment prescribed for the offense in question.

(e) Any person who unlawfully takes deer between a half hour after sunset and a half hour before sunrise with the aid of an artificial light is guilty of a Class 2 misdemeanor, punishable by a fine of not less than two hundred fifty dollars ($250.00) in addition to such other punishment prescribed for the offense in question.

(f) Any person who unlawfully takes, possesses, transports, sells, or buys any beaver, or violates any rule of the Wildlife Resources Commission adopted to protect beavers, is guilty of a Class 3 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(g) Any person who unlawfully takes wild animals or birds from or with the use of a vessel equipped with a motor or with motor attached is guilty of a Class 2 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(h) Any person who willfully makes any false or misleading statement in order to secure for himself or another any license, permit, privilege, exemption, or other benefit under this Subchapter to which he or the person in question is not entitled is guilty of a Class 1 misdemeanor.

(i) Any person who violates any provision of G.S. 113-291.6, regulating trapping, is guilty of a Class 2 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(j) Any person who unlawfully sells, possesses for sale, or buys a fox, or who takes any fox by unlawful trapping or with the aid of any electronic calling device is guilty of a Class 2 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(k) Repealed by Session Laws 1995, c. 209, s. 1.

(*l*) Any person who unlawfully takes, possesses, transports, sells or buys any bald eagle or golden eagle, alive or dead, or any part, nest or egg of a bald eagle or golden eagle is guilty of a Class 1 misdemeanor, unless a greater penalty is prescribed for the offense in question.

(m) Any person who unlawfully takes any migratory game bird with a rifle; or who unlawfully takes any migratory game bird with the aid of live decoys or any salt, grain, fruit, or other bait; or who unlawfully takes any migratory game bird during the closed season or during prohibited shooting hours; or who unlawfully exceeds the bag limits or possession limits applicable to any migratory game bird; or who violates any of the migratory game bird permit or tagging rules of the Wildlife Resources Commission is guilty of a Class 2 misdemeanor, punishable by a fine of not less than one hundred dollars ($100.00) in addition to any other punishment prescribed for the offense in question.

(n) Any person who violates any rule of the Commission that restricts access by vehicle on game lands to a person who holds a special vehicular access identification card and permit issued by the Commission to persons who have a handicap that limits physical mobility shall be guilty of a Class 2 misdemeanor and shall be fined not less than one hundred dollars ($100.00) in addition to any other punishment prescribed for the offense. (1935, c. 486, s. 25; 1939, c. 235, s. 2; c. 269; 1941, c. 231, s. 2; c. 288; 1945, c. 635; 1949, c. 1205, s. 4; 1953, c. 1141; 1963, c. 147; c. 697, ss. 2, 3½; 1965, c. 616; 1967, c. 729; c. 1149, s. 1; 1971, c. 423, s. 1; c. 524; c. 899, s. 2; 1973, c. 677; 1975, c. 216; 1977, c. 705, s. 4; c. 794, s. 2; c. 933, s. 8; 1979, c. 830, s. 1; 1985, c. 306; c. 554, s. 3; 1987, c. 452, s. 4; c. 827, s. 98; 1989, c. 327, s. 2; 1991, c. 366, s. 1; 1993, c. 539, s. 863; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 209, ss. 1, 2.)

CASE NOTES

Constitutionality. — Former § 113-104, similar to § 113-291, and the first sentence of former § 113-109(b), similar to subsection (e) of this section, protecting and managing wildlife, were within the legitimate interests of the State and in the public interest and are constitutional. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

Purpose. — Former § 113-104 and the first sentence of former § 113-109(b) had the purpose of controlling and managing the use and methods of taking wildlife. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

"Taking". — The shooting and killing of a deer with a rifle was a "taking" within the intent and meaning of former § 113-294(b). State v. Link, 13 N.C. App. 568, 186 S.E.2d 634 (1972).

§ 113-295. Unlawful harassment of persons taking wildlife resources.

(a) It is unlawful for a person to interfere intentionally with the lawful taking of wildlife resources or to drive, harass, or intentionally disturb any wildlife resources for the purpose of disrupting the lawful taking of wildlife resources. It is unlawful to take or abuse property, equipment, or hunting dogs that are being used for the lawful taking of wildlife resources. This subsection

does not apply to a person who incidentally interferes with the taking of wildlife resources while using the land for other lawful activity such as agriculture, mining, or recreation. This subsection also does not apply to activity by a person on land he owns or leases.

Violation of this subsection is a Class 2 misdemeanor for a first conviction and a Class 1 misdemeanor for a second or subsequent conviction.

(b) The Wildlife Resources Commission may, either before or after the institution of any other action or proceeding authorized by this section, institute a civil action for injunctive relief to restrain a violation or threatened violation of subsection (a) of this section pursuant to G.S. 113-131. The action shall be brought in the superior court of the county in which the violation or threatened violation is occurring or about to occur and shall be in the name of the State upon the relation of the Wildlife Resources Commission. The court, in issuing any final order in any action brought pursuant to this subsection may, in its discretion, award costs of litigation including reasonable attorney and expert-witness fees to any party. (1987, c. 636, s. 3; 1993, c. 539, s. 864; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-296. Disabled Sportsman Program.

(a) The Disabled Sportsman Program is established, to be developed and administered by the Wildlife Resources Commission. The Disabled Sportsman Program shall consist of special hunting and fishing activities adapted to the needs of persons with the disabilities described in subsection (b) of this section.

(b) In order to be eligible for participation in the Disabled Sportsman Program established by this section, a person must be able to certify through competent medical evidence one of the following disabilities:

(1) Amputation of one or more limbs;
(2) Paralysis of one or more limbs;
(3) Dysfunction of one or more limbs rendering the person unable to perform the tasks of grasping and lifting with the hands and arms or unable to walk without mechanical assistance, other than a cane;
(4) Disease, injury, or defect confining the person to a wheelchair, walker, or crutches;
(5) Legal deafness; or
(6) Legal blindness, for purposes of participation in disabled fishing only.

The disability must be permanent, and a person loses eligibility to participate in the Disabled Sportsman Program when the specified disability ceases to exist.

(c) A person who qualifies under subsection (b) of this section may apply for participation in the Disabled Sportsman Program by completing an application supplied by the Wildlife Resources Commission and by supplying the medical evidence necessary to confirm the person's disability. In order to participate in activities under the Program, each disabled participant may be accompanied by an able-bodied companion, who may also participate in the hunting, fishing, or other activity. The Commission shall charge each disabled participant an annual fee of ten dollars ($10.00) to defray the cost of processing the application and administering the special activities provided under the Program. The participant and the participant's companion shall also obtain any applicable hunting, fishing, or other special license required for the activities.

(d) In developing the Disabled Sportsman Program, the Wildlife Resources Commission shall:

(1) Establish special seasons and bag limits for hunting all or selected species of wildlife;
(2) Authorize the manner for taking wildlife, consistent with State law;

(3) Permit the use of vehicles and other means of conveyance in areas normally closed to such use;
(4) Set special fishing seasons and size and creel limits for inland fish; and
(5) Permit the use of crossbows or other specially equipped bows by persons incapable of arm movement sufficient to operate a longbow, recurve bow, or compound bow, but only during a season for hunting with bow and arrow and only during a special hunt organized and supervised by the Wildlife Resources Commission for the Disabled Sportsman Program; and
(6) Alter any other established rules of the Wildlife Resources Commission pertaining to hunting, fishing, or special activities, as generally applicable or as applicable to game lands, for the purpose of providing access to disabled persons participating in the Disabled Sportsman Program.

The Wildlife Resources Commission may use its game lands for purposes of conducting special activities for the Disabled Sportsman Program, and may enter into agreements with other landholders for purposes of conducting special activities on private lands.

(e) The Wildlife Resources Commission may establish special activities under the Disabled Sportsman Program for any class or classes of disability described in subsection (b) of this section. The Commission shall publicize these activities through the public media and in the Commission's publications to ensure that disabled persons are notified of the activities and informed about the application process.

(f) The Wildlife Resources Commission shall hold at least four special hunting activities under the Disabled Sportsman Program per calendar year, at least two during the season for taking deer with bow and arrow, and at least two during the season for taking deer with guns. The Commission shall alternate the location of these special activities so as to provide equal access to disabled persons in all regions of the State. (1993 (Reg. Sess., 1994), c. 557, s. 1.)

§ 113-297. Method exemptions for disabled persons.

(a) Any person whose physical disability makes it impossible for the person to hunt or fish by conventional methods for one year or more may apply to the Wildlife Resources Commission for a hunting or fishing methods exemption allowing that person to hunt or fish in a manner that would otherwise be prohibited by rules adopted by the Commission. The application shall be accompanied by a signed statement from a physician containing the following information:

(1) The nature of the person's disability;
(2) The necessity of the exemption in order to allow the person to hunt or fish; and
(3) Whether the disability is permanent or temporary and, if temporary, the length of time after which the physician anticipates that the person may be able to hunt or fish without the exemption.

The Wildlife Resources Commission may authorize any reasonable exemption in order to permit a disabled person complying with the requirements of this section to hunt or fish and may issue a permit describing the exemption made in each case. The permit may be permanent or, if the disability is temporary, the permit may coincide with the length of time the signed physician's statement indicates the disability is expected to last. A person issued a permit under this section shall possess the permit while hunting or fishing in the exempted manner.

(b) In addition to providing disabled persons reasonable exemptions from rules adopted by the Wildlife Resources Commission, the Commission may

permit a person complying with the application procedure outlined in subsection (a) of this section to use a crossbow or other specially equipped bow if the physician's statement indicates that the person is incapable of arm movement sufficient to operate a longbow, recurve bow, or compound bow. (1995, c. 62, s. 1.)

§ 113-298. Unlawful use of facilities provided for disabled sportsman.

Any person who knowingly uses facilities or participates in activities provided by the Wildlife Resources Commission for disabled sportsmen, when that person does not meet the qualifications for use of those facilities or participation in those activities, is guilty of a Class 3 misdemeanor. (1997-326, s. 5.)

Editor's Note. — Session Laws 1997-326, s. 5, enacted as § 113-297, was codified as this section at the direction of the Revisor of Statutes.

§§ 113-299 through 113-300: Reserved for future codification purposes.

Article 22A.

Use of Poisons and Pesticides.

§ 113-300.1. Use of poisons and pesticides in general.

No one may take any wild animal or bird with the use of any poison or pesticide except as provided in this Article. The taking of fish by the use of poison is governed by G.S. 113-261 and G.S. 113-262, and the prohibitions of those sections against the taking of wildlife by poison apply unless specifically permitted under this Article. Otherwise, the Wildlife Resources Commission may, by rules consistent with the North Carolina Pesticide Law of 1971 and the Structural Pest Control Act of 1955, regulate, prohibit, or restrict the use of poisons or pesticides upon or severely affecting wildlife resources. (1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 9; 1987, c. 827, s. 98.)

§ 113-300.2. Declaring wild animal or bird a pest; concurrence of Wildlife Resources Commission required before poison or pesticide may be used.

(a) When there is a factual basis for the declaration, any wild animal or bird may be declared a pest by:

(1) The Commissioner of Agriculture under the Structural Pest Control Act of North Carolina of 1955, as amended, in Article 4C of Chapter 106 of the General Statutes, in accordance with any regulations or restrictions imposed by the Structural Pest Control Committee; or

(2) The Pesticide Board under the North Carolina Pesticide Law of 1971, as amended, in Article 52 of Chapter 143 of the General Statutes.

(b) When a wild animal or bird is declared a pest, the Commissioner of Agriculture or the Pesticide Board, as the case may be, must notify the Wildlife Resources Commission in writing of the action taken; the areas in which the declaration is effective; the type, amount, and mode of application of any poison or pesticide proposed for use against the pest; and other information pertinent to the declaration.

(c) Upon receiving notification under subsection (b), the Wildlife Resources Commission may:

(1) Hold a timely public hearing on the question whether it should concur in the declaration that the wild animal or bird is a pest and should be open to taking with the type or types of poison or pesticide specified or authorized in the notice, in the areas and under the circumstances specified. After holding the public hearing the Wildlife Resources Commission must decide, within 60 days after receiving the notice under subsection (b), whether it concurs or refuses to concur in the declaration that the wild animal or bird is a pest.

(2) Take no action. In this event, 60 days after the Wildlife Resources Commission receives notice of the declaration under subsection (b), the concurrence of the Wildlife Resources Commission will occur automatically.

(d) Upon the concurrence of the Wildlife Resources Commission in the declaration under subsection (b), the wild animal or bird may be taken with the use of any poison or pesticide specified in the notice in accordance with applicable restrictions in statutes and regulations and in accordance with any special restrictions imposed by the Commissioner of Agriculture, the Structural Pest Control Committee, or the Pesticide Board. If the Wildlife Resources Commission refuses to concur, no poison or pesticide may be used to take the wild animal or bird.

(e) After holding a public hearing on the subject, the Wildlife Resources Commission may rescind its concurrence to a declaration under subsection (b) or grant its concurrence previously withheld.

(f) With the approval of the Structural Pest Control Committee or the Pesticide Board, as the case may be, the Wildlife Resources Commission may grant a qualified concurrence to a declaration, imposing further restrictions as to the use of poison or pesticide in taking the wild animal or bird in question. (1979, c. 830, s. 1.)

§ 113-300.3. Penalties for violations of Article; repeated offenses.

(a) Each day in which poisons or pesticides are used unlawfully in taking wild animals or birds constitutes a separate offense.

(b) Any taking of a wild animal or bird in willful violation of this Article or in willful violation of any restrictions imposed by the Commissioner of Agriculture, the Structural Pest Control Committee, the Pesticide Board, or the Wildlife Resources Commission is punishable under G.S. 113-262(a). For the purposes of prosecutions under that subsection, the term "poison" includes pesticides.

(c) Any person taking a wild animal or bird declared a pest with the use of poison or pesticide who neglects to observe applicable restrictions imposed by the Commissioner of Agriculture, the Structural Pest Control Committee, the Pesticide Board, or the Wildlife Resources Commission is guilty of a Class 3 misdemeanor, unless a greater penalty is prescribed for the offense in question. (1979, c. 830, s. 1; 1993, c. 539, s. 865; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 23.

Administrative Provisions; Regulatory Authority of Wildlife Resources Commission.

§ 113-301: Repealed by Session Laws 1979, c. 830, s. 1.

§ 113-301.1. Wildlife Resources Commission obligated to make efforts to notify members of the public who may be affected by operative provisions of statutes and regulations.

(a) The Wildlife Resources Commission must prepare and distribute to license agents informational materials relating to hunting, fishing, trapping, and boating laws and regulations administered by the Wildlife Resources Commission. The materials furnished an agent should be appropriate to the types of licenses he customarily handles, and in a quantity reasonably anticipated to be sufficient to meet the needs of licensees obtaining licenses from the agent.

(b) In issuing new licenses and permits from the Raleigh office by mail, the Wildlife Resources Commission must generally inform the licensee or permittee of governing provisions of law and regulations applicable to the type of license or permit secured. In issuing renewal licenses and permits by mail, the Wildlife Resources Commission must inform the licensee or permittee of any substantial changes in the law or regulations which may affect the activities of the licensee or permittee.

(c) After adopting regulations which impose new restrictions upon the activities of members of the public who do not normally hold licenses or permits to engage in the activity in question, the Wildlife Resources Commission must take appropriate steps to publicize the new restrictions. These steps may include press releases to the media, informing local authorities, and other forms of communication that give promise of reaching the segment of the public affected.

(d) After adopting new restrictions on hunting, fishing, trapping, or boating at a time other than when usual annual changes in the regulations affecting those activities are adopted, the Wildlife Resources Commission must take appropriate steps to publicize the new restrictions in a manner designed to reach persons who may be affected.

(e) Repealed by Session Laws 1987, c. 827, s. 9. (1979, c. 830, s. 1; 1979, 2nd Sess., c. 1285, s. 10; 1987, c. 827, s. 9.)

Editor's Note. — Session Laws 1987, c. 827, s. 98, amended several sections in Chapter 113 by deleting the words "regulations", "Regulations", and "regulation" each time they appeared, including the catchlines, and substituting the words "rules", "Rules", and "rule" respectively, but did not amend this section.

§ 113-302. Prima facie evidence provisions.

(a) Except as provided below, possession of game or game fish in any hotel, restaurant, cafe, market, or store, or by any produce dealer, constitutes prima facie evidence of possession for the purpose of sale. This subsection does not apply to:

(1) Possession of propagated game birds or hatchery-reared trout that is in accordance with licensing requirements and wrapping or tagging provisions that may apply; or

(2) Game or game fish brought in by patrons in accordance with G.S. 113-276(i).

(b) The flashing or display of any artificial light between a half hour after sunset and a half hour before sunrise in any area which is frequented or inhabited by wild deer by any person who has accessible to him a firearm, crossbow, or other bow and arrow constitutes prima facie evidence of taking deer with the aid of an artificial light. This subsection does not apply to the

headlights of any vehicle driven normally along any highway or other public or private roadway. (1965, c. 957, s. 2; 1979, c. 830, s. 1.)

CASE NOTES

Editor's Note. — *The case cited in the following annotations was decided under former § 113-109(b), similar to subsection (b) of this section.*

Constitutionality of Subsection (b). — The prima facie evidence rule of former § 113-109(b), similar to subsection (b) of this section, was constitutional and met the requirement for constitutionality that there be a rational connection between the fact proved and the ultimate fact presumed so that the inference of one from proof of the other is not unreasonable and arbitrary. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

Presumption Not Conclusive. — The presumption in former § 113-109(b) was not conclusive upon the jury; they could still under the law return a verdict in favor of the defendant. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

It Does Not Deprive Defendants of Rights. — The presumption in former § 113-109(b) did not shift the burden of proof from the State to the defendants, or deprive them of due process of law or the presumption of innocence, which remained with them until overcome by evidence of guilt beyond a reasonable doubt. State v. Lassiter, 13 N.C. App. 292, 185 S.E.2d 478 (1971), cert. denied, 280 N.C. 495, 186 S.E.2d 514, appeal dismissed, 280 N.C. 724, 186 S.E.2d 926 (1972).

§ 113-302.1. Inspection of licensed or commercial premises; authority to secure inspection warrants.

(a) Protectors are authorized to enter and make a reasonable inspection at an appropriate time of day of any premises in which a person subject to administrative control under G.S. 113-276.2 conducts his operations to determine whether any wildlife on the premises is possessed in accordance with applicable laws and rules, required records are being kept, and other legal requirements are being observed. It is an appropriate time of day for inspection if the establishment is open for business or if a proprietor or employee is on the premises.

(b) In cases not controlled by subsection (a), protectors who believe that wildlife may be on the premises of any public refrigeration storage plant, meat shop, store, produce market, hotel, restaurant, or other public food-storage or eating place may request permission to enter the nonpublic areas of the premises to make a reasonable inspection to determine whether any wildlife on the premises is possessed in accordance with applicable laws and rules. If the person in charge of the premises refuses the inspection request of a protector, he is authorized to procure and execute an administrative search warrant issued under the terms of Article 4A of Chapter 15 of the General Statutes or under any successor legislation.

(c) In cases controlled by subsection (a), an administrative search warrant may be secured in the protector's discretion or if case law requires it. Nothing in this section is intended to prevent a lawful search of premises, with or without a search warrant under Chapter 15A of the General Statutes, when the circumstances so justify. (1979, c. 830, s. 1; 1987, c. 827, s. 98.)

§ 113-303. Arrest, service of process and witness fees of protectors.

All arrest fees and other fees that may be charged in any bill of costs for service of process by protectors must be paid to the county in which the trial is

held. No witness fee may be taxed in any bill of costs by virtue of the appearance of a protector as a witness in a criminal case within his enforcement jurisdiction. Acceptance by any protector of any arrest fee, witness fee, or any other fee to which he is not entitled is a Class 1 misdemeanor. (1965, c. 957, s. 2; 1993, c. 539, s. 866; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-304. Reciprocal agreements by Wildlife Resources Commission.

The Wildlife Resources Commission is empowered to make reciprocal agreements with other jurisdictions respecting the matters governed in this Subchapter. Pursuant to such agreements the Wildlife Resources Commission may by rule modify provisions of this Subchapter in order to effectuate the purposes of such agreements, in the overall best interests of the conservation of wildlife resources. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1987, c. 827, s. 98.)

§ 113-305. Cooperative agreements by Wildlife Resources Commission.

The Wildlife Resources Commission is empowered to enter into cooperative agreements with public and private agencies and individuals respecting the matters governed in this Subchapter. Pursuant to such agreements the Wildlife Resources Commission may expend funds, assign employees to additional duties within or without the State, assume additional responsibilities, and take other actions that may be required by virtue of such agreements, in the overall best interests of the conservation of wildlife resources. (1965, c. 957, s. 2; 1973, c. 1262, s. 18.)

§ 113-306. Administrative authority of Wildlife Resources Commission; disposition of license funds; delegation of powers; injunctive relief.

(a) In the overall best interests of the conservation of wildlife resources, the Wildlife Resources Commission may lease or purchase lands, equipment, and other property; accept gifts and grants on behalf of the State; establish wildlife refuges, management areas, and boating and fishing access areas, either alone or in cooperation with others; provide matching funds for entering into projects with some other governmental agency or with some scientific, educational, or charitable foundation or institution; condemn lands in accordance with the provisions of Chapter 40A of the General Statutes and other governing provisions of law; and sell, lease, or give away property acquired by it. Provided, that any private person selected to receive gifts or benefits by the Wildlife Resources Commission be selected:

(1) With regard to the overall public interest that may result; and

(2) From a defined class upon such a rational basis open to all within the class as to prevent constitutional infirmity with respect to requirements of equal protection of the laws or prohibitions against granting exclusive privileges or emoluments.

(b) Except as otherwise specifically provided by law, all money credited to, held by, or to be received by the Wildlife Resources Commission from the sale of licenses authorized by this Subchapter must be consolidated and placed in the Wildlife Resources Fund.

(c) The Wildlife Resources Commission may, within the terms of policies set by rule, delegate to the Executive Director all administrative powers granted to it.

(d) The Wildlife Resources Commission is hereby authorized and directed to develop a plan and policy of wildlife management for all lands owned by the State of North Carolina which are suitable for this purpose. The Division of State Property and Construction of the Department of Administration shall determine which lands are suitable for the purpose of wildlife management. Nothing in the wildlife management plan shall prohibit, restrict, or require the change in use of State property which is presently being used or will in the future be used to carry out the goals and objectives of the State agency utilizing such land. Each plan of wildlife management developed by the Wildlife Resources Commission shall consider the question of public hunting; and whenever and wherever possible and consistent with the primary land use of the controlling agency, public hunting shall be allowed under cooperative agreement with the Wildlife Resources Commission. Any dispute over the question of public hunting shall be resolved by the Division of State Property and Construction.

(e) Subject to any policy directives adopted by the members of the Wildlife Resources Commission, the Executive Director in his discretion may institute an action in the name of the Wildlife Resources Commission in the appropriate court for injunctive relief to prevent irreparable injury to wildlife resources or to prevent or regulate any activity within the jurisdiction of the Wildlife Resources Commission which constitutes a public nuisance or presents a threat to public health or safety. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1977, c. 759; 1979, c. 830, s. 1; 1981, c. 482, s. 3; 1987, c. 827, ss. 98, 106.)

§ 113-307. Adoption of federal laws and regulations.

To the extent that the Wildlife Resources Commission is granted authority under this Chapter or under any other provision of law, including Chapter 75A of the General Statutes, over subject matter as to which there is concurrent federal jurisdiction, the Wildlife Resources Commission in its discretion may by reference in its rules adopt relevant provisions of federal law and regulations as State rules. To prevent confusion or conflict of jurisdiction in enforcement, the Wildlife Resources Commission may provide for an automatic incorporation by reference into its rules of future changes within any particular set of federal laws or regulations relating to some subject clearly within the jurisdiction of the Wildlife Resources Commission. (1965, c. 957, s. 2; 1973, c. 1262, s. 18; 1987, c. 827, s. 107.)

§ 113-307.1. Legislative assent to specific federal acts.

(a) The consent of the General Assembly of North Carolina is hereby given to the making by the Congress of the United States, or under its authority, of all such rules and regulations as the federal government shall determine to be needful in respect to game animals, game and nongame birds, and fish on such lands in the western part of North Carolina as shall have been, or may hereafter be, purchased by the United States under the terms of the act of Congress of March 1, 1911, entitled "An act to enable any state to cooperate with any other state or states, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purposes of conserving the navigability of navigable rivers" (36 Stat. 961), and acts of Congress supplementary thereto and amendatory thereof, and in or on the waters thereon.

Nothing in this subsection shall be construed as conveying the ownership of wildlife from the State of North Carolina or permit the trapping, hunting, or transportation of any game animals, game or nongame birds, or fish by any person, including any agency, department, or instrumentality of the United

States or agents thereof, on the lands in North Carolina, as shall have been or may hereafter be purchased by the United States under the terms of any act of Congress, except in accordance with the provisions of this Subchapter and its implementing regulations. Provided, that the provisions of G.S. 113-39 apply with respect to licenses.

Any person, including employees or agents of any department or instrumentality of the United States, violating the provisions of this subsection is guilty of a Class 1 misdemeanor.

(b) The State of North Carolina hereby assents to the provisions of the act of Congress entitled "An act to provide that the United States shall aid the states in wildlife restoration projects, and for other purposes," approved September 2, 1937 (Public Law 415, 75th Congress), and the Wildlife Resources Commission is hereby authorized, empowered, and directed to perform such acts as may be necessary to the conduct and establishment of cooperative wildlife restoration projects, as defined in said act of Congress, in compliance with said act and rules and regulations promulgated by the Secretary of Agriculture thereunder; and no funds accruing to the State of North Carolina from license fees paid by hunters shall be diverted for any other purpose than the protection and propagation of game and wildlife in North Carolina and administration of the laws enacted for such purposes, which laws are and shall be administered by the Wildlife Resources Commission.

(c) Assent is hereby given to the provisions of the act of Congress entitled "An act to provide that the United States shall aid the states in fish restoration and management projects, and for other purposes," approved August 9, 1950 (Public Law 681, 81st Congress), and the Wildlife Resources Commission is hereby authorized, empowered, and directed to perform such acts as may be necessary to the conduct and establishment of cooperative fish restoration projects, as defined in said act of Congress, in compliance with said act and rules and regulations promulgated by the Secretary of the Interior thereunder; and no funds accruing to the State of North Carolina from license fees paid by fishermen shall be directed for any other purpose than the administration of the Wildlife Resources Commission and for the protection, propagation, preservation, and investigation of fish and wildlife.

(d) If as a precondition to receiving funds under any cooperative program there must be a separation of license revenues received from certain classes of licensees and utilization of such revenues for limited purposes, the Wildlife Resources Commission is directed to make such arrangements for separate accounting within the Wildlife Resources Fund, or for separate funding, as may be necessary to insure the use of the revenues for the required purposes and eligibility for the cooperative funds. This subsection applies whether the cooperative program is with a public or private agency and whether the Wildlife Resources Commission acts alone on behalf of the State or in conjunction with some other State agency. (1915, c. 205; C.S., s. 2099; 1939, c. 79, ss. 1, 2; 1979, c. 830, s. 1; 1993, c. 539, s. 867; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

Editor's Note. *— The case cited in the following annotations was decided under former § 113-113, similar to subsection (a) of this section.*

Acceptance May Be Presumed. — Acceptance of such a grant as was made by former § 113-113 may be presumed. Chalk v. United States, 114 F.2d 207 (4th Cir. 1940), cert. denied, 312 U.S. 679, 61 S. Ct. 449, 85 L. Ed. 1118 (1941).

Acceptance of Jurisdiction over Pisgah National Forest and Pisgah National Game Preserve. — A federal statute authorizing the President of the United States to designate areas set aside for protection of game and fish on lands purchased by the United States, and punishing the unlawful taking of game or fish, constituted an acceptance by the United States of the cession to it of jurisdiction over the Pisgah National Forest and the Pisgah Na-

tional Game Preserve by a prior act of the legislature of North Carolina. Chalk v. United States, 114 F.2d 207 (4th Cir. 1940), cert. denied, 312 U.S. 679, 61 S. Ct. 449, 85 L. Ed. 1118 (1941).

Limitation on Number of Deer Therein. — Where the United States acquired land by grant from North Carolina for the Pisgah National Forest and the Pisgah National Game Preserve, and the legislature of North Carolina enacted an act consenting that Congress should make rules and regulations with respect to animals, birds, and fish, and it was established that the deer herd on the Preserve was so large as to damage the Preserve, the United States could, without regard to State laws, limit the number of deer thereon. Chalk v. United States, 114 F.2d 207 (4th Cir. 1940), cert. denied, 312 U.S. 679, 61 S. Ct. 449, 85 L. Ed. 1118 (1941).

ARTICLE 23A.

Promotion of Coastal Fisheries and Seafood Industry.

§ 113-308. Definitions.

The definitions as given in G.S. 113-128 shall apply to this Article, except that the following will additionally apply:

(1) Agency: A group or an association which shall make applications and otherwise act for the fishing and seafood industry or a distinguishable part thereof. (1967, c. 890, s. 1.)

Editor's Note. — This section, as enacted by Session Laws 1967, c. 890, s. 1, contains a subdivision (1) but no (2).

§ 113-309. Declaration of policy.

It is declared to be in the interest of the public welfare of North Carolina that those engaged in "coastal fisheries," as defined in G.S. 113-129, shall be permitted and encouraged to act jointly and cooperatively for the purposes of promoting the common good, welfare, and advancement of their industry. (1967, c. 890, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 27.17, creates within the Department of Environment, Health, and Natural Resources [Department of Environment and Natural Resources] the Fishery Resource Grant Program, to enhance the State's coastal fishery resources through individual grants to test new equipment, research industry trends, perform environmental pilot studies, and study other fishery issues, provides for administration, specifies an application procedure, and appropriates funds for the 1994-95 fiscal year.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1994-95 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1994-95 fiscal year."

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 113-310. Certain activities not to be deemed illegal or in restraint of trade.

No association, meeting or activity undertaken in pursuance of the provisions of this Article and intended to benefit all of the coastal fisheries or distinguishable part thereof hereinunder certified by the Marine Fisheries Commission shall be deemed or considered illegal or in restraint of trade. (1967, c. 890, s. 3; 1973, c. 1262, s. 28.)

§ 113-311. Referendum and assessment declared to be in public interest.

It is hereby declared to be in the interest of the public that the coastal fisheries or any distinguishable part thereof shall be permitted by referendum to be held among themselves as prescribed by this Article, to levy upon themselves an assessment on such respective catches, volume, landings, income, or production for the purposes of promoting the common good, welfare, and advancement of the fishing and seafood industry of North Carolina, in addition to any and all taxes, levies, and licenses in effect on June 22, 1967, or that may be enacted and levied or imposed subsequently. (1967, c. 890, s. 4.)

§ 113-312. Application to Marine Fisheries Commission for authority to conduct referendum.

Any agency fairly representative of any distinguishable part or all of the fishing and seafood industry may at any time make application in writing or petition to the Marine Fisheries Commission for certification and approval to conduct a referendum among the coastal fisheries or any distinguishable part thereof for the purpose of levying an assessment under the provisions of this Article, collecting, and utilizing the proceeds for the purposes stated in such referendum and as set forth in this Article. (1967, c. 890, s. 5; 1973, c. 1262, s. 28.)

§ 113-313. Action of Marine Fisheries Commission on application.

Upon receiving an application or petition as herein provided, the Marine Fisheries Commission shall at its next regular quarterly meeting consider such application as follows:

(1) The Marine Fisheries Commission shall determine if the agency is in fact fairly representative of the coastal fisheries or distinguishable part thereof making application or petitioning for referendum and record in its minutes its determination.

(2) The Marine Fisheries Commission shall determine if the application or petition is in conformity with the provisions and purposes of this Article and record in its minutes its determination.

(3) If the Marine Fisheries Commission determines in the affirmative as to (1) and (2) above, it shall authorize and empower the agency to hold and conduct a referendum on the question of whether or not members of the fishing and seafood industry, or the distinguishable part thereof, making application or petition, shall levy upon themselves an assessment under and subject to the conditions and provisions and for the purpose stated in this Article. (1967, c. 890, s. 6; 1973, c. 1262, s. 28.)

§ 113-314. Agency to determine time and place of referendum, amount and basis of assessment, etc.; notice of referendum.

The agency shall fix, determine, and publicly announce such referendum at least 30 days before the date set for such referendum, the date, hours, and polling places for voting in such referendum, the amount and basis of the assessment proposed to be collected, the means by which such assessment shall be collected if favorably voted upon, and the general purposes to which

said amount so collected shall be applied. Such public notice shall be published at least once 20 days prior to the election in one or more newspapers having general circulation in the area where the vote is to be taken. (1967, c. 890, s. 7.)

§ 113-315. Maximum assessment.

No assessment levied on any commodity under the provisions of this Article shall exceed one percent (1%) of the average value of this commodity during the next three years for which published statistics by the State of North Carolina or the federal government are available next preceding the application or petition. (1967, c. 890, s. 8.)

§ 113-315.1. Arrangements for and management of referendum; expenses.

The arrangements for and management of any referendum conducted under the provisions of this Article shall be under the direction of the agency duly certified and authorized to conduct the same, and any and all expenses in connection herewith shall be borne by the agency. (1967, c. 890, s. 9.)

§ 113-315.2. Referendum may be by mail ballot or box ballot; who may vote.

Any referendum conducted under the provisions of this Article may be held by mail ballot or by box ballot as may be determined and publicly announced as herein provided by the agency before such referendum is called. A person licensed by the Marine Fisheries Commission to engage in business and commerce as may be directly affected by the paying of the assessment, or anyone who would be subject to paying such assessment should the question be voted in the affirmative, shall be eligible and may vote in such referendum. (1967, c. 890, s. 10; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 641, s. 6.)

§ 113-315.3. Preparation and distribution of ballots; conduct of referendum; canvass and declaration of results.

The duly certified agency shall prepare and distribute in advance of such referendum all necessary ballots for the purpose thereof, and shall under rules and regulations drawn up and promulgated by said agency, arrange for the necessary poll holders or officials for conducting the said referendum; and following said referendum and within 10 days thereafter the duly certified agency shall canvass and publicly declare the result of such referendum; except that in the event a mail ballot is used, a mail ballot shall be posted by registered mail on a prearranged date at least 30 days following announcement of same to each duly licensed voter by the agency, and a return, self-addressed envelope of suitable size and construction for containing the completed ballot with ample postage affixed shall be enclosed along with complete instructions on the voting procedure, these instructions stating that the ballot should be marked by the voter to indicate and show his preference, then inserted into the return envelope, sealed, and posted or returned within 10 days of the date of the original or first posting, and on a predesignated date and hour at least 15 days after the original mailing and at an open and public meeting, the return envelopes described above shall be opened, the ballots counted, tabulated, and the results publicly declared by the agency or its authorized representatives. (1967, c. 890, s. 11.)

§ 113-315.4. Levy and collection of assessment; use of proceeds and other funds.

If in such referendum called under the provisions of this Article two thirds or more of the voters eligible and voting vote in the affirmative and in favor of the levying and collection of such assessment proposed in such referendum, then such assessment shall be collected annually, or more often as predetermined by the agency, for the three years set forth in the call for such referendum, and the collection of such assessment shall be under such method, rules, and regulations as may be determined by the agency prior to the announcement of the referendum and included in the announcement of the referendum; said assessment so collected shall be paid into the treasury of the agency, to be used together with other funds, including donations and grants from individuals, firms, governmental agencies, or corporations, and from other fees, dues, or assessments, for the purpose set out in the referendum. (1967, c. 890, s. 12.)

§ 113-315.5. Alternative method for collection of assessment.

As an alternate method for the collection of assessments provided for in G.S. 113-315.4, upon the request or petition of the agency and action by the Marine Fisheries Commission as prescribed in G.S. 113-313, the Secretary shall notify, by letter, all persons or firms licensed by the Marine Fisheries Commission to engage in business and commerce as may be directly affected by the paying of the assessment, that on and after the date specified in the letter the assessment shall become due and payable, and shall be remitted by said persons or firms to the Secretary who shall thereupon pay the amount of the assessments to the agency. The books and records of all such persons and firms shall at all times during regular business hours be open for inspection by the Secretary or his duly authorized agents. (1967, c. 890, s. 13; 1973, c. 1262, ss. 28, 86; 1977, c. 356; c. 771, s. 4; 1987, c. 641, s. 6; 1995, c. 504, s. 6; c. 509, s. 57.)

§ 113-315.6. Subsequent referendum where assessment defeated.

In the event such referendum as herein provided for shall not be voted on affirmatively by two thirds or more of the voters eligible and voting, then the agency shall have full power and authority to call another referendum for the purposes herein set forth at any time after the next succeeding 12 months, on the question of an assessment for three years. (1967, c. 890, s. 14.)

§ 113-315.7. Subsequent referendum where assessment adopted.

In the event such referendum as herein provided for shall be voted on affirmatively by two thirds or more of the voters eligible and voting, then the agency shall in its discretion have full power and authority to call and conduct during the third year after the latest referendum another referendum for the purpose set forth herein for the next ensuing three years. (1967, c. 890, s. 15.)

§ 113-315.8. Refund of assessment; refusal to pay assessment.

Any persons or firm hereinunder assessed shall have the right to demand of and receive from the treasurer or disbursing office of the agency a refund of

such assessment so collected, provided such demand for refund is made in writing within 30 days from the end of the assessment year which shall be determined by the agency. Should a person or firm hereinunder assessed refuse to pay and does not pay the assessment within 30 days of when it is due and payable, then in such event suit may be brought by the duly certified agency in a court of competent jurisdiction to enforce the collection of the said assessment. (1967, c. 890, s. 16; 1971, c. 642, s. 1.)

§ 113-315.9. Bond of financial officer; audit.

(a) Before collecting and receiving such assessments, such treasurer or financial officer shall give bond to the agency to run in favor of the agency in the amount of the estimated total of such assessments as will be collected, and from time to time the agency may alter the amount of such bond which, at all times, must be equal to the total financial assets of the agency, such bond to have as surety thereon a surety company licensed to do business in the State of North Carolina, and to be in the form and amount approved by the agency and to be filed with the chairman or executive head of such agency.

(b) The chairman or executive head of such agency shall cause an annual certified audit to be made of the financial records of the agency. Such audit shall include, among other things, total annual compensation of each employee of the agency and detailed expenses incurred and reimbursed for each employee of the agency. The chairman or executive head of such agency shall cause a copy of the certified audit to be submitted to the Department within 60 days of the end of the agency's fiscal year and shall cause a copy of the audit, or a summary thereof, to be published at least once in one or more newspapers having general circulation in the area where the assessments are made within 60 days of the end of the agency's fiscal year. If the chairman or executive head of the agency shall fail to carry out the provisions of this paragraph, he shall be guilty of a Class 1 misdemeanor. (1967, c. 890, s. 17; 1971, c. 642, s. 2; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1989, c. 727, s. 115; 1993, c. 539, s. 868; 1994, Ex. Sess., c. 24, s. 14(c).)

§§ 113-315.10 through 113-315.14: Reserved for future codification purposes.

Article 23B.

Fishermen's Economic Development Program.

§ 113-315.15. Short title.

This Article shall be known as the Fishermen's Economic Development Act. (1973, c. 618, s. 1.)

§ 113-315.16. Legislative findings.

The legislature finds that the fishermen of North Carolina perform essential functions in providing wholesome food for the diets of the citizens of North Carolina, that they properly earn a livelihood by performing these essential functions, that they are entitled to the same or similar governmental services provided other segments of our society so as to become more proficient in the performance of these essential functions, and that the quality of life for North Carolinians is enhanced by the economic development of the fishing industry. (1973, c. 618, s. 1.)

§ 113-315.17. Definitions.

As used in this Article:

(1) "Economic development" means: giving helpful and useful aid to improve the proficiency of the citizens, and the efficiency of the operations are improved to the end that the economic well-being of fishermen is improved, the quality of life is enhanced and equality of opportunity is provided.

(2) "Fisherman" means: any person, firm, corporation, cooperative, partnership, or any legally constituted group, engaged in the harvesting, handling, processing, packaging, and marketing of fishery or seafood products from coastal fishing waters as defined by G.S. 113-129. (1973, c. 618, s. 1.)

§ 113-315.18. Fishermen's Economic Development Program.

The Secretary is hereby authorized to provide through his Department and the extension services of the University of North Carolina those services intended to promote the economic development of the fishermen, including but not limited to:

(1) Instituting business management services to promote better business management practices throughout the fishing and seafood industry, and to promote the better use of credit and other business management techniques.

(2) Providing counseling services to the fishermen at all levels and assisting them in meeting the federal and State environmental, safety and health requirements.

(3) Improving waterways, harbors, inlets, and generally the water transportation system of North Carolina so as to more efficiently and safely accommodate commercial and sport fishing craft, and to provide access to and from fishing grounds. (1973, c. 618, s. 1; c. 1262, s. 28; 1975, c. 19, s. 36; 1977, c. 771, s. 4; 1989, c. 727, s. 116.)

§ 113-315.19. Personnel needs.

To effectively carry out the duties and responsibilities set forth above, the Secretary may employ or contract with the extension services of the University of North Carolina to employ the following persons:

(1) A person to have responsibility for the successful execution of the program and to coordinate as deemed desirable with other agencies of the State and federal government,

(2) A business management specialist,

(3) An insurance and finance specialist,

(4) A specialist who could understand, interpret, and counsel on regulations and requirements,

(5) A specialist in waterways, and water transportation, and

(6) Such clerical personnel as necessary to carry out the provisions of this Article. (1973, c. 618, s. 1.)

§§ 113-315.20 through 113-315.24: Reserved for future codification purposes.

ARTICLE 23C.

North Carolina Seafood Industrial Park Authority.

§ 113-315.25. Creation of Authority; membership; appointment; terms and vacancies; officers; meetings and quorum; compensation.

(a) There is hereby created the North Carolina Seafood Industrial Park Authority. It shall be governed by a board composed of 11 members to be appointed as follows. The Board is hereby designated as the Authority.

(b) Nine members shall be appointed by the Governor.

The initial appointments by the Governor shall be made on or after the date of ratification, four terms to expire July 1, 1981; four terms to expire July 1, 1983; and one term to expire July 1, 1985. Thereafter, at the expiration of each stipulated term of office all appointments shall be for a term of four years. The members of the Authority shall be selected as follows: one member be appointed to the Authority for a term to expire July 1, 1983, who is a resident of the village or town where the Seafood Industrial Park is located; one member be appointed to the Authority for a term to expire July 1, 1983, who is a resident of the county where the Seafood Industrial Park is located; two members be appointed to the Authority for terms which expire July 1, 1981, from the area of the State where the Seafood Industrial Park is located; five members (two terms expire July 1, 1981; two terms expire July 1, 1983; and one term expires July 1, 1985) be appointed to the Authority who are residents of the State at large and insofar as practicable shall represent all the other sections of the State. At the expiration of the terms for the representatives as stated above the Governor shall use his discretion on reappointments. However, there shall be no less than five members of the Authority from coastal counties and there should be at least one member on the Authority from each village or town in which the Seafood Parks are located. Any vacancy occurring in the membership of the Authority shall be filled by the appointing authority for the unexpired term. The Governor shall have the authority to remove any member appointed by the Governor.

(c) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1191, s. 36.

(d) The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President Pro Tempore of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. The terms of subsequent appointees by the General Assembly shall be two years.

(e) The Governor shall annually appoint from the members of the Authority the chairman and vice-chairman of the Authority. The Secretary of Economic and Community Development or his designee shall serve as secretary of the Authority.

(f) No person shall serve on the Authority for more than two complete consecutive terms.

(g) The Authority shall meet once in each 90 days at such regular meeting time as the Authority by rule may provide and at any place within the State as the Authority may provide, and shall also meet upon the call of its chairman or a majority of its members. A majority of its members shall constitute a quorum for the transaction of business. The members of the Authority shall not be entitled to compensation for their services, but shall receive per diem and

necessary travel and subsistence expense in accordance with G.S. 138-5 and 138-6. (1979, c. 459, s. 1; 1981 (Reg. Sess., 1982), c. 1191, ss. 36, 37; 1989, c. 751, s. 8(12); 1995, c. 490, s. 47.)

Editor's Note. — Session Laws 1979, c. 459, which amended this section, in s. 16, provided: "North Carolina Seafood Industrial Park Authority transfer. The North Carolina Seafood Industrial Park Authority, as contained in this Article, will take title to, develop and manage seafood industrial parks which henceforth has been the responsibility of several State agencies."

§ 113-315.26. Personnel.

The Secretary of Commerce shall appoint such personnel as deemed necessary who shall serve at the pleasure of the Secretary of Commerce. The Secretary of Commerce shall have the power to appoint, employ and dismiss such number of employees as he may deem necessary to accomplish the purposes of this Article subject to the availability of funds. It is recommended that, to the fullest extent possible, the Secretary of Commerce consult with the Authority on matters of personnel. (1979, c. 459, s. 2; 1983, c. 717, s. 24; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1989, c. 751, s. 8(13); c. 752, s. 39(d); 1991 (Reg. Sess., 1992), c. 959, s. 24.)

§ 113-315.27. Executive committee.

There shall be an executive committee consisting of the chairman of the Authority and two other members elected annually by the Authority. The executive committee shall be vested with authority to do all acts which are specifically authorized by the bylaws of the Authority. Members of the executive committee shall serve until their successors are elected. (1979, c. 459, s. 3.)

§ 113-315.28. Purposes of Authority.

Through the Authority hereinbefore created, the State of North Carolina may engage in promoting, developing, constructing, equipping, maintaining and operating the seafood industrial parks within the State, or within the jurisdiction of the State, and works of internal improvements incident thereto, including the acquisition or construction, maintenance and operation as such seafood industrial parks of watercraft and facilities thereon or essential for the proper operation thereof. Said Authority is created as an instrumentality of the State of North Carolina for the accomplishment of the following general purposes:

(1) To develop and improve the Wanchese Seafood Industrial Park, and such other places, including inland ports and facilities, as may be deemed feasible for a more expeditious and efficient handling of seafood commerce from and to any place or places in the State of North Carolina and other states and foreign countries;

(2) To acquire, construct, equip, maintain, develop and improve the port facilities at said parks and to improve such portions of the waterways thereat as are within the jurisdiction of the federal government and the waterways connecting the Wanchese Seafood Industrial Park with the channels of commerce of the Atlantic Ocean, consistent with the project designed by the United States Army Corps of Engineers pursuant to the Manteo (Shallowbag) Bay navigation project as authorized in the Rivers and Harbors Act of 1970 (P.L. 91-611);

(3) To foster and stimulate the shipment of seafood commerce through said ports, whether originating within or without the State of North

Carolina, including the investigation and handling of matters pertaining to all transportation rates and rate structures affecting the same;

(4) To cooperate with the United States of America and any agency, department, corporation or instrumentality thereof in the maintenance, development, improvement and use of said seafood harbors and the waterways connecting the parks with the channels of commerce of the Atlantic Ocean;

(5) To accept funds from any of said counties or cities wherein said ports are located and to use the same in such manner, within the purposes of said Authority, as shall be stipulated by the said county or city, and to act as agent or instrumentality of any of said counties or cities in any matter coming within the general purposes of said Authority;

(5a) To encourage and develop the general maritime and marine-related industries and activities at or in the vicinity of the seafood industrial parks;

(6) And in general to do and perform any act or function which may tend to be useful toward the development and improvement of seafood industrial parks of the State of North Carolina, and to increase the movement of waterborne seafood commerce, foreign and domestic, to, through, and from said seafood industrial parks.

The enumeration of the above purposes shall not limit or circumscribe the broad objective of developing to the utmost the seafood possibilities of the State of North Carolina. (1979, c. 459, s. 4; 1993, c. 278, s. 1; 1998-212, s. 15.5(a).)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1028, s. 8 abolished the Wanchese Harbor Citizens Advisory Council and repeals Session Laws 1977, c. 612. The Seafood Industrial Park Authority is authorized to perform the functions of the Council.

Session Laws 1998-212. s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, at the end of subdivision (2), added the language beginning "and the waterways connecting"; and at the end of subdivision (4), added "and the waterways connecting the parks with the channels of commerce of the Atlantic Ocean."

§ 113-315.29. Powers of Authority.

In order to enable it to carry out the purposes of this Article, the Authority shall:

(1) Have the powers of a body corporate, including the power to sue and be sued, to make contracts, and to adopt and use a common seal and to alter the same as may be deemed expedient;

(2) Have the authority to make all necessary contracts and arrangements with other seafood industrial park or port authorities of this and other states for the interchange of business, and for such other purposes as will facilitate and increase the seafood industries;

(3) Be authorized and empowered to rent, lease, buy, own, acquire, mortgage, otherwise encumber, and dispose of such property, real or personal, as said Authority may deem proper to carry out the purposes and provisions of this Article, all or any of them;

(4) Be authorized and empowered to acquire, construct, maintain, equip and operate any wharves, docks, piers, quays, elevators, compresses, refrigeration storage plants, warehouses and other structures, and any and all facilities needful for the convenient use of the same in the aid of commerce, including the dredging of approaches thereto;

(5) Be authorized and empowered to pay all necessary costs and expenses involved and incident to the formation and organization of said

Authority, and incident to the administration and operation thereof, and to pay all other costs and expenses reasonably necessary or expedient in carrying out and accomplishing the purposes of this Article;

(6) Be authorized and empowered to apply for and accept loans and grants of money from any federal agency or the State of North Carolina or any political subdivision thereof or from any public or private sources available for any and all of the purposes authorized in this Article, and to expend the same in accordance with the directions and requirements attached thereto, or imposed thereon by any such federal agency, the State of North Carolina, or any political subdivision thereof, or any public or private lender or donor, and to give such evidences of indebtedness as shall be required, provided, however, that no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State of North Carolina, or any political subdivisions thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State of North Carolina, or any political subdivision thereof;

(7) Be authorized and empowered to act as agent for the United States of America, or any agency, department, corporation, or instrumentality thereof, in any matter coming within the purposes or powers of the Authority;

(8) Have power to adopt, alter or repeal bylaws and rules governing the manner in which its business may be transacted and in which the power granted to it may be enjoyed, and may provide for the appointment of such committees, and the functions thereof, as the Authority may deem necessary or expedient in facilitating its business;

(8a) Have the authority to assess and collect fees for its services or for the use of its facilities;

(9) Be authorized and empowered to do any and all other acts and things in this Article authorized or required to be done, whether or not included in the general powers in this section mentioned; and

(10) Be authorized and empowered to do any and all things necessary to accomplish the purposes of this Article. (1979, c. 459, s. 5; 1987, c. 827, s. 108; 1993, c. 323, s. 1.)

§ 113-315.30. Approval of acquisition and disposition of real property.

Any transactions relating to the acquisition or disposition of real property or any estate or interest in real property, by the North Carolina State Seafood Industrial Park Authority, shall be subject to prior review by the Governor and Council of State, and shall become effective only after the same has been approved by the Governor and Council of State. Upon the acquisition of real property or other estate therein, by the Authority, the fee title or other estate shall vest in and the instrument of conveyance shall name the "Seafood Industrial Park Authority" as grantee, lessee, or transferee. Upon the disposition of real property or any interest or estate therein, the instrument of conveyance or transfer shall be executed by the North Carolina Seafood Industrial Park Authority. The approval of any transaction by the Governor and Council of State may be evidenced by a duly certified copy of excerpt of minutes of the meeting of the Governor and Council of State, attested by the private secretary to the Governor or the Governor, reciting such approval, affixed to the instrument of acquisition or transfer, and said certificate may be recorded as a part thereof, and the same shall be conclusive evidence of review

and approval of the subject transaction by the Governor and Council of State. The Governor, acting with the approval of the Council of State, may delegate the review and approval of such classes of lease, rental, easement, or right-of-way transactions as he deems advisable, and he may likewise delegate the review and approval of the severance of buildings and timber from the land. (1979, c. 459, s. 6.)

§ 113-315.31. Issuance of bonds.

(a) As a means of raising the funds needed from time to time in the acquisition, construction, equipment, maintenance and operation of any facility, building, structure, or any other matter or thing which the Authority is herein authorized to acquire, construct, equip, maintain, or operate, all or any of them, the said Authority is hereby authorized at one time or from time to time to issue with the approval of the Governor negotiable revenue bonds of the Authority. The principal and interest of revenue bonds shall be payable solely from the revenue to be derived from the operation of all or any part of its properties and facilities. Prior to taking any action under this subsection, the Governor may consult with the Advisory Budget Commission.

(b) A pledge of the net revenues derived from the operation of said properties and facilities, all or any of them, shall be made to secure the payment of said bonds as and when they mature.

(c) Revenue bonds issued under the provisions of this Article shall not be deemed to constitute a debt of the State of North Carolina or a pledge of the faith and credit of the State. The issuance of such revenue bonds shall not directly or indirectly or contingently obligate the State to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment.

(d) Such bonds and the income thereof shall be exempt from all taxation within the State.

(e) Notwithstanding any other provisions of this Article, the State Treasurer shall have the exclusive power to issue bonds and notes authorized under the act upon request of the Authority and with the approval of the Governor after receiving the advice of the Local Government Commission. The State Treasurer in his sole discretion shall determine the interest rates, maturities, and other terms and conditions of the bonds and notes authorized by this Article. The North Carolina Seafood Industrial Park Authority shall determine when a bond issue is indicated. The Authority shall cooperate with the State Treasurer in structuring any bond issue in general, and also in soliciting proposals from financial consultants, underwriters, and bond attorneys. (1979, c. 459, s. 7; 1983, c. 577, s. 2; 1985 (Reg. Sess., 1986), c. 955, ss. 13, 14.)

§ 113-315.32. Power of eminent domain.

For the acquiring of rights-of-way and property necessary for the construction of wharves, piers, ships, docks, quays, elevators, compresses, refrigerator storage plants, warehouses and other riparian and littoral terminals and structures and approaches thereto, including the navigation stabilization structures recommended by the United States Army Corps of Engineers pursuant to the authorization in United States Public Law 91-611, and transportation facilities needful for the convenient use of same, the Authority shall have the right and power to acquire the same by purchase, by negotiation, or by condemnation, and should it elect to exercise the right of eminent domain, condemnation proceedings shall be maintained by and in the name of the Authority, and it may proceed in the manner provided for the Board of Transportation by Article 9 of Chapter 136 of the General Statutes. The power

of eminent domain shall not apply to property of persons, State agency or corporations already devoted to public use, other than lands subject to the power of eminent domain by the State of North Carolina in the reservation clauses of a deed recorded in the Dare County Registry at Book 79 Page 548. (1979, c. 459, s. 8; 1998-212, s. 15.5(b).)

Editor's Note. — Session Laws 1998-212. s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, in the first sentence, inserted "including the navigation ... United States Public Law 91-611" and substituted "provided for the Board of Transportation by Article 9 of Chapter 136 of the General Statutes" for "provided by the general laws of the State of North Carolina for the procedure by any county, municipality or authority organized under the laws of this State"; and at the end of the second sentence, added "other than lands subject to the power of eminent domain by the State of North Carolina in the reservation clauses of a deed recorded in the Dare County Registry at Book 79 Page 548."

§ 113-315.33. Exchange of property; removal of buildings, etc.

The Authority may exchange any property or properties acquired under the authority of this Chapter for other property, or properties usable in carrying out the powers hereby conferred, and also may remove from lands needed for its purposes and reconstruct on other locations, buildings, terminals, or other structures, upon the payment of just compensation, if in its judgment, it is necessary or expedient so to do in order to carry out any of its plans for seafood industrial park development, under the authorization of this Article. (1979, c. 459, s. 9.)

§ 113-315.34. Jurisdiction of the Authority; application of Chapter 20; appointment and authority of special police.

(a) The jurisdiction of the Authority in any of said harbors or seaports within the State for the shipment of seafood commerce shall extend to all properties owned by or under control of the Authority and shall also extend over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows, and shall extend to the outer edge of the outer bar at such harbors or seaports.

(b) All the provisions of Chapter 20 of the General Statutes relating to the use of the highways of the State and the operation of motor vehicles thereon are hereby made applicable to the streets, alleys and driveways on the properties owned by or under the control of the North Carolina Seafood Industrial Park Authority. Any person violating any of the provisions of said Chapter in or on such streets, alleys or driveways shall, upon conviction thereof, be punished as therein prescribed. Nothing herein contained shall be construed as in any way interfering with the ownership and control of such streets, alleys and driveways on the properties of said Authority as is now vested by law in the said Authority.

(c) The Authority shall post copies of rules concerning traffic and parking at appropriate places on property of the Authority. Violation of a rule concerning traffic or parking on property of the Authority is a Class 3 misdemeanor.

(d) The Secretary of Commerce is authorized to appoint such number of employees of the Authority as he may think proper as special policemen, who,

when so appointed, shall have within the jurisdiction of the Authority all the powers of policemen of incorporated towns. Special policemen may arrest persons who violate State law or a rule adopted by the Authority. Employees appointed as such special policemen shall take the general oath of office prescribed by G.S. 11-11. (1979, c. 459, s. 10; 1987, c. 827, s. 109; 1989, c. 751, s. 8(14); 1991 (Reg. Sess., 1992), c. 959, s. 25; 1993, c. 539, s. 869; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-315.35. Audit.

The operations of the North Carolina Seafood Industrial Park Authority shall be subject to the oversight of the State Auditor pursuant to Article 5A of Chapter 147 of the General Statutes. (1979, c. 459, s. 11; 1983, c. 913, s. 14.)

§ 113-315.36. Building contracts.

(a) The following general laws, to the extent provided below, do not apply to the North Carolina Seafood Industrial Park Authority:

(1) Repealed by Session Laws 1999-368, s. 1, effective July 1, 1999.

(2) Except for G.S. 143-128(f), Article 8 of Chapter 143 of the General Statutes does not apply to public building contracts of the Authority that require the estimated expenditure of public money in an amount less than two hundred fifty thousand dollars ($250,000). With respect to a contract that is exempted from certain provisions of Article 8 under this subdivision, the powers and duties set out in Article 8 shall be exercised by the Authority, and the Secretary of Administration and other State officers, employees, or agencies shall have no duties or responsibilities concerning the contract.

(3) G.S. 143-341(3) does not apply to plans and specifications for construction or renovation authorized by the Authority that require the estimated expenditure of public money in an amount less than two hundred fifty thousand dollars ($250,000).

(b) Notwithstanding the other provisions of this section, the services of the Department of Administration may be made available to the Authority, when requested by the Authority, with regard to matters governed by Article 8 of Chapter 143 of the General Statutes and G.S. 143-341(3). The Authority shall report quarterly to the Joint Legislative Commission on Governmental Operations on any building contract to which this exemption is applied. The quarterly report required by this subsection shall specifically include information regarding the Authority's compliance with the provisions of G.S. 143-128(f). (1979, c. 459, s. 12; 1997-331, s. 2; 1999-368, ss. 1, 2.)

Editor's Note. — Session Laws 1997-331, s. 4, had provided that the amendments to this section by Session Laws 1997-331, s. 2, would expire on July 1, 1999. However, Session Laws 1999-368, s. 2, amended Session Laws 1997-331, s. 4, so as to delete the sunset provision.

Effect of Amendments. — Session Laws 1999-368, s. 1, effective July 1, 1999, substituted the present catchline for "Purchase of supplies, material, equipment, and building contracts"; designated the former first and second paragraphs as subsections (a) and (b); repealed subdivision (a)(1), which had exempted contracts for supplies, materials, equipment and contractual services of the Authority from Article 3 of Chapter 143; rewrote subdivisions (a)(2) and (a)(3); and in subsection (b), substituted "Article 8" for "Articles 3 and 8" in the first sentence, substituted "building contract" for "purchases or building contracts exceeding two hundred fifty thousand dollars ($250,00)" in the second sentence, and added the last sentence; and made a minor stylistic change.

§ 113-315.37. Liberal construction of Article.

It is intended that the provisions of this Article shall be liberally construed to accomplish the purposes provided for, or intended to be provided for, herein, and where strict construction would result in the defeat of the accomplishment of any of the acts authorized herein, and a liberal construction would permit or assist in the accomplishment thereof, the liberal construction shall be chosen. (1979, c. 459, s. 13.)

§ 113-315.38. Warehouses, wharves, etc., on property abutting navigable waters.

The powers, authority and jurisdiction granted to the North Carolina Seafood Industrial Park Authority under this Article and Chapter shall not be construed so as to prevent other persons, firms and corporations, including municipalities, from owning, constructing, leasing, managing and operating warehouses, structures and other improvements on property owned, leased or under the control of such other persons, firms and corporations abutting upon and adjacent to navigable waters and streams in this State, nor to prevent such other persons, firms and corporations from constructing, owning, leasing and operating in connection therewith wharves, docks and piers, nor to prevent such other persons, firms and corporations from encumbering, leasing, selling, conveying or otherwise dealing with and disposing of such properties, facilities, lands and improvements after such construction. (1979, c. 459, s. 14.)

§ 113-315.39. Taxation.

The property of the Authority shall not be subject to any taxes or assessments thereon. (1979, c. 459, s. 15.)

Article 24.

Miscellaneous Transitional Provisions.

§ 113-316. General statement of purpose and effect of revisions of Subchapter IV made in 1965 and 1979.

To clarify the conservation laws of the State and the authority and jurisdiction of the Department and the North Carolina Wildlife Resources Commission: commercial fishing waters are renamed coastal fishing waters and the Department is given jurisdiction over and responsibility for the marine and estuarine resources in coastal fishing waters; the laws pertaining to commercial fishing operations and marine fishing and fisheries regulated by the Department are consolidated and revised generally and broadened to reflect the jurisdictional change respecting coastal fisheries; laws relating to the conservation of wildlife resources administered by the Wildlife Resources Commission are consolidated and revised; and the enforcement authority of marine fisheries inspectors and wildlife protectors is clarified, including the authority of wildlife protectors over boating and other activities other than conservation within the jurisdiction of the Wildlife Resources Commission. (1965, c. 957, s. 1; 1973, c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1979, c. 830, s. 1; 1989, c. 727, s. 117.)

§ 113-317: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For repealed sections and local acts continued in effect as to particular counties by Session Laws 1979, c. 830, see § 113-133.1.

§§ 113-318 through 113-320: Repealed by Session Laws 1973, c. 1262, s. 28.

§§ 113-321, 113-322: Repealed by Session Laws 1979, c. 830, s. 1.

Cross References. — For repealed sections and local acts continued in effect as to particular counties, see § 113-133.1.

§§ 113-323 through 113-330: Reserved for future codification purposes.

Article 25.

Endangered and Threatened Wildlife and Wildlife Species of Special Concern.

§ 113-331. Definitions.

All of the definitions contained in Article 12 of this Chapter 113 shall apply in this Article except to the extent that they may be herein modified for the purpose of this Article 25. As used in this Article, unless the context requires otherwise:

(1) "Conserve" and "conservation" mean the use and application of all methods, procedures and biological information for the purpose of bringing populations of native and once-native species of wildlife in balance with the optimum carrying capacity of their habitat, and maintaining such balance. These methods and procedures include all activities associated with scientific resource management such as research; census; law enforcement; habitat protection, acquisition, and enhancement; and restoration of species to unoccupied parts of historic range. With respect to endangered and threatened species, the terms means the use of methods and procedures to bring the species to the point at which the measures provided are no longer necessary.

(2) "Endangered species" means any native or once-native species of wild animal whose continued existence as a viable component of the State's fauna is determined by the Wildlife Resources Commission to be in jeopardy or any species of wild animal determined to be an "endangered species" pursuant to the Endangered Species Act.

(3) "Endangered Species Act" means the Endangered Species Act of 1973, Public Law 93-205 (87 Stat. 884), as it may be subsequently amended.

(4) "Advisory Committee" means the North Carolina Nongame Wildlife Advisory Committee which is the advisory body of knowledgeable and representative citizens established by resolution of the Wildlife Resources Commission and charged to consider matters relating to nongame wildlife conservation and to advise the Commission in such matters.

(5) "Protected animal" means a species of wild animal designated by the Wildlife Resources Commission as endangered, threatened, or of special concern.
(6) "Protected animal list" means any one of the lists of North Carolina animal species that are endangered, threatened, or of special concern.
(7) "Scientific council" means the group of scientists identified and assembled by the Advisory Committee to review the scientific evidence and to evaluate the status of wildlife species that are candidates for inclusion on a protected animal list.
(8) "Special concern species" means any species of wild animal native or once-native to North Carolina which is determined by the Wildlife Resources Commission to require monitoring but which may be taken under regulations adopted under the provisions of this Article.
(9) "Threatened species" means any native or once-native species of wild animal which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range, or one that is designated as a threatened species pursuant to the Endangered Species Act.
(10) "Wild animal" means any native or once-native nongame amphibian, bird, crustacean, fish, mammal, mollusk or reptile not otherwise legally classified by statute or regulation such as game and fur bearing animals, except those inhabiting and depending upon coastal fishing waters, marine and estuarine resources, marine mammals found in coastal fishing waters, sea turtles found in coastal fishing waters, and those declared to be pests under the Structural Pest Control Act of North Carolina of 1955 or the North Carolina Pesticide Law of 1971. Nothing in this definition is intended to abrogate G.S. 113-132(a) or (c), confer jurisdiction upon the Wildlife Resources Commission as to any subject exclusively regulated by any other agency, or to authorize the Wildlife Resources Commission by its regulations to supersede any valid provision of law or regulation administered by any other agency. (1987, c. 382, s. 1.)

§ 113-332. Declaration of policy.

The General Assembly finds that the recreation and aesthetic needs of the people, the interests of science, the quality of the environment, and the best interests of the State require that endangered and threatened species of wild animals and wild animals of special concern be protected and conserved, that their numbers should be enhanced and that conservation techniques be developed for them; however, nothing in this Article shall be construed to limit the rights of a landholder in the management of his lands for agriculture, forestry, development or any other lawful purpose without his consent. The North Carolina Zoological Park is not subject to the provisions of this Article. (1987, c. 382, s. 1.)

§ 113-333. Powers and duties of the Commission.

(a) In the administration of this Article, the Wildlife Resources Commission shall have the following powers and duties:
(1) To adopt and publish an endangered species list, a threatened species list, and a list of species of special concern, as provided for in G.S. 113-334, identifying each entry by its scientific and common name.
(2) To reconsider and revise the lists from time to time in response to public proposals or as the Commission deems necessary.
(3) To coordinate development and implementation of conservation programs and plans for endangered and threatened species of wild animals and for species of special concern.

(4) To adopt and implement conservation programs for endangered, threatened, and special concern species and to limit, regulate, or prevent the taking, collection, or sale of protected animals.

(5) To conduct investigations to determine whether a wild animal should be on a protected animal list and to determine the requirements for conservation of protected wild animal species.

(b) Using the procedures set out in Article 2A of Chapter 150B of the General Statutes, the Wildlife Resources Commission shall develop a conservation plan for the recovery of protected wild animal species. In developing a conservation plan for a protected wild animal species, the Wildlife Resources Commission shall consider the range of conservation, protection, and management measures that may be applied to benefit the species and its habitat. The conservation plan shall include a comprehensive analysis of all factors that have been identified as causing the decline of the protected wild animal species and all measures that could be taken to restore the species. The analysis shall consider the costs of measures to protect and restore the species and the impact of those measures on the local economy, units of local government, and the use and development of private property. The analysis shall consider reasonably available options for minimizing the costs and adverse economic impacts of measures to protect and restore the species.

(c) In implementing a conservation plan under this Article, the Wildlife Resources Commission shall not adopt any rule that restricts the use or development of private property. If a conservation plan identifies a conservation, protection, or restoration measure the implementation of which is beyond the scope of the authority of the Wildlife Resources Commission, the Commission may petition the General Assembly, any agency that has regulatory authority to implement the measure, a unit of local government, or any other public or private entity and request the assistance of that agency or entity in implementing the measure. (1987, c. 382, s. 1; 1995, c. 392, s. 1.)

§ 113-334. Criteria and procedures for placing animals on protected animal lists.

(a) All native or resident wild animals which are on the federal lists of endangered or threatened species pursuant to the Endangered Species Act have the same status on the North Carolina protected animals lists.

(b) The Advisory Committee, after considering a report on the status of a candidate species from the Scientific Council, may by resolution propose to the Wildlife Resources Commission that a species of wild animal be added to or removed from a protected animal list.

(c) If the Commission, with the advice of the Advisory Committee, finds there is probably merit in the proposal, it shall examine relevant scientific and economic data and factual information necessary to determine:

(1) Whether any other state or federal agency or private entity is taking steps to protect the wild animal which is the subject of the proposal;

(2) Whether there is present or threatened destruction, modification, or curtailment of its habitat;

(3) If there is over-utilization for commercial, recreational, scientific, or educational purposes;

(4) Whether there is critical population depletion from disease, predation, or other mortality factors;

(5) Whether alternative regulatory mechanisms exist; and

(6) The existence of other man-made factors affecting continued viability of the animal in North Carolina.

(d) The Commission, with the advice of the Advisory Committee, shall tentatively determine whether any regulatory action is warranted with regard

to the proposal and, if so, the specific regulatory action to be proposed by it. Notice of its proposed rulemaking shall be published in the North Carolina Register and the subsequent proceedings shall conform with the Administrative Procedure Act. (1987, c. 382, s. 1.)

§ 113-335. North Carolina Nongame Wildlife Advisory Committee.

The North Carolina Nongame Wildlife Advisory Committee is created subject to constitution, organization, and function as determined appropriate and advisable by resolution of the Wildlife Resources Commission. The Advisory Committee is to be comprised of knowledgeable and representative citizens of North Carolina whose responsibility shall be to advise the Commission on matters related to conservation of nongame wildlife including creation of protected animal lists and development of conservation programs for endangered, threatened, and special concern species.

Members of the Advisory Committee shall receive necessary travel and subsistence expenses while on official business of the Committee in accordance with G.S. 138-5 and G.S. 138-6, to be paid from the Nongame Account of the Wildlife Resources Fund. (1987, c. 382, s. 1; 1989 (Reg. Sess., 1990), c. 1066, s. 48.)

§ 113-336. Powers and duties of the Advisory Committee.

The Advisory Committee shall have the following powers and duties:

(1) To gather and provide information and data and advise the Wildlife Resources Commission with respect to all aspects of the biology and ecology of endangered, threatened, and special concern species;

(2) To investigate and make recommendations to the Commission as to the status of endangered, threatened, and special concern species;

(3) To identify and assemble experts from the disciplines of ornithology, mammalogy, herpetology, ichthyology, taxonomy, ecology and other fields as necessary to serve as the Scientific Council and to charge the Scientific Council to review the scientific evidence, to evaluate the status of candidate species, and to report back their findings with recommendations;

(4) To develop and present to the Commission management and conservation practices for preserving endangered, threatened, and special concern species;

(5) To recommend critical habitat areas for protection or acquisition;

(6) To advise the Commission on matters submitted to it by the Commission which involve technical zoological questions or the development of pertinent regulations, and to make any recommendations as deemed by the Advisory Committee to be worthy of the Commission's attention. (1987, c. 382, s. 1.)

§ 113-337. Unlawful acts; penalties.

(a) It is unlawful:

(1) To take, possess, transport, sell, barter, trade, exchange, export, or offer for sale, barter, trade, exchange or export, or give away for any purpose including advertising or other promotional purpose any animal on a protected wild animal list, except as authorized according to the regulations of the Commission, including those promulgated pursuant to G.S. 113-333(1);

(2) To perform any act specifically prohibited by the regulations of the Commission promulgated pursuant to its authority under G.S. 113-333.

(b) Each person convicted of violating the provisions of this Article is guilty of a Class 1 misdemeanor. (1987, c. 382, s. 1; 1999-408, s. 10.)

Editor's Note. — The reference to § 113-333(1) should now be to § 113-333(a)(1).

Effect of Amendments. — Session Laws 1999-408, s. 10, effective December 1, 1999, and applicable to acts committed on or after that date, substituted "is guilty of a Class 1 misdemeanor" for "shall in addition to any other penalty prescribed in the discretion of the court be fined not less than one hundred dollars ($100.00) upon the first conviction, and not less than five hundred dollars ($500.00) upon any subsequent conviction" in subsection (b).

§§ 113-338 through 113-377: Reserved for future codification purposes.

Article 26.

Marine Fisheries Compact and Commission.

§§ 113-377.1 through 113-377.7: Transferred to §§ 113-252 through 113-258 by Session Laws 1965, c. 957.

SUBCHAPTER IVA. REPEALS.

Article 26A.

Repeal of Acts.

§ 113-377.8. Repeal of certain public, public-local, special and private acts.

The following public, public-local, special and private acts are hereby repealed: Chapter 36 of the Public Laws of 1901; Chapter 113 of the Public Laws of 1901; Chapter 260 of the Public Laws of 1901; Chapter 308 of the Public Laws of 1901; Chapter 326 of the Public Laws of 1901; Chapter 370 of the Public Laws of 1901; Chapter 431 of the Public Laws of 1901; Chapter 435 of the Public Laws of 1901; Chapter 475 of the Public Laws of 1901; Chapter 589 of the Public Laws of 1901; Chapter 673 of the Public Laws of 1901; Chapter 702 of the Public Laws of 1901; Chapter 771 of the Public Laws of 1901; Chapter 131 of the Public Laws of 1903; Chapter 414 of the Public Laws of 1903; Chapter 520 of the Public Laws of 1903; Chapter 631 of the Public Laws of 1903; Chapter 650 of the Public Laws of 1903; Chapter 658 of the Public Laws of 1903; Chapter 668 of the Public Laws of 1903; Chapter 732 of the Public Laws of 1903; Chapter 752 of the Public Laws of 1903; Chapter 86 of the Public Laws of 1905; Chapter 265 of the Public Laws of 1905; Chapter 283 of the Public Laws of 1905; Chapter 351 of the Public Laws of 1905; Chapter 363 of the Public Laws of 1905; Chapter 500 of the Public Laws of 1905; Chapter 560 of the Public Laws of 1905; Chapter 386 of the Public Laws of 1907; Chapter 572 of the Public Laws of 1907; Chapter 690 of the Public Laws of 1907; Chapter 811 of the Public Laws of 1907; Chapter 977 of the Public Laws of 1907; Chapter 426 of the Public Laws of 1909; Chapter 466 of the Public Laws of 1909; Chapter 585 of the Public Laws of 1909; Chapter 755 of the Public Laws of 1909; Chapter 871 of the Public Laws of 1909; Chapter 525 of the Public-Local Laws of 1911; Chapter 547 of the Public-Local Laws of 1911; Chapter 572 of the Public-Local Laws of 1913; Chapter 587 of the

Public-Local Laws of 1913; Chapter 402 of the Private Laws of 1913; Chapter 58 of the Public-Local Laws, Extra Session of 1913; Chapter 211 of the Public-Local Laws, Extra Session of 1913; Chapter 30 of the Public Laws of 1915; Chapter 180 of the Public Laws of 1915; Chapter 610 of the Public-Local Laws of 1915; Chapter 599 of the Public-Local Laws of 1917; Chapter 202 of the Public-Local Laws, Extra Session 1920; Chapter 114 of the Public-Local Laws of 1921; Chapter 384 of the Public-Local Laws of 1921; Chapter 432 of the Public-Local Laws of 1921; Chapter 439 of the Public-Local Laws of 1921; Chapter 157 of the Public-Local Laws, Extra Session of 1921; Chapter 130 of the Public-Local Laws of 1923; Chapter 352 of the Public-Local Laws of 1923; Chapter 533 of the Public-Local Laws of 1923; Chapter 548 of the Public-Local Laws of 1923; Chapter 461 of the Public-Local Laws of 1925; Chapter 623 of the Public-Local Laws of 1925; Chapter 228 of the Public-Local Laws of 1927; Chapter 208 of the Public-Local Laws of 1929; Chapter 42 of the Public Laws of 1933; Chapter 51 of the Public Laws of 1933; Chapter 241 of the Public-Local Laws of 1933; Chapter 575 of the Public-Local Laws of 1933; Chapter 365 of the Public-Local Laws of 1935; Chapter 368 of the Public-Local Laws of 1935; Chapter 509 of the Public-Local Laws of 1935; Chapter 513 of the Public-Local Laws of 1935; Chapter 352 of the Public Laws of 1937; Chapter 266 of the Public-Local Laws of 1937; Chapter 632 of the Public-Local Laws of 1937; Chapter 265 of the Public Laws of 1939; Chapter 138 of the Public-Local Laws of 1939; Chapter 179 of the Public-Local Laws of 1939; Chapter 335 of the Public-Local Laws of 1941; Chapter 221 of the Special Laws of 1947; Chapter 485 of the Special Laws of 1947; Chapter 1017 of the Special Laws of 1947; Chapter 1031 of the Special Laws of 1949.

Provided that any public, public-local, special or private law herein repealed may be covered by a regulation of the Board of Conservation and Development to effectuate the same privileges or protection therein provided upon the petition of either the representative or senator from that county or district filed within six months from the date of ratification.' (1951, c. 1045, s. 2.)

Editor's Note. — Subchapter IV-A was redesignated as subchapter IVA pursuant to Session Laws 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer program database.

The words "Special Laws" in the last three lines of the first paragraph were apparently intended to read "Session Laws."

Because this section relates to past events, no changes have been made in it pursuant to Session Laws 1973, c. 1262, which reorganized the former Department of Natural and Economic Resources.

SUBCHAPTER V. OIL AND GAS CONSERVATION.

ARTICLE 27.

Oil and Gas Conservation.

Part 1. General Provisions.

§ 113-378. Persons drilling for oil or gas to register and furnish bond.

Any person, firm or corporation before making any drilling exploration in this State for oil or natural gas shall register with the Department of Environment and Natural Resources or such other State agency as may

hereafter be established to control the conservation of oil or gas in this State. To provide for such registration, the drilling operator must furnish the name and address of such person, firm or corporation, and the location of the proposed drilling operations, and file with the aforesaid Department a bond in the amount of five thousand dollars ($5,000) running to the State of North Carolina, conditioned that any well opened by the drilling operator upon abandonment shall be plugged in accordance with the rules of said Department. (1945, c. 765, s. 2; 1971, c. 813, s. 1; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 827, s. 110; 1989, c. 727, s. 118; 1997-443, s. 11A.119(a).)

§ 113-379. Filing log of drilling and development of each well.

Upon the completion or shutting down of any abandoned well, the drilling operator shall file with the Department or other State agency, or with any division thereof hereinafter created for the regulation of drilling for oil or natural gas, a complete log of the drilling and development of each well. (1945, c. 765, s. 3; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 119.)

§ 113-380. Violation a misdemeanor.

Any person, firm or officer of a corporation violating any of the provisions of G.S. 113-378 or 113-379, shall upon conviction thereof be guilty of a Class 1 misdemeanor. (1945, c. 765, s. 4; 1971, c. 813, s. 2; 1993, c. 539, s. 870; 1994, Ex. Sess., c. 24, s. 14(c).)

Part 2. The Oil and Gas Conservation Act.

§ 113-381. Title.

This law shall be designated and known as the Oil and Gas Conservation Act. (1945, c. 702, s. 1.)

Legal Periodicals. — For discussion of Session Laws 1945, c. 702, from which this Part derives, see 23 N.C.L. Rev. 332 (1945).

§ 113-382. Declaration of policy.

In recognition of imminent evils that can occur in the production and use and waste of natural oil and/or gas in the absence of equal or correlative rights of owners of crude oil or natural gas in a common source of supply to produce and use the same, and in the absence of adequate measures for the protection of the environment, this law is enacted for the protection of public interests against such evils by prohibiting waste and compelling ratable production and authorizing regulations for the protection of the environment. (1945, c. 702, s. 2; 1971, c. 813, ss. 3, 4.)

OPINIONS OF ATTORNEY GENERAL

"Commercial Quantities" Defined. — See opinion of Attorney General to Mr. Roy G. Sowers, Jr., Director, Department of Conservation and Development, 40 N.C.A.G. 67 (1970).

§§ 113-383 through 113-386: Repealed by Session Laws 1973, c. 1262, s. 86.

§ 113-387. Production of crude oil and gas regulated; tax assessments.

All common sources of supply of crude oil discovered after January 1, 1945, if so found necessary by the Department, shall have the production of oil therefrom controlled or regulated in accordance with the provisions of this law, and the Department is hereby authorized to assess from time to time against each barrel of oil produced and saved a tax not to exceed five mills on each barrel. All moneys so collected shall be used solely to pay the expenses and other costs in connection with the administration of this law.

All common sources of supply of natural gas discovered after January 1, 1945, if so found necessary by the Department, shall have the production of gas therefrom controlled or regulated in accordance with the provisions of this law, and the Department is hereby authorized to assess from time to time against each 1000 cubic feet of gas produced and saved from a gas well a tax not to exceed one-half mill on each 1000 cubic feet of gas. All moneys so collected shall be used solely to pay the expenses and other costs in connection with the administration of this law. (1945, c. 702, s. 7; 1973, c. 1262, s. 86.)

§ 113-388. Collection of assessments.

Any person purchasing oil or gas in this State at the well, under any contract or agreement requiring payment for such production to the respective owners thereof, in respect of which production any sums assessed under the provisions of G.S. 113-387 are payable to the Department, is hereby authorized, empowered and required to deduct from any sums so payable to any such person the amount due the Department by virtue of any such assessment and remit that sum to the Department.

Further, any person taking oil or gas from any well in this State for use or resale, in respect of which production any sums assessed under the provisions of G.S. 113-387 are payable to the Department, shall remit any sums so due to the Department in accordance with those rules of the Department which may be adopted in regard thereto. (1945, c. 702, s. 8; 1973, c. 1262, s. 86; 1987, c. 827, s. 110.)

§ 113-389. Definitions.

Unless the context otherwise requires, the words defined in this section shall have the following meaning when found in this law:

(1) "Department" shall mean the "Department of Environment and Natural Resources," as created by this law.

(2) "Field" shall mean the general area which is underlaid or appears to be underlaid by at least one pool; and "field" shall include the underground reservoir or reservoirs containing crude petroleum oil or natural gas, or both. The words "field" and "pool" mean the same thing when only one underground reservoir is involved; "field," unlike "pool," may relate to two or more pools.

(3) "Gas" shall mean all natural gas, including casing-head gas, and all other hydrocarbons not defined as oil in subdivision (7).

(4) "Illegal gas" shall mean gas which has been produced within the State of North Carolina from any well during any time that well has produced in excess of the amount allowed by any rule, regulation or order of the Department, as distinguished from gas produced within

the State of North Carolina from a well not producing in excess of the amount so allowed, which is "legal gas."

(5) "Illegal oil" shall mean oil which has been produced within the State of North Carolina from any well during any time that that well has produced in excess of the amount allowed by rule, regulation or order of the Department, as distinguished from oil produced within the State of North Carolina from a well not producing in excess of the amount so allowed, which is "legal oil."

(6) "Illegal product" shall mean any product of oil or gas, any part of which was processed or derived, in whole or in part, from illegal oil or illegal gas or from any product thereof, as distinguished from "legal product," which is a product processed or derived to no extent from illegal oil or illegal gas.

(7) "Oil" shall mean crude petroleum oil, and other hydrocarbons, regardless of gravity, which are produced at the well in liquid form by ordinary production methods, and which are not the result of condensation of gas after it leaves the reservoir.

(8) "Owner" shall mean the person who has the right to drill into and to produce from any pool, and to appropriate the production either for himself or for himself and others.

(9) "Person" shall mean any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator, fiduciary or representative of any kind.

(10) "Pool" shall mean an underground reservoir containing a common accumulation of crude petroleum oil or natural gas or both. Each zone of a general structure which is completely separated from the other zone in the structure is covered by the term "pool" as used herein.

(11) "Producer" shall mean the owner of a well or wells capable of producing oil or gas, or both.

(12) "Product" means any commodity made from oil or gas and shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casing-head gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of oil with one or more liquid products or by-products derived from oil or gas, and blends or mixtures of two or more liquid products or by-products derived from oil or gas, whether hereinabove enumerated or not.

(13) "Tender" shall mean a permit or certificate of clearance for the transportation of oil, gas or products, approved and issued or registered under the authority of the Department.

(14) "Waste" in addition to its ordinary meaning, shall mean "physical waste" as that term is generally understood in the oil and gas industry. It shall include:

a. The inefficient, excessive or improper use or dissipation of reservoir energy; and the locating, spacing, drilling, equipping, operating or producing of any oil or gas well or wells in a manner which results, or tends to result, in reducing inefficiently the quantity of oil or gas ultimately to be recovered from any pool in this State.

b. The inefficient storing of oil, and the locating, spacing, drilling, equipping, operating or producing of any oil or gas well or wells in a manner causing, or tending to cause, unnecessary or excessive surface loss or destruction of oil or gas.

c. Abuse of the correlative rights and opportunities of each owner of oil and gas in a common reservoir due to nonuniform, dispropor-

tionate, and unratable withdrawals causing undue drainage between tracts of land.

d. Producing oil or gas in such manner as to cause unnecessary water channelling or coning.

e. The operation of any oil well or wells with an inefficient gas-oil ratio.

f. The drowning with water of any stratum or part thereof capable of producing oil or gas.

g. Underground waste however caused and whether or not defined.

h. The creation of unnecessary fire hazards.

i. The escape into the open air, from a well producing both oil and gas, of gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

j. Permitting gas produced from a gas well to escape into the air. (1945, c. 702, s. 9; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 218(59); 1997-443, s. 11A.119(a).)

§ 113-390. Waste prohibited.

Waste of oil or gas as defined in this law is hereby prohibited. (1945, c. 702, s. 10.)

§ 113-391. Jurisdiction and authority; rules and orders.

(a) The Department shall have jurisdiction and authority of and over all persons and property necessary to administer and enforce effectively the provisions of this law and all other laws relating to the conservation of oil and gas.

(b) The Department shall have the authority and it shall be its duty to make such inquiries as it may think proper to determine whether or not waste over which it has jurisdiction exists or is imminent. In the exercise of such power the Department shall have the authority to collect data; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, check, test and gauge oil and gas wells, tanks, refineries, and means of transportation; to hold hearings; and to provide for the keeping of records and the making of reports; and to take such action as may be reasonably necessary to enforce this law.

(c) The Department may make rules and orders as may be necessary from time to time in the proper administration and enforcement of this law, including rules or orders for the following purposes:

(1) To require the drilling, operation, casing and plugging of wells to be done in such manner as to prevent the escape of oil or gas out of one stratum to another; to prevent the intrusion of water into an oil or gas stratum from a separate stratum; to prevent the pollution of fresh-water supplies by oil, gas or salt water, or to protect the quality of the water, air, soil or any other environmental resource against injury or damage or impairment; and to require reasonable bond condition for the performance of the duty to plug each dry or abandoned well.

(2) To require directional surveys upon application of any owner who has reason to believe that a well or wells of others has or have been drilled into the lands owned by him or held by him under lease. In the event such surveys are required, the costs thereof shall be borne by the owners making the request.

(3) To require the making of reports showing the location of oil and gas wells, and the filing of logs and drilling records.

(4) To prevent the drowning by water of any stratum or part thereof capable of producing oil or gas in paying quantities, and to prevent the

premature and irregular encroachment of water which reduces, or tends to reduce, the total ultimate recovery of oil or gas from any pool.

(5) To require the operation of wells with efficient gas-oil ratios, and to fix such ratios.

(6) To prevent "blow-outs," "caving" and "seepage" in the sense that conditions indicated by such terms are generally understood in the oil and gas business.

(7) To prevent fires.

(8) To identify the ownership of all oil or gas wells, producing leases, refineries, tanks, plants, structures and all storage and transportation equipment and facilities.

(9) To regulate the "shooting," perforating, and chemical treatment of wells.

(10) To regulate secondary recovery methods, including the introduction of gas, air, water or other substances into producing formations.

(11) To limit and prorate the production of oil or gas, or both, from any pool or field for the prevention of waste as herein defined.

(12) To require, either generally or in or from particular areas, certificates of clearance or tenders in connection with the transportation of oil or gas.

(13) To regulate the spacing of wells and to establish drilling units.

(14) To prevent, so far as is practicable, reasonably avoidable drainage from each developed unit which is not equalized by counter-drainage.

(15) To prevent where necessary the use of gas for the manufacture of carbon black.

(16) To regulate and, if necessary in its judgment for the protection of unique environmental values, to prohibit the location of wells in the interest of protecting the quality of the water, air, soil or any other environmental resource against injury, or damage or impairment. (1945, c. 702, s. 11; 1971, c. 813, ss. 5, 6; 1973, c. 1262, s. 86; 1987, c. 827, s. 111; 1989, c. 727, s. 120.)

§ 113-392. Protecting pool owners; drilling units in pools; location of wells; shares in pools.

(a) Whether or not the total production from a pool be limited or prorated, no rule or order of the Department shall be such in terms or effect

(1) That it shall be necessary at any time for the producer from, or the owner of, a tract of land in the pool, in order that he may obtain such tract's just and equitable share of the production of such pool, as such share is set forth in this section, to drill and operate any well or wells on such tract in addition to such well or wells as can produce without waste such share, or

(2) As to occasion net drainage from a tract unless there be drilled and operated upon such tract a well or wells in addition to such well or wells thereon as can produce without waste such tract's just and equitable share, as set forth in this section, of the production of such pool.

(b) For the prevention of waste and to avoid the augmenting and accumulation of risks arising from the drilling of an excessive number of wells, the Department shall, after a hearing, establish a drilling unit or units for each pool. The Department may establish drainage units of uniform size for the entire pool or may, if the facts so justify, divide into zones any pool, establish a drainage unit for each zone, which unit may differ in size from that established in any other zone; and the Department may from time to time, if the facts so justify, change the size of the unit established for the entire pool or

for any zone or zones, or part thereof, establishing new zones and units if the facts justify their establishment.

(c) Each well permitted to be drilled upon any drilling unit shall be drilled approximately in the center thereof, with such exception as may reasonably be necessary where it is shown, after notice and upon hearing, and the Department finds that the unit is partly outside the pool or, for some other reason, a well approximately in the center of the unit would be nonproductive or where topographical conditions are such as to make the drilling approximately in the center of the unit unduly burdensome. Whenever an exception is granted, the Department shall take such action as will offset any advantage which the person securing the exception may have over producers by reason of the drilling of the well as an exception, and so that drainage from developed units to the tract with respect to which the exception is granted will be prevented or minimized and the producer of the well drilled as an exception will be allowed to produce no more than his just and equitable share of the oil and gas in the pool, as such share is set forth in this section.

(d) Subject to the reasonable requirements for prevention of waste, a producer's just and equitable share of the oil and gas in the pool (also sometimes referred to as a tract's just and equitable share) is that part of the authorized production for the pool (whether it be the total which could be produced without any restriction on the amount of production, or whether it be an amount less than that which the pool could produce if no restriction on the amount were imposed) which is substantially in the proportion that the quantity of recoverable oil and gas in the developed area of his tract in the pool bears to the recoverable oil and gas in the total developed area of the pool, insofar as these amounts can be ascertained practically; and to that end, the rules, permits and orders of the Department shall be such as will prevent or minimize reasonably avoidable net drainage from each developed unit (that is, drainage which is not equalized by counter-drainage), and will give to each producer the opportunity to use his just and equitable share of the reservoir energy. (1945, c. 702, s. 12; 1973, c. 1262, s. 86; 1987, c. 827, s. 112.)

§ 113-393. Development of lands as drilling unit by agreement or order of Department.

(a) Integration of Interests and Shares in Drilling Unit. — When two or more separately owned tracts of land are embraced within an established drilling unit, the owners thereof may agree validly to integrate their interests and to develop their lands as a drilling unit. Where, however, such owners have not agreed to integrate their interests, the Department shall, for the prevention of waste or to avoid drilling of unnecessary wells, require such owners to do so and to develop their lands as a drilling unit. All orders requiring such integration shall be made after notice and hearing, and shall be upon terms and conditions that are just and reasonable, and will afford to the owner of each tract the opportunity to recover or receive his just and equitable share of the oil and gas in the pool without unnecessary expense, and will prevent or minimize reasonably avoidable drainage from each developed unit which is not equalized by counter-drainage. The portion of the production allocated to the owner of each tract included in a drilling unit formed by an integration order shall, when produced, be considered as if it had been produced from such tract by a well drilled thereon.

In the event such integration is required, and provided also that after due notice to all the owners of tracts within such drilling unit of the creation of such drilling unit, and provided further that the Department has received no protest thereto, or request for hearing thereon, whether or not 10 days have elapsed after notice has been given of the creation of the drilling unit, the

operator designated by the Department to develop and operate the integrated unit shall have the right to charge to each other interested owner the actual expenditures required for such purpose not in excess of what are reasonable, including a reasonable charge for supervision, and the operator shall have the right to receive the first production from the well drilled by him thereon, which otherwise would be delivered or paid to the other parties jointly interested in the drilling of the well, so that the amount due by each of them for his shares of the expense of drilling, equipping, and operating the well may be paid to the operator of the well out of production; with the value of the production calculated at the market price in the field at the time such production is received by the operator or placed to his credit. After being reimbursed for the actual expenditures for drilling and equipping and operating expenses incurred during the drilling operations and until the operator is reimbursed, the operator shall thereafter pay to the owner of each tract within the pool his ratable share of the production calculated at the market price in the field at the time of such production less the reasonable expense of operating the well. In the event of any dispute relative to such costs, the Department shall determine the proper costs.

(b) When Each Owner May Drill. — Should the owners of separate tracts embraced within a drilling unit fail to agree upon the integration of the tracts and the drilling of a well on the unit, and should it be established that the Department is without authority to require integration as provided for in subsection (a) of this section, then, subject to all other applicable provisions of this law, the owner of each tract embraced within the drilling unit may drill on his tract, but the allowable production from each tract shall be such proportion of the allowable for the full drilling unit as the area of such separately owned tract bears to the full drilling unit.

(c) Cooperative Development Not in Restraint of Trade. — Agreements made in the interests of conservation of oil or gas, or both, or for the prevention of waste, between and among owners or operators, or both, owning separate holdings in the same oil or gas pool, or in any area that appears from geological or other data to be underlaid by a common accumulation of oil or gas, or both, or between and among such owners or operators, or both, and royalty owners therein, of a pool or area, or any part thereof, as a unit for establishing and carrying out a plan for the cooperative development and operation thereof, when such agreements are approved by the Department, are hereby authorized and shall not be held or construed to violate any of the statutes of this State relating to trusts, monopolies, or contracts and combinations in restraining of trade.

(d) Variation from Vertical. — Whenever the Department fixes the location of any well or wells on the surface, the point at which the maximum penetration of such wells into the producing formation is reached shall not unreasonably vary from the vertical drawn from the center of the hole at the surface, provided, that the Department shall prescribe rules and orders governing the reasonableness of such variation. (1945, c. 702, s. 13; 1973, c. 1262, s. 86; 1987, c. 827, s. 112.)

§ 113-394. Limitations on production; allocating and prorating "allowables."

(a) Whenever the total amount of oil, including condensate, which all the pools in the State can produce, exceeds the amount reasonably required to meet the reasonable market demand for oil, including condensate, produced in this State, then the Department shall limit the total amount of oil, including condensate, which may be produced in the State by fixing an amount which shall be designated "allowable" for this State, which will not exceed the

reasonable market demand for oil, including condensate, produced in this State. The Department shall then allocate or distribute the "allowable" for the State among the pools on a reasonable basis and in such manner as to avoid undue discrimination, and so that waste will be prevented. In allocating the "allowable" for the State, and in fixing "allowables" for pools producing oil or hydrocarbons forming condensate, or both oil and such hydrocarbons, the Department shall take into account the producing conditions and other relevant facts with respect to such pools, including the separate needs for oil, gas and condensate, and shall formulate rules setting forth standards or a program for the distribution of the "allowable" for the State, and shall distribute the "allowable" for the State in accordance with such standards or program, and where conditions in one pool or area are substantially similar to those in another pool or area, then the same standards or programs shall be applied to such pools and areas so that as far as practicable a uniform program will be followed; provided, however, the Department shall permit the production of a sufficient amount of natural gas from any pool to supply adequately the reasonable market demand for such gas for light and fuel purposes if such production can be obtained without waste, and the condensate "allowable" for such pool shall not be less than the total amount of condensate produced or obtained in connection with the production of the gas "allowable" for light and fuel purposes, and provided further that, if the amount allocated to pool as its share of the "allowable" for the State is in excess of the amount which the pool should produce to prevent waste, then the Department shall fix the "allowable" for the pool so that waste will be prevented.

(b) The Department shall not be required to determine the reasonable market demand applicable to any single pool except in relation to all pools producing oil of similar kind and quality and in relation to the demand applicable to the State, and in relation to the effect of limiting the production of pools in the State. In allocating "allowables" to pools, the Department shall not be bound by nominations or desires of purchasers to purchase oil from particular fields or areas, and the Department shall allocate the "allowable" for the State in such manner as will prevent undue discrimination against any pool or area in favor of another or others which would result from selective buying or nominating by purchasers of oil, as such term "selective buying or nominating" is understood in the oil business.

(c) Whenever the Department limits the total amount of oil or gas which may be produced in any pool in this State to an amount less than that which the pool could produce if no restrictions were imposed (which limitation may be imposed either incidental to, or without, a limitation of the total amount of oil or gas which may be produced in the State), the Department shall prorate or distribute the "allowable" production among the producers in the pool on a reasonable basis, and so that each producer will have the opportunity to produce or receive his just and equitable share, as such share is set forth in subsection G.S. 113-392(d), subject to the reasonable necessities for the prevention of waste.

(d) Whenever the total amount of gas which can be produced from any pool in this State exceeds the amount of gas reasonably required to meet the reasonable market demand therefrom, the Department shall limit the total amount of gas which may be produced from such pool. The Department shall then allocate or distribute the allowable production among the developed areas in the pool on a reasonable basis, so that each producer will have the opportunity to produce his just and equitable share, as such share is set forth in subsection G.S. 113-392(d), whether the restriction for the pool as a whole is accomplished by order or by the automatic operation of the prohibitory provisions of this law. As far as applicable, the provisions of subsection (a) of this section shall be followed in allocating any "allowable" of gas for the State.

(e) After the effective date of any rule or order of the Department fixing the "allowable" production of oil or gas, or both, or condensate, no person shall produce from any well, lease, or property more than the "allowable" production which is fixed, nor shall such amount be produced in a different manner than that which may be authorized. (1945, c. 702, s. 14; 1973, c. 1262, s. 86; 1975, c. 19, ss. 37, 38; 1987, c. 827, s. 112.)

§ 113-395. Notice and payment of fee to Department before drilling or abandoning well; plugging abandoned well.

Before any well, in search of oil or gas, shall be drilled, the person desiring to drill the same shall notify the Department upon such form as it may prescribe and shall pay a fee of fifty dollars ($50.00) for each well. The drilling of any well is hereby prohibited until such notice is given and such fee has been paid and permit granted.

Each abandoned well and each dry hole promptly shall be plugged in the manner and within the time required by rules to be prescribed by the Department, and the owner of such well shall give notice, upon such form as the Department may prescribe, of the abandonment of each dry hole and of the owner's intention to abandon, and shall pay a fee of fifteen dollars ($15.00). No well shall be abandoned until such notice has been given and such fee has been paid. (1945, c. 702, s. 15; 1973, c. 1262, s. 86; 1987, c. 827, s. 113.)

§ 113-396. Wells to be kept under control.

In order to protect further the natural gas fields and oil fields in this State, it is hereby declared to be unlawful for any person to permit negligently any gas or oil well to go wild or to get out of control. The owner of any such well shall, after 24 hours' written notice by the Department given to him or to the person in possession of such well, make reasonable effort to control such well.

In the event of the failure of the owner of such well within 24 hours after service of the notice above provided for, to control the same, if such can be done within the period, or to begin in good faith upon service of such notice, operations to control such well, or upon failure to prosecute diligently such operations, then the Department shall have the right to take charge of the work of controlling such well, and it shall have the right to proceed, through its own agents or by contract with a responsible contractor, to control the well or otherwise to prevent the escape or loss of gas or oil from such well all at the reasonable expense of the owner of the well. In order to secure to the Department the payment of the reasonable cost and expense of controlling or plugging such well, the Department shall retain the possession of the same and shall be entitled to receive and retain the rents, revenues and income therefrom until the costs and expenses incurred by the Department shall be repaid. When all such costs and expenses have been repaid, the Department shall restore possession of such well to the owner; provided, that in the event the income received by the Department shall not be sufficient to reimburse the Department as provided for in this section, the Department shall have a lien or privilege upon all of the property of the owner of such well, except such as is exempt by law, and the Department shall proceed to enforce such lien or privilege by suit brought in any court of competent jurisdiction, the same as any other civil action, and the judgment so obtained shall be executed in the same manner now provided by law for execution of judgments. Any excess over the amount due the Department which the property seized and sold may bring, after payment of court costs, shall be paid over to the owner of such well. (1945, c. 702, s. 16; 1973, c. 1262, s. 86.)

§ 113-397. Hearing in emergency.

If an emergency situation, as defined by the Department, arises under this Article, the Department may conduct a hearing to determine the appropriate course of action after giving any notice it considers practicable. Chapter 150B of the General Statutes does not apply to a hearing under this section. The rules of evidence apply in a hearing under this section. (1945, c. 702, s. 17; 1973, c. 1262, s. 86; 1987, c. 827, s. 114.)

§ 113-398. Procedure and powers in hearings by Department.

In the exercise and enforcement of its jurisdiction, the said Department is authorized to summon witnesses, administer oaths, make ancillary orders and require the production of records and books for the purpose of examination at any hearing or investigation conducted by it. In connection with the exercise and enforcement of its jurisdiction, the Department shall also have the right and authority to certify as for contempt, to the court of any county having jurisdiction, violations by any person of any of the provisions of this Article or of the rules or orders of the Department, and if it be found by said court that such person has knowingly and willfully violated same, then such person shall be punished as for contempt in the same manner and to the same extent and with like effect as if said contempt had been of an order, judgment or decree of the court to which said certification is made. (1945, c. 702, s. 18; 1973, c. 1262, s. 86; 1987, c. 827, s. 115.)

§ 113-399. Suits by Department.

The Department may bring an action in any court of competent jurisdiction in the State to enforce, by injunction or another remedy, an order issued or rule adopted by the Department under this Article. The court may enter any judgment or order necessary to enforce an order issued or rule adopted by the Department under this Article. (1945, c. 702, s. 19; 1973, c. 1262, s. 86; 1987, c. 827, s. 116.)

§ 113-400. Assessing costs of hearings.

The said Department is hereby authorized and directed to tax and assess against the parties involved in any hearing the costs incurred therein. (1945, c. 702, s. 20; 1973, c. 1262, s. 86.)

§ 113-401. Party to hearings; review.

The term "party" as used in this Article shall include any person, firm, corporation or association. In proceedings for review of an order or decision of said Department, the Department shall have all rights and privileges granted by this Article to any other party to such proceedings. (1945, c. 702, s. 21; 1973, c. 1262, s. 86.)

§ 113-402. Administrative review.

A party who is dissatisfied with a decision or order of the Department under this Article may obtain administrative review of the decision by filing a petition for a contested case hearing under G.S. 150B-23 within 10 days after the decision or order is made. (1945, c. 702, s. 22; 1973, c. 1262, s. 86; 1987, c. 827, s. 117.)

§ 113-403. Judicial review.

Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision or order made under this Article. (1945, c. 702, s. 23; 1973, c. 1262, s. 86; 1987, c. 827, s. 118.)

§§ 113-404, 113-405: Repealed by Session Laws 1987, c. 827, s. 119.

§ 113-406. Effect of pendency of judicial review; stay of proceedings.

The filing or pendency of the application for judicial review provided for in this Article shall not in itself stay or suspend the operation of any order or decision of the Department, but, during the pendency of such proceeding the court, in its discretion, may stay or suspend, in whole or in part, the operation of the order or decision of the Department. No order so staying or suspending an order or decision of the Department shall be made by any court of this State otherwise than on five days' notice and, after a hearing, and if a stay or suspension is allowed the order granting the same shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that great or irreparable damage would otherwise result to the petitioner and specifying the nature of the damage. (1945, c. 702, s. 26; 1973, c. 1262, s. 86; 1987, c. 827, s. 120.)

§ 113-407. Stay bond.

In case the order or decision of the Department is stayed or suspended, the order or judgment of the court shall not become effective until a bond shall have been executed and filed with and approved by the court, payable to the Department, sufficient in amount and security to secure the prompt payment, by the party petitioning for the stay, of all damages caused by the delay in the enforcement of the order or decision of the Department. (1945, c. 702, s. 27; 1973, c. 1262, s. 86.)

§ 113-408. Enjoining violation of laws and rules; service of process; application for drilling well to include residence address of applicant.

Whenever it shall appear that any person is violating, or threatening to violate, any statute of this State with respect to the conservation of oil or gas, or both, or any provision of this law, or any rule or order made thereunder by any act done in the operation of any well producing oil or gas, or by omitting any act required to be done thereunder, the Department, through the Attorney General, may bring suit against such person in the superior court in the county in which the well in question is located, to restrain such person or persons from continuing such violation or from carrying out the threat of violation. In such suit the Department may obtain injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant, including, when appropriate, an injunction restraining any person from moving or disposing of illegal oil, illegal gas or illegal product, and any or all such commodities may be ordered to be impounded or placed under the control of an agent appointed by the court if, in the judgment of the court, such action is advisable.

If any such defendant cannot be personally served with summons in that county, personal jurisdiction of that defendant in such suit may be obtained by

service made on any employee or agent of that defendant working on or about the oil or gas well involved in such suit, and by the Department mailing a copy of the complaint in the action to the defendant at the address of the defendant then recorded with the director of production and conservation.

Each application for the drilling of a well in search of oil or gas in this State shall include the address of the residence of the applicant or each applicant, which address shall be the address of each person involved in accordance with the records of the director of production and conservation, until such address is changed on the records of the Department after written request. (1945, c. 702, s. 28; 1973, c. 1262, s. 86; 1987, c. 827, s. 121.)

§ 113-409. Punishment for making false entries, etc.

Any person who, for the purpose of evading this law, or of evading any rule or order made thereunder, shall intentionally make or cause to be made any false entry or statement of fact in any report required to be made by this law or by any rule or order made hereunder; or who, for such purpose, shall make or cause to be made any false entry in any account, record, or memorandum kept by any person in connection with the provisions of this law or of any rule or order made thereunder; or who, for such purpose, shall omit to make, or cause to be omitted, full, true and correct entries in such accounts, records, or memoranda, of all facts and transactions pertaining to the interest or activities in the petroleum industry of such person as may be required by the Department under authority given in this law or by any rule or order made hereunder; or who, for such purpose shall remove out of the jurisdiction of the State, or who shall mutilate, alter, or by any other means falsify, any book, record, or other paper, pertaining to the transactions regulated by this law, or by any rule or order made hereunder, shall be deemed guilty of a Class 2 misdemeanor. (1945, c. 702, s. 29; 1973, c. 1262, s. 86; 1987, c. 827, s. 122; 1993, c. 539, s. 871; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113-410. Penalties for other violations.

Any person who knowingly and willfully violates any provision of this law, or any rule or order of the Department made hereunder, shall, in the event a penalty for such violation is not otherwise provided for herein, be subject to a penalty of not to exceed one thousand dollars ($1,000) a day for each and every day of such violation, and for each and every act of violation, such penalty to be recovered in a suit in the superior court of the county where the defendant resides, or in the county of the residence of any defendant if there be more than one defendant, or in the superior court of the county where the violation took place. The place of suit shall be selected by the Department, and such suit, by direction of the Department, shall be instituted and conducted in the name of the Department by the Attorney General. The payment of any penalty as provided for herein shall not have the effect of changing illegal oil into legal oil, illegal gas into legal gas, or illegal product into legal product, nor shall such payment have the effect of authorizing the sale or purchase or acquisition, or the transportation, refining, processing, or handling in any other way, of such illegal oil, illegal gas or illegal product, but, to the contrary, penalty shall be imposed for each prohibited transaction relating to such illegal oil, illegal gas or illegal product.

Any person knowingly and willfully aiding or abetting any other person in the violation of any statute of this State relating to the conservation of oil or gas, or the violation of any provisions of this law, or any rule or order made thereunder, shall be subject to the same penalties as prescribed herein for the violation by such other person.

The clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1945, c. 702, s. 30; 1973, c. 1262, s. 86; 1987, c. 827, s. 122; 1998-215, s. 50.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added the last paragraph.

§ 113-411. Dealing in or handling of illegal oil, gas or product prohibited.

(a) The sale, purchase or acquisition, or the transportation, refining, processing or handling in any other way of illegal oil, illegal gas or illegal product is hereby prohibited. All persons purchasing any petroleum product must first be licensed to do so by the Department.

(b) Unless and until the Department provides for certificates of clearance or tenders, or some other method, so that any person may have an opportunity to determine whether any contemplated transaction of sale, purchase or acquisition, or transportation, refining, processing or handling in any other way, involves illegal oil, illegal gas or illegal product, no penalty shall be imposed for the sale, purchase or acquisition, or the transportation, refining, processing or handling in any other way of illegal oil, illegal gas or illegal product, except under circumstances hereinafter stated. Penalties shall be imposed for the commission of each transaction prohibited in this section when the person committing the same knows that illegal oil, illegal gas or illegal product is involved in such transaction, or when such person could have known or determined such fact by the exercise of reasonable diligence or from facts within his knowledge. However, regardless of lack of actual notice or knowledge, penalties as provided in this law shall apply to any sale, purchase or acquisition, and to the transportation, refining, processing or handling in any other way, of illegal oil, illegal gas or illegal product, where administrative provision is made for identifying the character of the commodity as to its legality. It shall likewise be a violation for which penalties shall be imposed for any person to sell, purchase or acquire, or to transport, refine, process or handle in any other way any oil, gas or any product without complying with any rule or order of the Department relating thereto. (1945, c. 702, s. 31; 1973, c. 1262, s. 86; 1987, c. 827, s. 122.)

§ 113-412. Seizure and sale of contraband oil, gas and product.

Apart from, and in addition to, any other remedy or procedure which may be available to the Department, or any penalty which may be sought against or imposed upon any person with respect to violations relating to illegal oil, illegal gas, or illegal product, all illegal oil, illegal gas and illegal product shall, except under such circumstances as are stated herein, be contraband and shall be seized and sold. Such sale shall not take place unless the court shall find, in the proceeding provided for in this paragraph, that the commodity involved is contraband. Whenever the Department believes that illegal oil, illegal gas or illegal product is subject to seizure and sale, as provided herein, it shall, through the Attorney General, have issued a warrant of attachment and bring a civil action in rem for that purpose in the superior court of the county where the commodity is found, or the action may be maintained in connection with any suit or cross bill for injunction or for penalty relating to any prohibited

transaction involving such illegal oil, illegal gas or illegal product. Any interested person who may show himself to be adversely affected by any such seizure and sale shall have the right to intervene in such suit to protect his rights.

The action referred to above shall be strictly in rem and shall proceed in the name of the State as plaintiff against the illegal oil, illegal gas or illegal product mentioned in the complaint, as defendant, and no bond or bonds shall be required of the plaintiff in connection therewith. Upon the filing of the complaint, the clerk of the court shall issue a summons directed to the sheriff of the county, or to such other officer or person as the court may authorize to serve process, requiring him to summon any and all persons (without undertaking to name them) who may be interested in the illegal oil, illegal gas, or illegal product mentioned in the complaint to appear and answer within 30 days after the issuance and service of such summons. The summons shall contain the style and number of the suit and a very brief statement of the nature of the cause of action. It shall be served by posting one copy thereof at the courthouse door of the county where the commodity involved in the suit is alleged to be located and by posting another copy thereof near the place where the commodity is alleged to be located. Copy of such summons shall be posted at least five days before the return day stated therein, and the posting of such copy shall constitute constructive possession of such commodity by the State. A copy of the summons shall also be published once each week for four weeks in some newspaper published in the county where the suit is pending and having a bona fide circulation therein. No judgment shall be pronounced by any court condemning such commodity as contraband until after the lapse of five days from the last publication of said summons. Proof of service of said summons, and the manner thereof, shall be as provided by general law.

Where it appears by a verified pleading on the part of the plaintiff, or by affidavit, or affidavits, or by oral testimony, that grounds for the seizure and sale exist, the clerk, in addition to the summons or warning order, shall issue a warrant of attachment, which shall be signed by the clerk and bear the seal of the court. Such warrant of attachment shall specifically describe the illegal oil, illegal gas or illegal product, so that the same may be identified with reasonable certainty. It shall direct the sheriff to whom it is addressed to take into his custody, actual or constructive, the illegal oil, illegal gas or illegal product, described therein, and to hold the same subject to the orders of the court. Said warrant of attachment shall be executed as a writ of attachment is executed. No bond shall be required before the issuance of such warrant of attachment, and the sheriff shall be responsible upon his official bond for the proper execution thereof.

In a proper case, the court may direct the sheriff to deliver the custody of any illegal oil, illegal gas or illegal product seized by him under a warrant of attachment, to a commissioner to be appointed by the court, which commissioner shall act as the agent of the court and shall give bond with such approved surety as the court may direct, conditioned that he will faithfully conserve such illegal oil, illegal gas or illegal product, as may come into his custody and possession in accordance with the orders of the court; provided, that the court may in its discretion appoint any member of the Department or any agent of the Department as such commissioner of the court.

Sales of illegal oil, illegal gas or illegal product seized under the authority of this law, and notices of such sales, shall be in accordance with the laws of this State relating to the sale and disposition of attached property; provided, however, that where the property is in custody of a commissioner of the court, the sale shall be held by said commissioner and not by the sheriff. For his services hereunder, such commissioner shall receive a reasonable fee to be paid

out of the proceeds of the sale or sales to be fixed by the court ordering such sale.

The court may order that the commodity be sold in specified lots or portions, and at specified intervals, instead of being sold at one time. Title to the amount sold shall pass as of the date of the law which is found by the court to make the commodity contraband. The judgment shall provide for the clear proceeds of the sales to be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. The amount sold shall be treated as legal oil, legal gas or legal product, as the case may be, in the hands of the purchaser, but the purchaser and the commodity shall be subject to all applicable laws, rules, and orders with respect to further sale or purchase or acquisition, and with respect to the transportation, refining, processing, or handling in any other way, of the commodity purchased.

Nothing in this section shall deny or abridge any cause of action a royalty owner, or a lienholder, or any other claimant, may have, because of the forfeiture of the illegal oil, illegal gas, or illegal product, against the person whose act resulted in such forfeiture. No illegal oil, illegal gas or illegal product shall be sold for less than the average market value at the time of sale of similar products of like grade and character. (1945, c. 702, s. 32; 1973, c. 1262, s. 86; 1987, c. 827, s. 123; 1998-215, s. 51.)

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, at the end of the first sentence of the first paragraph, deleted "and the proceeds applied as herein provided," and in the sixth paragraph, substituted "provide for the clear proceeds of the sales to be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2" for "provide for payment of the proceeds of the sale into the general fund of the State Treasurer, after first deducting the costs in connection with the proceedings and the sale."

§ 113-413: Repealed by Session Laws 1987, c. 827, s. 124.

§ 113-414. Filing list of renewed leases in office of register of deeds.

On December 31 of each year, or within 10 days thereafter, every person, firm or corporation holding petroleum leases shall file in the office of the register of deeds of the county within which the land covered by such leases is located, a list showing the leases which have been renewed for the ensuing year. (1945, c. 702, s. 34.)

§ 113-415. Conflicting laws.

No provision of this Article shall be construed to repeal, amend, abridge or otherwise affect the authority and responsibility vested in the Environmental Management Commission by Article 7 of Chapter 87, pertaining to the location, construction, repair, operation and abandonment of wells, or the authority or responsibility vested in the Department and the Commission for Health Services by Article 10 of Chapter 130A of the General Statutes pertaining to public water-supply requirements. (1971, c. 813, s. 7; 1973, c. 476, s. 128; c. 1262, s. 23; 1989, c. 727, s. 121.)

SUBCHAPTER VI. WELL DRILLING.

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[Repealed.]

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[Repealed.]

113A-202 through 113A-204. [Repealed.]

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Mountain Ridge Protection.

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Article 1.

Environmental Policy Act.

§ 113A-1. Title.

This Article shall be known as the North Carolina Environmental Policy Act of 1971. (1971, c. 1203, s. 1; 1991, c. 431, s. 1.)

Cross References. — For provision exempting the issuance of permits for sanitary landfills operated by local governments from the environmental impact statements required by this Article, see § 130A-294(a)(4).

Editor's Note. — Session Laws 1987 (Reg. Sess., 1988), c. 1086, s. 123(b), provided that the Office of State Budget and Management could contract for and supervise all aspects of construction or demolition of certain prison facilities without being subject to the requirements of certain statutes including G.S. 113A-1 through 113A-10 and 113A-50 through 113A-66. Session Laws 1989, c. 754, s. 28(a), made similar provisions. Likewise, Session Laws 1991, c. 689, s. 239(f), as amended by Session Laws 1991 (Reg. Sess., 1992), c. 1044, s. 41(b), made similar provisions and also provided for participation by minority and women-owned businesses.

As to exemption of the Office of State Budget and Management from the requirements of this Article in administration and implementation of the Prison Facilities Legislative Bond Act of 1990, see Session Laws 1989 (Reg. Sess., 1990), c. 933, s. 6(4).

As to exemption of the Office of State Budget and Management from the requirements of this Article in providing prison facilities under the provisions of the State Prison and Youth Services Facilities Bond Act, see Session Laws 1989 (Reg. Sess., 1990), c. 935, s. 6(a)(4).

As to exemption of the Office of State Construction of the Department of Administration from certain statutes, including G.S. 113A-1 through G.S. 113A-10, if the Secretary of Administration, after consultation with the Secretary of Correction, finds that the delivery of state prison and youth services facilities authorized to be constructed must be expedited for good cause, see Session Laws 1993, c. 550, s. 6.

As to exemption of the Office of State Construction of the Department of Administration from the requirements of this section to the extent necessary to expedite delivery of certain prison facilities, see Session Laws 1994, Extra Session, c. 24, s. 67(b).

As to exemption of the Office of State Construction of the Department of Administration from certain statutes, including G.S. 113A-1 through G.S. 113A-10, and G.S. 113A-50 through G.S. 113A-66, if the construction of prison facilities in Avery and Mitchell Counties must be expedited for good cause, as determined by the Secretary of Administration and Secretary of Correction, see Session Laws 1995, c. 507, s. 27.10.

Session Laws 1996, Second Extra Session, c. 18, s. 23.4(a) provides in part that the Department of Justice, in consultation with the Office of State Construction of the Department of Administration, shall contract for and supervise all aspects of administration, technical assistance, design, construction, or demolition of all facilities in order to implement the repairs and renovations of the Western Justice Academy without being subject to this statute.

As to exemption of the Office of State Construction of the Department of Administration from certain statutes, including G.S. 113A-1 through G.S. 113A-10 and G.S. 113A-50 through G.S. 113A-66, and rules implementing these sections, to the extent necessary to expedite delivery of juvenile facilities, see Session Laws 1998-202, s. 35(a), quoted under § 143-128.

Session Laws 1999-237, ss. 15.14(a) to (h) provide:

"(a) The Department of Environment and Natural Resources and North Carolina State University shall jointly establish the North Carolina Water Quality Workgroup. The Workgroup shall work collaboratively with the appropriate divisions of the Department of Environment and Natural Resources and North Carolina State University, the Scientific Advi-

sory Council on Water Resources and Coastal Fisheries Management, the Environmental Management Commission, and the Environmental Review Commission to identify the scientific and State agency databases that can be used to formulate public policy regarding the State's water quality, evaluate those databases to determine the information gaps in those databases, and establish the priorities for obtaining the information lacking in those databases. The Workgroup shall have the following duties:

"(1) To address specifically the ongoing need of evaluation, synthesis, and presentation of current scientific knowledge that can be used to formulate public policy on water quality issues.

"(2) To identify knowledge gaps in the current understanding of water quality problems and fill these gaps with appropriate research projects.

"(3) To maintain a web-based water quality data distribution site.

"(4) To organize and evaluate existing scientific and State agency water quality databases.

"(5) To prioritize recognized knowledge gaps in water quality issues for immediate funding.

"(b) The North Carolina Water Quality Workgroup shall be composed of no more than 15 members. Those members shall be jointly appointed by the Chancellor of North Carolina State University and the Secretary of Environment and Natural Resources. Any person appointed as a member of the Workgroup shall be knowledgeable in one of the following areas:

"(1) Water Quality Assessment, Water Quality Monitoring and Permitting.

"(2) Nutrient Management.

"(3) Water Pollution Control.

"(4) Waste Management.

"(5) Groundwater Resources.

"(6) Stream Hydrology.

"(7) Aquatic Biology.

"(8) Environmental Education and Web-Based Data Dissemination.

"(c) North Carolina State University shall provide meeting facilities for the North Carolina Water Quality Workgroup as requested by the Chair.

"(d) The members of the North Carolina Water Quality Workgroup shall elect a Chair. The Chair shall call meetings of the Workgroup and set the meeting agenda.

"(e) The Chair of the North Carolina Water Quality Workgroup shall report each year by January 30 to the Scientific Advisory Council on Water Resources and Coastal Fisheries Management, to the Environmental Review Commission, to the Cochairs of the House of Representatives and Senate Appropriations Subcommittees on Natural and Economic Resources, and to the Chancellor of North Carolina State University or the Chancellor's designee on the previous year's activities, findings, and recommendations of the North Carolina Water Quality Workgroup.

"(f) The North Carolina Water Quality Workgroup shall develop a water quality monitoring system to be known as the Rivernet that effectively uses the combined resources of North Carolina State University and State agencies. The Rivernet system shall be designed to implement advances in monitoring technology and information management systems with web-based data dissemination in the waters that are impaired based on the criteria of the State's basinwide water quality management plans. Water quality and nutrient parameters shall be continuously monitored at each station, and the data shall be sent back to a centralized computer server.

"The Rivernet system shall be coordinated with related data collection and monitoring activities of the Department of Environment and Natural Resources, the Water Resources Research Institute, the North Carolina Water Quality Workgroup, and other research efforts pursued by academic institutions or State government entities. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are testing procedure guidelines promulgated by the United States Environmental Protection Agency, the American Public Health Association, the American Water Works Association, or the Water Environment Federation then the testing procedures shall comply with the appropriate guidelines. If the North Carolina Water Quality Workgroup chooses to employ a technology for which there are no testing procedure guidelines promulgated by any of the groups cited in this subsection, then the North Carolina Water Quality Workgroup may establish testing procedure guidelines.

"The Rivernet system shall also have the capabilities to trigger alarms and notify the appropriate member of the Workgroup when monitoring stations exceed defined limits indicating a spill or a significant water quality or nutrient measurement event, which then can be comprehensively analyzed.

"(g) For the 1999-2001 biennium, the North Carolina Water Quality Workgroup shall select as a pilot project site an area of impaired waters within one of the State's river basins based on the criteria of the State's basinwide water quality management plans and shall implement a Rivernet monitoring system pilot project in those waters.

"(h) Of the funds appropriated by this act to the Department of Environment and Natural Resources, the sum of one million two hundred thousand dollars ($1,200,000) for the 1999-2000 fiscal year and the sum of seven hundred thousand dollars ($700,000) for the 2000-2001 fiscal year shall be used to implement this

section. Those funds shall be allocated as follows:

"(1) $300,000 shall be transferred for the 1999-2000 fiscal year and $300,000 for the 2000-2001 fiscal year to the Board of Governors of The University of North Carolina for North Carolina State University to use for operating costs of the Rivernet monitoring system and pilot project including personnel to maintain the system, archive, and disseminate the data.

"(2) $500,000 for the 1999-2000 fiscal year only shall be transferred to the Board of Governors of The University of North Carolina to be used by North Carolina State University for the purchase of monitoring equipment, installation of the data transfer network, and for installation of the computer hardware and software to archive the data and sustain the web-based data system.

"(3) $400,000 for the 1999-2000 fiscal year and $400,000 for the 2000-2001 fiscal year shall be held in a reserve fund to be administered by the Scientific Advisory Council on Water Resources and Coastal Fisheries Management. Monies in the fund shall be used only for research projects recommended by the North Carolina Water Quality Workgroup. The Workgroup shall consider only new studies that promote collaborative work among the Department of Environment and Natural Resources and any constituent institution of the University of North Carolina to collectively close knowledge policy gaps with regard to the State's water quality and the nutrient levels of impaired waters."

Legal Periodicals. — For survey of 1982 law on administrative law, see 61 N.C.L. Rev. 961 (1983).

For article discussing a practical interpretation of North Carolina's comprehensive plan requirement for zoning regulations, see 7 Campbell L. Rev. 1 (1984).

CASE NOTES

The North Carolina State Environmental Policy Act (SEPA) requires preparation of an environmental impact statement (EIS) for publicly funded actions that significantly affect the environment. For the same reasons that an EIS is required under the National Environmental Policy Act (NEPA), one must be prepared in accordance with SEPA. Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990).

Environmental Impact Statement Required — Bridge Construction. — For a case holding that state and federal agencies were required to file environmental impact statements, under both federal law and this chapter, concerning a coastal bridge replacement project, see Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990).

Cited in Civic Imp. Comm'n. v. Volpe, 459 F.2d 957 (4th Cir. 1972); In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

§ 113A-2. Purposes.

The purposes of this Article are: to declare a State policy which will encourage the wise, productive, and beneficial use of the natural resources of the State without damage to the environment, maintain a healthy and pleasant environment, and preserve the natural beauty of the State; to encourage an educational program which will create a public awareness of our environment and its related programs; to require agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys or use of public land; and to provide means to implement these purposes. (1971, c. 1203, s. 2; 1991 (Reg. Sess., 1992), c. 945, s. 1.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Filing of Statement. — Nothing in this Chapter makes the filing of a statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

Quoted in In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

§ 113A-3. Declaration of State environmental policy.

The General Assembly of North Carolina, recognizing the profound influence of man's activity on the natural environment, and desiring, in its role as trustee for future generations, to assure that an environment of high quality will be maintained for the health and well-being of all, declares that it shall be the continuing policy of the State of North Carolina to conserve and protect its natural resources and to create and maintain conditions under which man and nature can exist in productive harmony. Further, it shall be the policy of the State to seek, for all of its citizens, safe, healthful, productive and aesthetically pleasing surroundings; to attain the widest range of beneficial uses of the environment without degradation, risk to health or safety; and to preserve the important historic and cultural elements of our common inheritance. (1971, c. 1203, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Toxic Waste Disposal Falls Within Zone of Protected Interests. — County had standing to challenge the creation of a toxic waste disposal site within its borders under this Article, as such a site falls within the zone of interests protected under this section. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

Quoted in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980); In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981); State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

§ 113A-4. Cooperation of agencies; reports; availability of information.

The General Assembly authorizes and directs that, to the fullest extent possible:

(1) The policies, rules, and public laws of this State shall be interpreted and administered in accordance with the policies set forth in this Article; and

(2) Every State agency shall include in every recommendation or report on any action involving expenditure of public moneys or use of public land for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:

a. The environmental impact of the proposed action;

b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;

c. Mitigation measures proposed to minimize the impact;

d. Alternatives to the proposed action;

e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and

f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

(2a) Prior to making any detailed statement, the responsible official shall consult with and obtain the comments of any agency which has either jurisdiction by law or special expertise with respect to any environmental impact involved. Any unit of local government or other interested party that may be adversely affected by the proposed action may submit written comment. The responsible official shall consider written comment from units of local government and interested parties that is received within the established comment period. Copies of such detailed statement and such comments shall be made available to the Governor, to such agency or agencies as he may designate, and to the appropriate multi-county regional agency as certified by the Secretary of Administration, shall be placed in the public file of the agency and shall accompany the proposal through the existing agency review processes. A copy of such detailed statement shall be made available to the public and to counties, municipalities, institutions and individuals, upon request.

(3) The Governor, and any State agency charged with duties under this Article, may call upon any of the public institutions of higher education of this State for assistance in developing plans and procedures under this Article and in meeting the requirements of this Article, including without limitation any of the following units of the University of North Carolina: the Water Resources Research Institute, the Institute for Environmental Studies, the Triangle Universities Consortium on Air Pollution, and the Institute of Government. (1971, c. 1203, s. 4; 1987, c. 827, s. 125; 1991, c. 431, s. 2; 1991 (Reg. Sess., 1992), c. 945, s. 2.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Legal Periodicals. — For survey of 1980 administrative law, see 59 N.C.L. Rev. 1026 (1981).

For survey of 1981 administrative law, see 60 N.C.L. Rev. 1165 (1982).

CASE NOTES

I. General Consideration.
II. Environmental Impact Statements.
A. In General.
B. Contents.
C. Agency Actions Requiring Statement.

I. GENERAL CONSIDERATION.

Reasons for State Environmental Impact Statements Are the Same as under Federal Law. — The North Carolina State Environmental Policy Act (SEPA) requires preparation of an environmental impact statement (EIS) for publicly funded actions that significantly affect the environment. For the same reasons that an EIS is required under the National Environmental Policy Act (NEPA), one must be prepared in accordance with SEPA. Mullin v. Skinner, 756 F. Supp. 904 (E.D.N.C. 1990).

Quoted in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

Stated in State v. Williams & Hessee, 53 N.C. App. 674, 281 S.E.2d 721 (1981).

Cited in North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990); Richmond County v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 335 N.C. 77, 436 S.E.2d 113 (1993).

II. ENVIRONMENTAL IMPACT STATEMENTS.

A. In General.

Purpose. — The purpose of an environmental impact statement is to provide the responsible State agency with a useful decision-making tool. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

The requirement of the impact statement is designed to provide a mechanism by which all

affected State agencies raise and consider environmental factors of proposed projects. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

Statement Must Be Before Decisionmaker. — In order for a statement to be a decisionmaking tool, the responsible State agency must have the statement before it when it is determining the action it is going to take or recommend. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

"Rule of Reason" Measures Adequacy. — In determining the adequacy of an environmental impact statement under this section, the federal courts' "rule of reason" is sufficient to determine if the statement was compiled with objective good faith and whether the resulting statement would permit a decisionmaker to consider and balance fully environmental factors. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

B. Contents.

Method of Quality Control for Toxic Waste Site. — There is no requirement under this section for the State to set forth in an environmental impact statement how quality control of a toxic waste disposal site will be done. The reporting requirements of this Article insure that it is done. Warren County v. North Carolina, 528 F. Supp. 276 (E.D.N.C. 1981).

C. Agency Actions Requiring Statement.

Authorization for Acquisition of Land for Reservoir. — The issuance of a certificate by the Environmental Management Commission authorizing acquisition of land for the construction of a reservoir constitutes a "recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment," thereby necessitating an environmental impact statement. In re Environmental Mgt. Comm'n, 53 N.C. App. 135, 280 S.E.2d 520 (1981).

Construction of Building for Which State Funds Appropriated. — Nothing in this Chapter makes the filing of a statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

Need for Statement Became Moot. — Where plaintiff's sought declaratory and injunctive relief regarding the selection and testing of potential sites for a disposal facility for dangerous waste, alleging violations of state law in the selection process and raising due process claims, because the characterization of both sites became virtually complete while appeal of the trial court was pending, plaintiff's claim seeking to require the preparation by the defendants of a precharacterization environmental impact statement was moot. Richmond County v. North Carolina Low-level Radioactive Waste Mgt. Auth., 108 N.C. App. 700, 425 S.E.2d 468, aff'd, 335 N.C. 77, 436 S.E.2d 113 (1993).

§ 113A-5. Review of agency actions involving major adverse changes or conflicts.

Whenever, in the judgment of the responsible State official, the information obtained in preparing the statement indicates that a major adverse change in the environment, or conflicts concerning alternative uses of available natural resources, would result from a specific program, project or action, and that an appropriate alternative cannot be developed, such information shall be presented to the Governor for review and final decision by him or by such agency as he may designate, in the exercise of the powers of the Governor. (1971, c. 1203, s. 5.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-6. Title.

All agencies of the State shall periodically review their statutory authority, administrative rules, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein

which prohibit or hinder full compliance with the purposes and provisions of this Article and shall propose to the Governor such measures as may be necessary to bring their authority, rules, policies and procedures into conformity with the intent, purposes and procedures set forth in this Article. (1971, c. 1203, s. 6; 1987, c. 827, s. 126.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Stated in Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890 (1980).

§ 113A-7. Other statutory obligations of agencies.

Nothing in this Article shall in any way affect nor detract from specific statutory obligations of any State agency

(1) To comply with criteria or standards of environmental quality or to perform other statutory obligations imposed upon it,

(2) To coordinate or consult with any other State agency or federal agency, or

(3) To act, or refrain from acting contingent upon the recommendations or certification of any other State agency or federal agency. (1971, c. 1203, s. 7.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Relation Between Federal and State Law. — The North Carolina Board of Transportation would be acting within this Article, the North Carolina Environmental Protection Act, if it were complying with either the State or federal environmental regulations or procedural requirements, and to the extent that the federal environmental law is relied upon to meet the requirements of the North Carolina Environmental Protection Act, the federal requirements are by reference enforceable against North Carolina agencies as State law. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890, cert. denied, 301 N.C. 94, 273 S.E.2d 299 (1980).

§ 113A-8. Major development projects.

(a) The governing bodies of all cities, counties, and towns acting individually, or collectively, may by ordinance require any special-purpose unit of government or private developer of a major development project to submit detailed statements, as defined in G.S. 113A-4(2), of the impact of such projects for consideration by those governing bodies in matters within their jurisdiction. Any such ordinance may not be designed to apply to only a particular major development project, and shall be applied consistently.

(b) Any ordinance adopted pursuant to this section shall exempt those major development projects for which a detailed statement of the environmental impact of the project or a functionally equivalent permitting process is required by federal or State law, regulation, or rule.

(c) Any ordinance adopted pursuant to this section shall establish minimum criteria to be used in determining whether a statement of environmental impact is required. A detailed statement of environmental impact may not be required for a project that does not exceed the minimum criteria and any exceptions to the minimum criteria established by the ordinance. (1971, c. 1203, s. 8; 1991, c. 431, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Cited in North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 394 S.E.2d 462 (1990), appeal dismissed, 327 N.C. 484, 397 S.E.2d 215 (1990).

§ 113A-8.1. Surface water transfers.

An environmental assessment shall be prepared for any transfer for which a petition is filed in accordance with G.S. 143-215.22I. The determination of whether an environmental impact statement is needed with regard to the proposed transfer shall be made in accordance with the provisions of this Article. (1998-168, s. 6.)

Editor's Note. — Session Laws 1998-168, s. 8 made this section effective October 1, 1998, and applicable to any application for a certificate submitted pursuant to G.S. 143-215.22I, as amended by Section 4 of Session Laws 1998-168, on or after that date.

For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-9. Definitions.

As used in this Article, unless the context indicates otherwise, the term:

(1) "Environmental assessment" (EA) means a document prepared by a State agency to evaluate whether the probable impacts of a proposed action require the preparation of an environmental impact statement under this Article.

(2) "Environmental document" means an environmental assessment, an environmental impact statement, or a finding of no significant impact.

(3) "Environmental impact statement" (EIS) means the detailed statement described in G.S. 113A-4(2).

(4) "Finding of no significant impact" (FONSI) means a document prepared by a State agency that lists the probable environmental impacts of a proposed action, concludes that a proposed action will not result in a significant adverse effect on the environment, states the specific reason or reasons for such conclusion, and states that an environmental impact statement is not required under this Article.

(5) "Major development project" shall include but is not limited to shopping centers, subdivisions and other housing developments, and industrial and commercial projects, but shall not include any projects of less than two contiguous acres in extent.

(6) "Minimum criteria" means a rule that designates a particular action or class of actions for which the preparation of environmental documents is not required.

(7) "Public land" means all land and interests therein, title of which is vested in the State of North Carolina, in any State agency, or in the State for the use of any State agency or political subdivision of the

State, and includes all vacant and unappropriated land, swampland, submerged land, land acquired by the State by virtue of being sold for taxes, escheated land, and acquired land.

(8) "Special-purpose unit of government" includes any special district or public authority.

(9) "State agency" includes every department, agency, institution, public authority, board, commission, bureau, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include local governmental units or bodies such as cities, towns, other municipal corporations or political subdivisions of the State, county or city boards of education, other local special-purpose public districts, units or bodies of any kind, or private corporations created by act of the General Assembly, except in those instances where programs, projects and actions of local governmental units or bodies are subject to review, approval or licensing by State agencies in accordance with existing statutory authority, in which case local governmental units or bodies shall supply information which may be required by such State agencies for preparation of any environmental statement required by this Article.

(10) "State official" means the Director, Commissioner, Secretary, Administrator or Chairman of the State agency having primary statutory authority for specific programs, projects or actions subject to this Article, or his authorized representative.

(11) "Use of public land" means activity that results in changes in the natural cover or topography that includes:

a. The grant of a lease, easement, or permit authorizing private use of public land; or

b. The use of privately owned land for any project or program if the State or any agency of the State has agreed to purchase the property or to exchange the property for public land. (1971, c. 1203, s. 9; 1991 (Reg. Sess., 1992), c. 945, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-10. Provisions supplemental.

The policies, obligations and provisions of this Article are supplementary to those set forth in existing authorizations of and statutory provisions applicable to State agencies and local governments. In those instances where a State agency is required to prepare an environmental document or to comment on an environmental document under provisions of federal law, the environmental document or comment shall meet the provisions of this Article. (1971, c. 1203, s. 10; 1991 (Reg. Sess., 1992), c. 945, s. 4.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Relation Between Federal and State Law. — The North Carolina Board of Transportation would be acting within this Article, the North Carolina Environmental Protection Act, if it were complying with either the State or federal environmental regulations or procedural requirements, and to the extent that the federal environmental law is relied upon to meet the requirements of the North Carolina Environmental Protection Act, the federal re-

quirements are by reference enforceable against North Carolina agencies as State law. Orange County Sensible Hwys. & Protected Env'ts, Inc. v. North Carolina DOT, 46 N.C. App. 350, 265 S.E.2d 890, cert. denied, 301 N.C. 94, 273 S.E.2d 299 (1980).

§ 113A-11. Adoption of rules.

(a) The Department of Administration shall adopt rules to implement this Article.

(b) Each State agency may adopt rules that establish minimum criteria. An agency may include a particular action or class of actions in its minimum criteria only if the agency makes a specific finding that the action or class of actions has no significant impact on the environment. Rules establishing minimum criteria shall be consistent with rules adopted by the Department of Administration. In addition to all other rule-making requirements, rules establishing minimum criteria are subject to approval by the Secretary of Administration. (1991 (Reg. Sess., 1992), c. 899, s. 1; c. 945, s. 7(b).)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-12. Environmental document not required in certain cases.

No environmental document shall be required in connection with:

(1) The construction, maintenance, or removal of an electric power line, water line, sewage line, stormwater drainage line, telephone line, telegraph line, cable television line, data transmission line, or natural gas line within or across the right-of-way of any street or highway.

(2) An action approved under a general permit issued under G.S. 113A-118.1, 143-215.1(b)(3), or 143-215.108(c)(8).

(3) A lease or easement granted by a State agency for:

a. The use of an existing building or facility.

b. Placement of a wastewater line on or under submerged lands pursuant to a permit granted under G.S. 143-215.1.

c. A shellfish cultivation lease granted under G.S. 113-202.

(4) The construction of a driveway connection to a public roadway. (1991 (Reg. Sess., 1992), c. 945, ss. 5, 7(a); c. 1030, s. 51.15.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-13. Administrative and judicial review.

The preparation of an environmental document required under this Article is intended to assist the responsible agency in determining the appropriate decision on the proposed action. An environmental document required under this Article is a necessary part of an application or other request for agency action. Administrative and judicial review of an environmental document is incidental to, and may only be undertaken in connection with, review of the agency action. No other review of an environmental document is allowed. (1991 (Reg. Sess., 1992), c. 945, ss. 5, 7(a).)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§§ 113A-14 through 113A-20: Reserved for future codification purposes.

Article 2.

Interstate Environmental Compact.

§ 113A-21. Title.

This Article shall be known and cited as "The Interstate Environmental Compact Act of 1971." (1971, c. 805, s. 1.)

§ 113A-22. Purpose.

The General Assembly of North Carolina recognizes and declares:

(1) The concern for the purity and life-giving qualities of our environment is of primary interest to every citizen of North Carolina and to all Americans.

(2) The quality of our environment depends upon the management of the air, water, and land resources upon which our lives depend.

(3) The ultimate responsibility for the health, safety, and welfare of the citizens of North Carolina rests upon the State government.

(4) The environment of every state is affected with local, state, regional, and national interests since ecological systems cross state boundaries.

(5) The discharge of this responsibility of environmental protection can be enhanced by acting in concert and cooperation with other states and with the federal government. (1971, c. 805, s. 2.)

§ 113A-23. Compact provisions.

The Interstate Environmental Compact is hereby enacted into law and entered into with all other jurisdictions legally joining herein in the form substantially as follows:

Article 1. Findings, Purposes and Reservations of Power.

(1) Findings. — Signatory states hereby find and declare:

(a) The environment of every state is affected with local, state, regional, and national interests and its protection, under appropriate arrangements for intergovernmental cooperation, are public purposes of the respective signatories.

(b) Certain environmental pollution problems transcend state boundaries and thereby become common to adjacent states requiring cooperative efforts.

(c) The environment of each state is subject to the effective control of the signatories, and coordinated, cooperative or joint exercise of control measures is in their common interests.

(2) Purposes. — The purposes of the signatories in enacting this Compact are:

(a) To assist and participate in the national environment protection programs as set forth in federal legislation; to promote intergovern-

mental cooperation for multi-state action relating to environmental protection through interstate agreements; and to encourage cooperative and coordinated environmental protection by the signatories and the federal government;

(b) To preserve and utilize the functions, powers, and duties of existing state agencies of government to the maximum extent possible consistent with the purposes of the Compact.

(3) Powers of the United States. — (a) Nothing contained in this Compact shall impair, affect or extend the constitutional authority of the United States. (b) The signatories hereby recognize the power and right of the Congress of the United States at any time by any statute expressly enacted for that purpose to revise the terms and conditions of its content.

(4) Powers of the States. — Nothing contained in this Compact shall impair or extend the constitutional authority of any signatory state, nor shall the police powers of any signatory state be affected.

Article 2. Short Title, Definitions, Purposes and Limitations.

(1) Short Title. — This Compact shall be known and may be cited as the Interstate Environmental Compact.

(2) Definitions. — For the purpose of this Compact and of any supplemental or concurring legislation enacted pursuant or in relation hereto, except as may be otherwise required by the context:

(a) "State" shall mean any one of the 50 states of the United States of America, the Commonwealth of Puerto Rico and the Territory of the Virgin Islands, but shall not include the District of Columbia.

(b) "Interstate environment pollution" shall mean any pollution of a stream or body of water crossing or marking a state boundary, interstate air quality control region designated by an appropriate federal agency or solid waste collection and disposal district or program involving the jurisdiction or territories of more than one state.

(c) "Government" shall mean the governments of the United States and the signatory states.

(d) "Federal government" shall mean the government of the United States of America and any appropriate department, instrumentality, agency, commission, bureau, division, branch or other unit thereof, as the case may be, but shall not include the District of Columbia.

(e) "Signator" shall mean any state which enters into this Compact and is a party thereto.

Article 3. Intergovernmental Cooperation.

(1) Agreements with the Federal Government and other Agencies. — Signatory states are hereby authorized jointly to participate in cooperative or joint undertakings for the protection of the interstate environment with the federal government or with any intergovernmental or interstate agencies.

Article 4. Supplementary Agreements, Jurisdiction and Enforcement.

(1) Signatories may enter into agreements for the purpose of controlling interstate environmental problems in accordance with applicable federal legislation and under terms and conditions as deemed appropriate by the agreeing states under paragraph (6) and paragraph (8) of this Article 4.

(2) Recognition of Existing Nonenvironmental Intergovernmental Arrangements. — The signatories agree that existing federal-state, interstate or

intergovernmental arrangements which are not primarily directed to environmental protection purposes as defined herein are not affected by this Compact.

(3) Recognition of Existing Intergovernmental Agreements Directed to Environmental Objectives. — All existing interstate compacts directly relating to environmental protection are hereby expressly recognized and nothing in this Compact shall be construed to diminish or supersede the powers and functions of such existing intergovernmental agreements and the organizations created by them.

(4) Modification of Existing Commissions and Compacts. — Recognition herein of multi-state commissions and compacts shall not be construed to limit directly or indirectly the creation of additional multi-state organizations or interstate compacts, nor to prevent termination, modification, extension, or supplementation of such multi-state organizations and interstate compacts recognized herein by the federal government or states party thereto.

(5) Recognition of Future Multi-State Commissions and Interstate Compacts. — Nothing in this Compact shall be construed to prevent signatories from entering into multi-state organizations or other interstate compacts which do not conflict with their obligations under this Compact.

(6) Supplementary Agreements. — Any two or more signatories may enter into supplementary agreements for joint, coordinated or mutual environmental management activities relating to interstate pollution problems common to the territories of such states and for the establishment of common or joint regulations, management, services, agencies or facilities for such purposes or may designate an appropriate agency to act as their joint agency in regard thereto. No supplementary agreement shall be valid to the extent that it conflicts with the purposes of this Compact and the creation of a joint agency by supplementary agreement shall not affect the privileges, powers, responsibilities or duties under this Compact of signatories participating therein as embodied in this Compact.

(7) Execution of Supplementary Agreements and Effective Date. — The Governor is authorized to enter into supplementary agreements for the State and his official signature shall render the agreement immediately binding upon the State; provided that:

(a) The legislature of any signatory entering into such a supplementary agreement shall at any subsequent legislative session by concurrent resolution bring the supplementary agreement before it and by appropriate legislative action approve, reverse, modify, or condition the agreement of that state.

(b) Nothing in this agreement shall be construed to limit the right of Congress by act of law expressly enacted for that purpose to disapprove or condition such a supplementary agreement.

(8) Special Supplementary Agreements. — Signatories may enter into special supplementary agreements with the District of Columbia or foreign nations for the same purposes and with the same powers as under paragraph (6), Article 4, upon the conditions that such nonsignatory party accept the general obligations of signatories under this Compact. Provided, that such special supplementary agreements shall become effective only after being consented to by the Congress.

(9) Jurisdiction of Signatories Reserved. — Nothing in this Compact or in any supplementary agreement thereunder shall be construed to restrict, relinquish or be in derogation of, any power or authority constitutionally possessed by any signatory within its jurisdiction.

(10) Complementary Legislation by Signatories. — Signatories may enact such additional legislation as may be deemed appropriate to enable its officers and governmental agencies to accomplish effectively the purposes of this Compact and supplementary agreements recognized or entered into under the terms of this Article.

(11) Legal Rights of Signatories. — Nothing in this Compact shall impair the exercise by any signatory of its legal rights or remedies established by the United States Constitution or any other laws of this nation.

Article 5. Construction, Amendment, and Effective Date.

(1) Construction. — It is the intent of the signatories that no provision of this Compact or supplementary agreement entered into hereunder shall be construed as invalidating any provision of law of any signatory and that nothing in this Compact shall be construed to modify or qualify the authority of any signatory to enact or enforce environmental protection legislation within its jurisdiction.

(2) Severability. — The provisions of this Compact or of agreements hereunder shall be severable and if any phrase, clause, sentence or provisions of this Compact, or such an agreement is declared to be contrary to the constitutionality of the remainder of this Compact or of any agreement and the applicability thereof to any participating jurisdiction, agency, person or circumstance shall not be affected thereby and shall remain in full force and effect as to the remaining participating jurisdictions and in full force and effect as to the signatory affected as to all severable matters. It is the intent of the signatories that the provisions of this Compact shall be reasonably and liberally construed in the context of its purposes.

(3) Amendments. — Amendments to this Compact may be initiated by legislative action of any signatory and become effective when concurred in by all signatories and approved by Congress.

(4) Effective Date. — This Compact shall become binding on a state when enacted by it into law and such state shall thereafter become a signatory and party hereto with any and all states legally joining herein. (1971, c. 805, s. 3.)

§§ 113A-24 through 113A-29: Reserved for future codification purposes.

Article 3.

Natural and Scenic Rivers System.

§ 113A-30. Short title.

This Article shall be known and may be cited as the "Natural and Scenic Rivers Act of 1971." (1971, c. 1167, s. 2.)

CASE NOTES

Declaratory Judgment Premature. — None of the plaintiffs seeking a declaratory judgment that Article 2 of Chapter 113 and Article 3 of Chapter 113A are unconstitutional and praying that defendants be permanently enjoined from adopting a "Master Plan" for the Eno River State Park had as yet been directly and adversely affected by the statutes they sought to challenge, and the plaintiffs failed to show the existence of a genuine controversy cognizable under the Declaratory Judgment Act, where no condemnation proceeding affecting any lands of the plaintiffs had as yet been instituted, and all that had occurred was that employees of the Division of Parks and Recreation had been preparing initial alternative planning proposals for a State park which contemplated ultimate acquisition of certain lands of the plaintiffs for park purposes. Barbour v. Little, 37 N.C. App. 686, 247 S.E.2d 252, cert. denied, 295 N.C. 733, 248 S.E.2d 862 (1978).

§ 113A-31. Declaration of policy.

The General Assembly finds that certain rivers of North Carolina possess outstanding natural, scenic, educational, geological, recreational, historic, fish and wildlife, scientific and cultural values of great present and future benefit to the people. The General Assembly further finds as policy the necessity for a rational balance between the conduct of man and the preservation of the natural beauty along the many rivers of the State. This policy includes retaining the natural and scenic conditions in some of the State's valuable rivers by maintaining them in a free-flowing state and to protect their water quality and adjacent lands by retaining these natural and scenic conditions. It is further declared that the preservation of certain rivers or segments of rivers in their natural and scenic condition constitutes a beneficial public purpose. (1971, c. 1167, s. 2.)

§ 113A-32. Declaration of purpose.

The purpose of this Article is to implement the policy as set out in G.S. 113A-31 by instituting a North Carolina natural and scenic rivers system, and by prescribing methods for inclusion of components to the system from time to time. (1971, c. 1167, s. 2.)

§ 113A-33. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Free-flowing," as applied to any river or section of a river, means existing or flowing in natural condition without substantial impoundment, diversion, straightening, rip-rapping, or other modification of the waterway. The existence of low dams, diversion works, and other minor structures at the time any river is proposed for inclusion in the North Carolina natural and scenic rivers system shall not automatically bar its consideration for such inclusion: Provided, that this shall not be construed to authorize, intend, or encourage future construction of such structures within components of the system.

(3) "River" means a flowing body of water or estuary or a section, portion, or tributary thereof, including rivers, streams, creeks, runs, kills, rills, and small lakes.

(4) "Road" means public or private highway, hard-surface road, dirt road, or railroad.

(5) "Scenic easement" means a perpetual easement in land which (i) is held for the benefit of the people of North Carolina, (ii) is specifically enforceable by its holder or beneficiary, and (iii) limits or obligates the holder of the servient estate, his heirs, and assigns with respect to their use and management of the land and activities conducted thereon. The object of such limitations and obligations is the maintenance or enhancement of the natural beauty of the land in question or of the areas affected by it.

(6) "Secretary" means the Secretary of Environment and Natural Resources. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1989, c. 727, s. 122; 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-34. Types of scenic rivers.

The following types of rivers are eligible for inclusion in the North Carolina natural and scenic rivers system:

Class I. Natural river areas. Those free-flowing rivers or segments of rivers and adjacent lands existing in a natural condition. Those rivers or segments of rivers that are free of man-made impoundments and generally inaccessible except by trail, with the lands within the boundaries essentially primitive and the waters essentially unpolluted. These represent vestiges of primitive America.

Class II. Scenic river areas. Those rivers or segments of rivers that are largely free of impoundments, with the lands within the boundaries largely primitive and largely undeveloped, but accessible in places by roads.

Class III. Recreational river areas. Those rivers or segments of rivers that offer outstanding recreation and scenic values and that are largely free of impoundments. They may have some development along their shorelines and have more extensive public access than natural or scenic river segments. Recreational river segments may also link two or more natural and/or scenic river segments to provide a contiguous designated river area. No provision of this section shall interfere with flood control measures; provided that recreational river users can continue to travel the river. (1971, c. 1167, s. 2; 1989, c. 752, s. 156(a).)

§ 113A-35. Criteria for system.

For the inclusion of any river or segment of river in the natural and scenic river system, the following criteria must be present:

(1) River segment length — must be no less than one mile.

(2) Boundaries — of the system shall be the visual horizon or such distance from each shoreline as may be determined to be necessary by the Secretary, but shall not be less than 20 feet.

(3) Water quality — shall not be less than that required for Class "C" waters as established by the North Carolina Environmental Management Commission.

(4) Water flow — shall be sufficient to assure a continuous flow and shall not be subjected to withdrawal or regulation to the extent of substantially altering the natural ecology of the stream.

(5) Public access — shall be limited, but may be permitted to the extent deemed proper by the Secretary, and in keeping with the property interest acquired by the Department and the purpose of this Article. (1971, c. 1167, s. 2; 1973, c. 1262, ss. 23, 86; 1989, c. 654, s. 1.)

§ 113A-35.1. Components of system; management plan; acquisition of land and easements; inclusion in national system.

(a) That segment of the south fork of the New River extending from its confluence with Dog Creek in Ashe County downstream through Ashe and Alleghany Counties to its confluence with the north fork of the New River and the main fork of the New River in Ashe and Alleghany Counties downstream to the Virginia State line shall be a scenic river area and shall be included in the North Carolina Natural and Scenic Rivers System.

The Department shall prepare and implement a management plan for this river section. This management plan shall recognize and provide for the protection of the existing undeveloped scenic and pastoral features of the river. Furthermore, it shall specifically provide for continued use of the lands adjacent to the river for normal agricultural activities, including, but not limited to, cultivation of crops, raising of cattle, growing of trees and other practices necessary to these agricultural pursuits.

For purposes of implementing this section and the management plan, the Department may acquire lands or interests in lands, provide for protection of scenic values as described in G.S. 113A-38, and provide for public access. Easements obtained for the purpose of implementing this section and the management plan shall not abridge the water rights being exercised on May 26, 1975.

Should the Governor seek inclusion of this river segment in the National System of Wild and Scenic Rivers by action of the Secretary of Interior, such inclusion shall be at no cost to the federal government, as prescribed in the National Wild and Scenic Rivers Act, and therefore shall be under the terms described in this section of the North Carolina Wild and Scenic Rivers Act and in the management plan developed pursuant thereto.

(b) The Department shall prepare an annual status report on the progress made in implementing the management plan required pursuant to subsection (a) of this section and the progress in implementing the management plan submitted by the Department in support of the request to the Secretary of the Interior for the river's inclusion in the National System of Wild and Scenic Rivers. The status report shall evaluate the extent to which current implementation of the management plans has in fact maintained the river's free-flowing state and protected the scenic conditions of the river and the adjacent lands consistent with the purpose of this Article. If implementation of either management plan is incomplete at the time the report is filed, the Secretary shall submit a schedule for implementing the remainder of the plan. The status report shall be filed with the General Assembly no later than January 15 of each year, beginning in 1990. (1973, c. 879; 1975, c. 404; 1977, c. 555; c. 771, s. 4; 1985, c. 129, s. 3; 1987, c. 827, s. 127; 1989, c. 654, s. 2; c. 765; 1999-147, s. 1.)

Effect of Amendments. — Session Laws 1999-147, s. 1, effective June 4, 1999, in subsection (a), in the second paragraph, substituted "this" for "said" and substituted "these" for "such," in the third paragraph, substituted "may" for "is authorized to," deleted "not to exceed 2,200 acres, to acquire such lands in fee simple or to acquire such interests in lands as easements, to" following "interests in lands" and deleted "to" following "113A-38, and," and in the fourth paragraph, substituted "this river" for "the said river."

Legal Periodicals. — For note, "The Conflict Over the New River, and the Test Case for the Wild and Scenic Rivers Act: North Carolina v. FPC," see 9 N.C. Cent. L.J. 192 (1978).

CASE NOTES

As to State's attempts to stay federal Power Commission order regarding dam on New River, see North Carolina v. Federal Power Comm'n, 393 F. Supp. 1116 (M.D.N.C. 1975).

§ 113A-35.2. Additional components.

That segment of the Linville River beginning at the State Highway 183 bridge over the Linville River and extending approximately 13 miles downstream to the boundary between the United States Forest Service lands and lands of Duke Power Company (latitude 35[] 50′ 20″) shall be a natural river area and shall be included in the North Carolina Natural and Scenic River System.

That segment of the Horsepasture River in Transylvania County extending downstream from Bohaynee Road (N.C. 281) to Lake Jocassee shall be a natural river and shall be included in the North Carolina Natural and Scenic Rivers System.

That segment of the Lumber River extending from county road 1412 in Scotland County downstream to the North Carolina-South Carolina state line,

a distance of approximately 102 river miles, shall be included in the Natural and Scenic Rivers System and classified as follows: from county road 1412 in Scotland County downstream to the junction of the Lumber River and Back Swamp shall be classified as scenic; from the junction of the Lumber River and Back Swamp downstream to the junction of the Lumber River and Jacob Branch and the river within the Fair Bluff town limits shall be classified as recreational; and from the junction of the Lumber River and Jacob Branch downstream to the North Carolina-South Carolina state line, excepting the Fair Bluff town limits, shall be classified as natural. (1975, c. 698; 1985, c. 344, s. 1; 1989, c. 752, s. 156(b).)

§ 113A-36. Administrative agency; federal grants; additions to the system; regulations.

(a) The Department is the agency of the State of North Carolina with the duties and responsibilities to administer and control the North Carolina natural and scenic rivers system.

(b) The Department shall be the agency of the State with the authority to accept federal grants of assistance in planning, developing (which would include the acquisition of land or an interest in land), and administering the natural and scenic rivers system.

(c) The Secretary of the Department shall study and from time to time submit to the Governor and to the General Assembly proposals for the additions to the system of rivers and segments of rivers which, in his judgment, fall within one or more of the categories set out in G.S. 113A-34. Each proposal shall specify the category of the proposed addition and shall be accompanied by a detailed report of the facts which, in the Secretary's judgment, makes the area a worthy addition to the system.

Before submitting any proposal to the Governor or the General Assembly for the addition to the system of a river or segment of a river, the Secretary or his authorized representative, shall hold a public hearing in the county or counties where said river or segment of river is situated. Notice of such public hearing shall be given by publishing a notice once each week for two consecutive weeks in a newspaper having general circulation in the county where said hearing is to be held, the second of said notices appearing not less than 10 days before said hearing. Any person attending said hearing shall be given an opportunity to be heard. Notwithstanding the provisions of the foregoing, no public hearing shall be required with respect to a river bounded solely by the property of one owner, who consents in writing to the addition of such river to the system.

The Department shall also conduct an investigation on the feasibility of the inclusion of a river or a segment of river within the system and file a written report with the Governor when submitting a proposal.

The Department shall also, before submitting such a proposal to the Governor or the General Assembly, notify in writing the owner, lessee, or tenant of any lands adjoining said river or segment of river of its intention to make such proposal. In the event the Department, after due diligence, is unable to determine the owner or lessee of any such land, the Department may publish a notice for four successive weeks in a newspaper having general circulation in the county where the land is situated of its intention to make a proposal to the Governor or General Assembly for the addition of a river or segment of river to the system.

(c1) Upon receipt of a request in the form of a resolution from the commissioners of the county or counties in which a river segment is located and upon studying the segment and determining that it meets the criteria set forth in G.S. 113A-35, the Secretary may designate the segment a potential component of the natural and scenic rivers system. The designation as a

potential component shall be transmitted to the Governor and all appropriate State agencies. Any segment so designated is subject to the provisions of this Article applicable to designated rivers, except for acquisition by condemnation or otherwise, and to any rules adopted pursuant to this Article. The Secretary shall make a full report and, if appropriate, a proposal for an addition to the natural and scenic rivers system to the General Assembly within 90 days after the convening of the next session following issuance of the designation, and the General Assembly shall determine whether to designate the segment as a component of the natural and scenic rivers system. If the next session of the General Assembly fails to take affirmative action on the designation, the designation as a potential component shall expire.

(d) The Department may adopt rules to implement this Article. (1971, c. 1167, s. 2; 1973, c. 911; c. 1262, ss. 28, 86; 1977, c. 771, s. 4; 1985, c. 129, s. 1; 1987, c. 827, ss. 125, 128; 1989, c. 727, s. 123.)

§ 113A-37. Raising the status of an area.

Whenever in the judgment of the Secretary of the Department a scenic river segment has been sufficiently restored and enhanced in its natural scenic and recreational qualities, such segment may be reclassified with the approval of the Department, to a natural river area status and thereafter administered accordingly. (1971, c. 1167, s. 2; 1973, c. 1262, ss. 28, 86.)

§ 113A-38. Land acquisition.

(a) The Department of Administration is authorized to acquire for the Department, within the boundaries of a river or segment of river as set out in G.S. 113A-35 on behalf of the State of North Carolina, lands in fee title or a lesser interest in land, preferably "scenic easements." Acquisition of land or interest therein may be by donation, purchase with donated or appropriated funds, exchange or otherwise.

(b) The Department of Administration in acquiring real property or a property interest therein as set out in this Article shall have and may exercise the power of eminent domain in accordance with Article 3 of Chapter 40A of the General Statutes, as amended. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 827, ss. 127, 129.)

Legal Periodicals. — For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

§ 113A-39. Claim and allowance of charitable deduction for contribution or gift of easement.

The contribution or donation of a "scenic easement," right-of-way or any other easement or interest in land to the State of North Carolina, as provided in this Article, shall be deemed a contribution to the State of North Carolina within the provisions of G.S. 105-130.9 and section 170(c)(1) of the Internal Revenue Code. The value of the contribution or donation shall be the fair market value of the easement or other interest in land when the contribution or donation is made. (1971, c. 1167, s. 2; 1991, c. 45, s. 23.)

§ 113A-40. Component as part of State park, wildlife refuge, etc.

Any component of the State natural and scenic rivers system that is or shall become a part of any State park, wildlife refuge, or state-owned area shall be

subject to the provisions of this Article and the Articles under which the other areas may be administered, and in the case of conflict between the provisions of these Articles the more restrictive provisions shall apply. (1971, c. 1167, s. 2.)

§ 113A-41. Component as part of national wild and scenic river system.

Nothing in this Article shall preclude a river or segment of a river from becoming part of the national wild and scenic river system. The Secretary of the Department is directed to encourage and assist any federal studies for the inclusion of North Carolina rivers in the national system. The Secretary may enter into cooperative agreements for joint federal-state administration of a North Carolina river or segment of river: Provided, that such agreements relating to water and land use are not less restrictive than the requirements of this Article. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86.)

§ 113A-42. Violations.

(a) Civil Action. — Whoever violates, fails, neglects or refuses to obey any provision of this Article or rule or order of the Secretary may be compelled to comply with or obey the same by injunction, mandamus, or other appropriate remedy.

(b) Penalties. — Whoever violates, fails, neglects or refuses to obey any provision of this Article or rule or order of the Secretary is guilty of a Class 3 misdemeanor and may be punished only by a fine of not more than fifty dollars ($50.00) for each violation, and each day such person shall fail to comply, where feasible, after having been officially notified by the Department shall constitute a separate offense subject to the foregoing penalty. (1971, c. 1167, s. 2; 1973, c. 1262, s. 86; 1977, c. 771, s. 4; 1987, c. 827, s. 125; 1989, c. 727, s. 124; 1993, c. 539, s. 872; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113A-43. Authorization of advances.

The Department of Administration is hereby authorized to advance from land-purchase appropriations necessary amounts for the purchase of land in those cases where reimbursement will be later effected by the Bureau of Outdoor Recreation of the United States Department of the Interior. (1971, c. 1167, s. 2.)

§ 113A-44. Restrictions on project works on natural or scenic river.

The State Utilities Commission may not permit the construction of any dam, water conduit, reservoir, powerhouse transmission line, or any other project works on or directly affecting any river that is designated as a component or potential component of the State Natural and Scenic Rivers System. No department or agency of the State may assist by loan, grant, license, permit, or otherwise in the construction of any water resources project that would have a direct and adverse effect on any river that is designated as a component or potential component of the State Natural and Scenic Rivers System. This section shall not, however, preclude licensing of or assistance to a development below or above a designated or potential component. No department or agency of the State may recommend authorization of any water resources project that would have a direct and adverse effect on any river that is designated as a component or potential component of the State Natural and Scenic Rivers System, or request appropriations to begin construction of any such project,

regardless of when authorized, without advising the Secretary in writing of its intention to do so at least 60 days in advance. Such department or agency making such recommendation or request shall submit a written impact statement to the General Assembly to accompany the recommendation or request specifically describing how construction of the project would be in conflict with the purposes of this act and how it would affect the component or potential component. (1985, c. 129, s. 2.)

§§ 113A-45 through 113A-49: Reserved for future codification purposes.

Article 4.

Sedimentation Pollution Control Act of 1973.

§ 113A-50. Short title.

This Article shall be known as and may be cited as the "Sedimentation Pollution Control Act of 1973." (1973, c. 392, s. 1.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Constitutional Considerations in Implementation of Regulatory Scheme. — A major purpose of N.C. Const., Art. IV, § 3, is to reconcile the retention of judicial power in the judicial branch required by N.C. Const., Art. IV, § 1, with the recognized need to utilize administrative expertise in implementing complicated regulatory schemes such as this Article, the Sedimentation Pollution Control Act. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

The purpose of this Article is to control erosion and sedimentation, rather than only land-disturbing activities. Cox v. State ex rel. Summers, 81 N.C. App. 612, 344 S.E.2d 808, cert. denied, 318 N.C. 413, 349 S.E.2d 592 (1986).

This Article Provides Sufficient Guidance for Promulgation of Penalty Factors. — This Article in general, and § 113A-64 in particular, provides sufficient guidance for the department's promulgation of penalty factors based on its experience and expertise in enforcing the Article; it is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

Applicability of Article to Activities Occurring Before Article and Regulations Became Effective. — To accomplish the purpose of this Article, the Article and the regulations enacted pursuant to it may be applied to land-disturbing activities which occurred before the Article and regulations became effective. Cox v. State ex rel. Summers, 81 N.C. App. 612, 344 S.E.2d 808, cert. denied, 318 N.C. 413, 349 S.E.2d 592 (1986).

Under this Article and the regulations enacted pursuant thereto, the developers of land, who still owned the roadway over which lot owners had an easement, could be held responsible for permanent erosion and sediment control measures in that roadway, even though the land-disturbing activity of the developers in developing the land occurred before the effective date of the regulations in question. Cox v. State ex rel. Summers, 81 N.C. App. 612, 344 S.E.2d 808, cert. denied, 318 N.C. 413, 349 S.E.2d 592 (1986).

Existence of Act is Evidence That Sedimentation is Considered a Pollutant. — Based on the existence of the Sedimentation Pollution Control Act, reasonable persons in the grading and paving business should recognize that sedimentation is considered a pollut-

ant and thus would fall within an exclusion in a commercial general liability policy and a commercial umbrella liability policy for pollution-related claims. Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc., 973 F. Supp. 560 (E.D.N.C. 1996), aff'd, 121 F.3d 699 (4th Cir. 1997).

Cited in Food Town Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980); State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983); State ex rel. Grimsley v. West Lake Dev., Inc., 71 N.C. App. 779, 323 S.E.2d 448 (1984); In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989); Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995).

§ 113A-51. Preamble.

The sedimentation of streams, lakes and other waters of this State constitutes a major pollution problem. Sedimentation occurs from the erosion or depositing of soil and other materials into the waters, principally from construction sites and road maintenance. The continued development of this State will result in an intensification of pollution through sedimentation unless timely and appropriate action is taken. Control of erosion and sedimentation is deemed vital to the public interest and necessary to the public health and welfare, and expenditures of funds for erosion and sedimentation control programs shall be deemed for a public purpose. It is the purpose of this Article to provide for the creation, administration, and enforcement of a program and for the adoption of minimal mandatory standards which will permit development of this State to continue with the least detrimental effects from pollution by sedimentation. In recognition of the desirability of early coordination of sedimentation control planning, it is the intention of the General Assembly that preconstruction conferences be held among the affected parties, subject to the availability of staff. (1973, c. 392, s. 2; 1975, c. 647, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Assessment of Civil Penalty Held Constitutional. — N.C. Const., Art. IV, § 3 did not prohibit the legislature from conferring on the North Carolina Department of Natural Resources and Community Development (now Environment, Health, and Natural Resources) the power to exercise discretion in determining civil penalties within an authorized range; plenary guiding standards existed to check the exercise of the Department's discretion in its assessment of civil penalties in varying amounts, commensurate with the seriousness of the violations of this Article, the Sedimentation Pollution Control Act. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

Application to Activities Occurring Prior to Effective Date of Article. — Application of this Article, the Sedimentation Pollution Control Act of 1973, to prevent erosion and sedimentation of public waters resulting from "land-disturbing" activities which occurred before the Article became effective does not constitute an unlawful retroactive application of the Article, since the purpose of the Article is to control erosion and sedimentation rather than only land-disturbing activities. State ex rel. Lee v. Penland-Bailey Co., 50 N.C. App. 498, 274 S.E.2d 348 (1981).

Legislative Intent. — The stated legislative intent behind the enactment of the SPCA is to protect against the sedimentation of waterways. McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources, 126 N.C. App. 469, 485 S.E.2d 861 (1997).

§ 113A-52. Definitions.

As used in this Article, unless the context otherwise requires:

(1) Repealed by Session Laws 1973, c. 1417, s. 1.

(1a) "Affiliate" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 June 1993 Edition), which defines "affiliate" as a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control of another person.

(2) "Commission" means the North Carolina Sedimentation Control Commission.

(3) "Department" means the North Carolina Department of Environment and Natural Resources.

(4) "District" means any Soil and Water Conservation District created pursuant to Chapter 139, North Carolina General Statutes.

(5) "Erosion" means the wearing away of land surface by the action of wind, water, gravity, or any combination thereof.

(6) "Land-disturbing activity" means any use of the land by any person in residential, industrial, educational, institutional or commercial development, highway and road construction and maintenance that results in a change in the natural cover or topography and that may cause or contribute to sedimentation.

(7) "Local government" means any county, incorporated village, town, or city, or any combination of counties, incorporated villages, towns, and cities, acting through a joint program pursuant to the provisions of this Article.

(7a) "Parent" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 June 1993 Edition), which defines "parent" as an affiliate that directly, or indirectly through one or more intermediaries, controls another person.

(8) "Person" means any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, interstate body, or other legal entity.

(9) "Secretary" means the Secretary of Environment and Natural Resources.

(10) "Sediment" means solid particulate matter, both mineral and organic, that has been or is being transported by water, air, gravity, or ice from its site of origin.

(10a) "Subsidiary" has the same meaning as in 17 Code of Federal Regulations § 240.12(b)-2 (1 June 1993 Edition), which defines "subsidiary" as an affiliate that is directly, or indirectly through one or more intermediaries, controlled by another person.

(10b) "Tract" means all contiguous land and bodies of water being disturbed or to be disturbed as a unit, regardless of ownership.

(11) "Working days" means days exclusive of Saturday and Sunday during which weather conditions or soil conditions permit land-disturbing activity to be undertaken. (1973, c. 392, s. 3; c. 1417, s. 1; 1975, c. 647, s. 1; 1977, c. 771, s. 4; 1989, c. 179, s. 1; c. 727, s. 218(60); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991, c. 275, s. 1; 1993 (Reg. Sess., 1994), c. 776, s. 1; 1997-443, s. 11A.119(a).)

Editor's Note. — For conditional and temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Quoted in Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Triangle Paving, Inc., 973 F. Supp. 560 (E.D.N.C. 1996), aff'd, 121 F.3d 699 (4th Cir. 1997).

Cited in McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources, 126 N.C. App. 469, 485 S.E.2d 861 (1997); McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources, 126 N.C. App. 469, 485 S.E.2d 861 (1997).

§ 113A-52.01. Applicability of this Article.

This Article shall not apply to the following land-disturbing activities:

(1) Activities, including the breeding and grazing of livestock, undertaken on agricultural land for the production of plants and animals useful to man, including, but not limited to:
   a. Forages and sod crops, grains and feed crops, tobacco, cotton, and peanuts.
   b. Dairy animals and dairy products.
   c. Poultry and poultry products.
   d. Livestock, including beef cattle, llamas, sheep, swine, horses, ponies, mules, and goats.
   e. Bees and apiary products.
   f. Fur producing animals.

(2) Activities undertaken on forestland for the production and harvesting of timber and timber products and conducted in accordance with best management practices set out in Forest Practice Guidelines Related to Water Quality, as adopted by the Department.

(3) Activities for which a permit is required under the Mining Act of 1971, Article 7 of Chapter 74 of the General Statutes.

(4) For the duration of an emergency, activities essential to protect human life. (1993 (Reg. Sess., 1994), c. 776, s. 2; 1997-84, s. 1.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Session Laws 1997-84, s. 3, applicable to rules adopted or amended on or after May 22, 1997, provides: "Any rules adopted by the Board of Agriculture that affect llamas shall not refer to llamas as exotic or wild animals. It is the intent of the General Assembly that llamas be treated as domesticated livestock in order to promote the development and improvement of the llama industry in the State. This section does not prohibit the Board of Agriculture from classifying llamas for animal health purposes in accordance with generally accepted standards of veterinary medicine. For purposes of this section, 'llama' means a South American camelid that is an animal of the genus llama. Llama includes llamas, alpacas, and guanacos. Llama does not include vicunas."

§ 113A-52.1. Forest Practice Guidelines.

(a) The Department shall adopt Forest Practice Guidelines Related to Water Quality (best management practices). The adoption of Forest Practices Guidelines Related to Water Quality under this section is subject to the provisions of Chapter 150B of the General Statutes.

(b) If land-disturbing activity undertaken on forestland for the production and harvesting of timber and timber products is not conducted in accordance with Forest Practice Guidelines Related to Water Quality, the provisions of this Article shall apply to such activity and any related land-disturbing activity on the tract.

(c) The Secretary shall establish a Technical Advisory Committee to assist in the development and periodic review of Forest Practice Guidelines Related to Water Quality. The Technical Advisory Committee shall consist of one member from the forest products industry, one member who is a consulting forester, one member who is a private landowner knowledgeable in forestry, one member from the United States Forest Service, one member from the academic community who is knowledgeable in forestry, one member who is knowledgeable in erosion and sedimentation control, one member who is knowledgeable in wildlife management, one member who is knowledgeable in

marine fisheries management, one member who is knowledgeable in water quality, and one member from the conservation community. (1989, c. 179, s. 2.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-53: Repealed by Session Laws 1973, c. 1262, s. 41.

Cross References. — For this section as amended by Session Laws 1973, c. 1417, s. 2, see the note to § 143B-299. As to creation and organization of the Sedimentation Control Commission, see §§ 143B-298, 143B-299.

§ 113A-54. Powers and duties of the Commission.

(a) The Commission shall, in cooperation with the Secretary of Transportation and other appropriate State and federal agencies, develop, promulgate, publicize, and administer a comprehensive State erosion and sedimentation control program.

(b) The Commission shall develop and adopt and shall revise as necessary from time to time, rules and regulations for the control of erosion and sedimentation resulting from land-disturbing activities. The Commission shall adopt or revise its rules and regulations in accordance with Chapter 150B of the General Statutes.

(c) The rules and regulations adopted pursuant to G.S. 113A-54(b) for carrying out the erosion and sedimentation control program shall:

(1) Be based upon relevant physical and developmental information concerning the watershed and drainage basins of the State, including, but not limited to, data relating to land use, soils, hydrology, geology, grading, ground cover, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services;

(2) Include such survey of lands and waters as may be deemed appropriate by the Commission or required by any applicable laws to identify those areas, including multijurisdictional and watershed areas, with critical erosion and sedimentation problems; and

(3) Contain conservation standards for various types of soils and land uses, which standards shall include criteria and alternative techniques and methods for the control of erosion and sediment resulting from land-disturbing activities.

(d) In implementing the erosion and sedimentation control program, the Commission shall:

(1) Assist and encourage local governments in developing erosion and sediment control programs and, as a part of this assistance, the Commission shall develop a model local erosion control ordinance. The Commission shall approve, approve as modified, or disapprove local programs submitted to it pursuant to G.S. 113A-60.

(2) Assist and encourage other State agencies in developing erosion and sedimentation control programs to be administered in their jurisdictions. The Commission shall approve, approve as modified, or disapprove programs submitted pursuant to G.S. 113A-56 and from time to time shall review these programs for compliance with rules adopted by the Commission and for adequate enforcement.

(3) Develop recommended methods of control of sedimentation and prepare and make available for distribution publications and other materials dealing with sedimentation control techniques appropriate

for use by persons engaged in land-disturbing activities, general educational materials on erosion and sedimentation control, and instructional materials for persons involved in the enforcement of this Article and erosion control rules, ordinances, regulations, and plans.

(4) Require submission of erosion control plans by those responsible for initiating land-disturbing activities for approval prior to commencement of the activities.

(e) To assist it in developing the erosion and sedimentation control program required by this Article, the Commission is authorized to appoint an advisory committee consisting of technical experts in the fields of water resources, soil science, engineering, and landscape architecture.

(f) Repealed by Session Laws 1987, c. 827, s. 10, effective August 13, 1987. (1973, c. 392, s. 5; c. 1331, s. 3; c. 1417, s. 6; 1975, 2nd Sess., c. 983, s. 74; 1977, c. 464, s. 35; 1979, c. 922, s. 2; 1983 (Reg. Sess., 1984), c. 1014, ss. 1, 2; 1987, c. 827, s. 10; 1987 (Reg. Sess., 1988), c. 1000, s. 3; 1989, c. 676, s. 1; 1993 (Reg. Sess., 1994), c. 776, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Applicability of Article to Activities Occurring Before Article and Regulations Became Effective. — To accomplish the purpose of this Article, the Article and the regulations enacted pursuant to it may be applied to land-disturbing activities which occurred before the Article and regulations became effective. Cox v. State ex rel. Summers, 81 N.C. App. 612, 344 S.E.2d 808, cert. denied, 318 N.C. 413, 349 S.E.2d 592 (1986).

Under this Article and the regulations enacted pursuant thereto, the developers of land, who still owned the roadway over which lot owners had an easement, could be held responsible for permanent erosion and sediment control measures in that roadway, even though the land-disturbing activity of the developers in developing the land occurred before the effective date of the regulations in question. Cox v. State ex rel. Summers, 81 N.C. App. 612, 344 S.E.2d 808, cert. denied, 318 N.C. 413, 349 S.E.2d 592 (1986).

Quoted in State ex rel. Lee v. Penland-Bailey Co., 50 N.C. App. 498, 274 S.E.2d 348 (1981).

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§ 113A-54.1. Approval of erosion control plans.

(a) A draft erosion control plan must contain the applicant's address and, if the applicant is not a resident of North Carolina, designate a North Carolina agent for the purpose of receiving notice from the Commission or the Secretary of compliance or noncompliance with the plan, this Article, or any rules adopted pursuant to this Article. The Commission shall approve, approve with modifications, or disapprove a draft erosion control plan for those land-disturbing activities for which prior plan approval is required within 30 days of receipt. The Commission shall condition approval of a draft erosion control plan upon the applicant's compliance with federal and State water quality laws, regulations, and rules. Failure to approve, approve with modifications, or disapprove a completed draft erosion control plan within 30 days of receipt shall be deemed approval of the plan. If the Commission disapproves a draft erosion control plan or a revised erosion control plan, it must state in writing the specific reasons that the plan was disapproved. Failure to approve, approve with modifications, or disapprove a revised erosion control plan within 15 days of receipt shall be deemed approval of the plan. The Commission may establish an expiration date for erosion control plans approved under this Article.

(b) If, following commencement of a land-disturbing activity pursuant to an approved erosion control plan, the Commission determines that the plan is inadequate to meet the requirements of this Article, the Commission may require any revision of the plan that is necessary to comply with this Article. Failure to approve, approve with modifications, or disapprove a revised erosion control plan within 15 days of receipt shall be deemed approval of the plan.

(c) The Commission shall disapprove an erosion control plan if implementation of the plan would result in a violation of rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. The Director of the Division of Land Resources may disapprove an erosion control plan upon finding that an applicant or a parent, subsidiary, or other affiliate of the applicant:

(1) Is conducting or has conducted land-disturbing activity without an approved plan, or has received notice of violation of a plan previously approved by the Commission or a local government pursuant to this Article and has not complied with the notice within the time specified in the notice;

(2) Has failed to pay a civil penalty assessed pursuant to this Article or a local ordinance adopted pursuant to this Article by the time the payment is due;

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-64(b) or any criminal provision of a local ordinance adopted pursuant to this Article; or

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article.

(d) In the event that an erosion control plan is disapproved by the Director pursuant to subsection (c) of this section, the Director shall state in writing the specific reasons that the plan was disapproved. The applicant may appeal the Director's disapproval of the plan to the Commission. For purposes of this subsection and subsection (c) of this section, an applicant's record may be considered for only the two years prior to the application date. (1989, c. 676, s. 2; 1993 (Reg. Sess., 1994), c. 776, s. 4; 1998-221, s. 1.11(a); 1999-379, s. 1.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Session Laws 1998-221, s. 5.2, contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective November 5, 1998, added the present first sentence of subsection (c).

Session Laws 1999-379, s. 1, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, in subsection (a), inserted the present third sentence, and inserted "plan or a revised erosion control" in the fifth sentence; and in subsection (c), substituted "The Commission" for "The Director of the Division of Land Resources" at the beginning, and substituted "implementation of the plan" for "the plan, when implemented."

§ 113A-54.2. Approval Fees.

(a) The Commission may establish a fee schedule for the review and approval of erosion control plans under this Article. In establishing the fee schedule, the Commission shall consider the administrative and personnel costs incurred by the Department for reviewing the plans and for related compliance activities. An application fee may not exceed fifty dollars ($50.00) per acre of disturbed land shown on an erosion control plan or of land actually disturbed during the life of the project.

(b) The Sedimentation Account is established as a nonreverting account within the Department. Fees collected under this section shall be credited to the Account and shall be applied to the costs of administering this Article.

(c) Repealed by Session Laws 1991 (Reg. Sess., 1992), c. 1039, s. 3.

(d) This section may not limit the existing authority of local programs approved pursuant to this Article to assess fees for the approval of erosion control plans. (1989 (Reg. Sess., 1990), c. 906, s. 1; 1991 (Reg. Sess., 1992), c. 1039, s. 3; 1993 (Reg. Sess., 1994), c. 776, s. 5; 1999-379, s. 5.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Effect of Amendments. — Session Laws 1999-379, s. 5, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, deleted the former third sentence in subsection (a), pertaining to the total amount of fees collected under this section.

§ 113A-55. Authority of the Secretary.

The sedimentation control program developed by the Commission shall be administered by the Secretary under the direction of the Commission. To this end the Secretary shall employ the necessary clerical, technical, and administrative personnel, and assign tasks to the various divisions of the Department for the purpose of implementing this Article. The Secretary may bring enforcement actions pursuant to G.S. 113A-64 and G.S. 113A-65. The Secretary shall make final agency decisions in contested cases that arise from civil penalty assessments pursuant to G.S. 113A-64. (1973, c. 392, s. 6; c. 1417, s. 3; 1993 (Reg. Sess., 1994), c. 776, s. 6.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-56. Jurisdiction of the Commission.

(a) The Commission shall have jurisdiction, to the exclusion of local governments, to adopt rules concerning land-disturbing activities that are:

(1) Conducted by the State;

(2) Conducted by the United States;

(3) Conducted by persons having the power of eminent domain;

(4) Conducted by local governments; or

(5) Funded in whole or in part by the State or the United States.

(b) The Commission may delegate the jurisdiction conferred by G.S. 113A-56(a), in whole or in part, to any other State agency that has submitted an erosion control program to be administered by it, if such program has been approved by the Commission as being in conformity with the general State program.

(c) The Commission shall have concurrent jurisdiction with local governments over all other land-disturbing activities. (1973, c. 392, s. 7; c. 1417, s. 4; 1987, c. 827, s. 130; 1987 (Reg. Sess., 1988), c. 1000, s. 4.)

Local Modification. — City of Raleigh: 1989 (Reg. Sess., 1990), c. 1043, s. 1.

Editor's Note. — Subsection (a) was amended by Session Laws 1987 (Reg. Sess., 1988), c. 1000, s. 4, in the coded bill drafting format provided by § 120-20.1. It has been set out in the form above at the direction of the Revisor of Statutes.

For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Funded by Governmental Entity. — If the state or United States provides a sum of money to be used for the purpose of construction, which involves some "land-disturbing activity," the governmental entity has "funded" that "land-disturbing activity" within the meaning

of subdivision (a)(5). City of Asheville v. Woodberry Assocs., 114 N.C. App. 377, 442 S.E.2d 328 (1994).

Use of Funds. — Even though construction project received a $15,000 grant from the North Carolina Housing Finance Agency, the project was not partially "funded" by the United States; although a grant, funded with either federal or state monies, does qualify as funding, in this instance, however, the grant monies were not used to fund any "land-disturbing" activities on the project site. The money from the grant was to be used, and was, in fact, used to install water and sewer lines to the project site. City of Asheville v. Woodberry Assocs., 114 N.C. App. 377, 442 S.E.2d 328 (1994).

Loan Insured by HUD. — Even though the loan on project site was insured by United States Department of Housing and Urban Development (HUD) it was not "funded" by the United States; HUD's insuring of the loan involved some federal spending but that money was not used for the construction of the project but was instead used to induce some other party to provide money for the construction of the project. City of Asheville v. Woodberry Assocs., 114 N.C. App. 377, 442 S.E.2d 328 (1994).

§ 113A-57. Mandatory standards for land-disturbing activity.

No land-disturbing activity subject to this Article shall be undertaken except in accordance with the following mandatory requirements:

(1) No land-disturbing activity during periods of construction or improvement to land shall be permitted in proximity to a lake or natural watercourse unless a buffer zone is provided along the margin of the watercourse of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity. Waters that have been classified as trout waters by the Environmental Management Commission shall have an undisturbed buffer zone 25 feet wide or of sufficient width to confine visible siltation within the twenty-five percent (25%) of the buffer zone nearest the land-disturbing activity, whichever is greater. Provided, however, that the Sedimentation Control Commission may approve plans which include land-disturbing activity along trout waters when the duration of said disturbance would be temporary and the extent of said disturbance would be minimal. This subdivision shall not apply to a land-disturbing activity in connection with the construction of facilities to be located on, over, or under a lake or natural watercourse.

(2) The angle for graded slopes and fills shall be no greater than the angle which can be retained by vegetative cover or other adequate erosion-control devices or structures. In any event, slopes left exposed will, within 15 working days or 30 calendar days of completion of any phase of grading, whichever period is shorter, be planted or otherwise provided with ground cover, devices, or structures sufficient to restrain erosion.

(3) Whenever land-disturbing activity is undertaken on a tract comprising more than one acre, if more than one acre is uncovered, the person conducting the land-disturbing activity shall install such sedimentation and erosion control devices and practices as are sufficient to retain the sediment generated by the land-disturbing activity within the boundaries of the tract during construction upon and development of said tract, and shall plant or otherwise provide a permanent ground cover sufficient to restrain erosion after completion of construction or development within a time period to be specified by rule of the Commission.

(4) No person shall initiate any land-disturbing activity on a tract if more than one acre is to be uncovered unless, 30 or more days prior to initiating the activity, an erosion and sedimentation control plan for such activity is filed with the agency having jurisdiction. The agency

having jurisdiction shall forward to the Director of the Division of Water Quality a copy of each erosion and sedimentation control plan for a land-disturbing activity that involves the utilization of ditches for the purpose of de-watering or lowering the water table of the tract. (1973, c. 392, s. 8; c. 1417, s. 5; 1975, c. 647, s. 2; 1979, c. 564; 1983 (Reg. Sess., 1984), c. 1014, s. 3; 1987, c. 827, s. 131; 1989, c. 676, s. 3; 1991, c. 275, s. 2; 1998-99, s. 1; 1999-379, s. 2.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Effect of Amendments. — The 1998 amendment, effective October 1, 1998, substituted "15 working days or 30 calendar days" for "30 working days," and inserted "whichever period is shorter" following "grading" in subdivision (2).

Session Laws 1999-379, s. 2, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, added the last sentence of subdivision (4).

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

CASE NOTES

Legislative Intent. — Had the General assembly also wished subsections (1) and (2) to contain a one acre requirement they could have added it to these sections. McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources, 126 N.C. App. 469, 485 S.E.2d 861 (1997).

Applicability of One Acre Requirement. — Although subsections (3) and (4) contain a requirement that more than one acre of land must be uncovered before a violation will be found, the one acre requirement does not apply to subsections (1) and (2). McHugh v. North Carolina Dep't of Envtl., Health & Natural Resources, 126 N.C. App. 469, 485 S.E.2d 861 (1997).

Application to Activities Occurring Prior to Effective Date of Article. — Application of this Article, the Sedimentation Pollution Control Act of 1973, to prevent erosion and sedimentation of public waters resulting from "land-disturbing" activities which occurred before the Article became effective does not constitute an unlawful retroactive application of the Article, since the purpose of the Article is to control erosion and sedimentation rather than only land-disturbing activities. State ex rel. Lee v. Penland-Bailey Co., 50 N.C. App. 498, 274 S.E.2d 348 (1981).

Ownership of Land. — This section does not require that the party causing the disturbance has to own more than one acre of the land being uncovered. Midway Grading Co. v. North Carolina Dep't of Env't, Health & Natural Resources, 123 N.C. App. 501, 473 S.E.2d 20 (1996).

Applied in In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989); Cramer Mt. Country Club & Properties, Inc. v. North Carolina Dep't of Natural Resources & Community Dev., Div. of Land Resources, 102 N.C. App. 236, 401 S.E.2d 851 (1991).

§ 113A-58. Enforcement authority of the Commission.

In implementing the provisions of this Article the Commission is authorized and directed to:

(1) Inspect or cause to be inspected the sites of land-disturbing activities to determine whether applicable laws, regulations or erosion control plans are being complied with;

(2) Make requests, or delegate to the Secretary authority to make requests, of the Attorney General or solicitors for prosecutions of violations of this Article. (1973, c. 392, s. 9.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-59. Educational activities.

The Commission in conjunction with the soil and water conservation districts, the North Carolina Agricultural Extension Service, and other appropriate State and federal agencies shall conduct educational programs in erosion and sedimentation control, such programs to be directed towards State and local governmental officials, persons engaged in land-disturbing activities, and interested citizen groups. (1973, c. 392, s. 10.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-60. Local erosion control programs.

(a) Any local government may submit to the Commission for its approval an erosion and sediment control program for its jurisdiction, and to this end local governments are authorized to adopt ordinances and regulations necessary to establish and enforce erosion and sediment control programs. Local governments are authorized to create or designate agencies or subdivisions of local government to administer and enforce the programs. An ordinance adopted by a local government shall at least meet and may exceed the minimum requirements of this Article and the rules adopted pursuant to this Article. Two or more units of local government are authorized to establish a joint program and to enter into any agreements that are necessary for the proper administration and enforcement of the program. The resolutions establishing any joint program must be duly recorded in the minutes of the governing body of each unit of local government participating in the program, and a certified copy of each resolution must be filed with the Commission.

(b) The Commission shall review each program submitted and within 90 days of receipt thereof shall notify the local government submitting the program that it has been approved, approved with modifications, or disapproved. The Commission shall only approve a program upon determining that its standards equal or exceed those of this Article and rules adopted pursuant to this Article.

(c) If the Commission determines that any local government is failing to administer or enforce an approved erosion and sediment control program, it shall notify the local government in writing and shall specify the deficiencies of administration and enforcement. If the local government has not taken corrective action within 30 days of receipt of notification from the Commission, the Commission shall assume enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement of the program. (1973, c. 392, s. 11; 1993 (Reg. Sess., 1994), c. 776, s. 7.)

Local Modification. — Town of Chapel Hill: 1999-255, ss. 3, 7.

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-61. Local approval of erosion control plans.

(a) For those land-disturbing activities for which prior approval of an erosion control plan is required, the Commission may require that a local government that administers an erosion and sediment control program approved under G.S. 113A-60 require the applicant to submit a copy of the erosion control plan to the appropriate soil and water conservation district or districts at the same time the applicant submits the erosion control plan to the

local government for approval. The soil and water conservation district or districts shall review the plan and submit any comments and recommendations to the local government within 20 days after the soil and water conservation district received the erosion control plan or within any shorter period of time as may be agreed upon by the soil and water conservation district and the local government. Failure of a soil and water conservation district to submit comments and recommendations within 20 days or within agreed upon shorter period of time shall not delay final action on the proposed plan by the local government.

(b) Local governments shall review each erosion control plan submitted to them and within 30 days of receipt thereof shall notify the person submitting the plan that it has been approved, approved with modifications, or disapproved. A local government shall only approve a plan upon determining that it complies with all applicable State and local regulations for erosion and sediment control.

(b1) A local government shall condition approval of a draft erosion control plan upon the applicant's compliance with federal and State water quality laws, regulations, and rules. A local government shall disapprove an erosion control plan if implementation of the plan would result in a violation of rules adopted by the Environmental Management Commission to protect riparian buffers along surface waters. A local government may disapprove an erosion control plan upon finding that an applicant or a parent, subsidiary, or other affiliate of the applicant:

(1) Is conducting or has conducted land-disturbing activity without an approved plan, or has received notice of violation of a plan previously approved by the Commission or a local government pursuant to this Article and has not complied with the notice within the time specified in the notice;

(2) Has failed to pay a civil penalty assessed pursuant to this Article or a local ordinance adopted pursuant to this Article by the time the payment is due;

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-64(b) or any criminal provision of a local ordinance adopted pursuant to this Article; or

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article.

(b2) In the event that an erosion control plan is disapproved by a local government pursuant to subsection (b1) of this section, the local government shall so notify the Director of the Division of Land Resources within 10 days of such disapproval. The local government shall advise the applicant and the Director in writing as to the specific reasons that the plan was disapproved. Notwithstanding the provisions of subsection (c) of this section, the applicant may appeal the local government's disapproval of the plan directly to the Commission. For purposes of this subsection and subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

(c) The disapproval or modification of any proposed erosion control plan by a local government shall entitle the person submitting the plan to a public hearing if such person submits written demand for a hearing within 15 days after receipt of written notice of the disapproval or modification. The hearings shall be conducted pursuant to procedures adopted by the local government. If the local government upholds the disapproval or modification of a proposed erosion control plan following the public hearing, the person submitting the erosion control plan shall be entitled to appeal the local government's action disapproving or modifying the plan to the Commission. The Commission, by regulation, shall direct the Secretary to appoint such employees of the

Department as may be necessary to hear appeals from the disapproval or modification of erosion control plans by local governments. In addition to providing for the appeal of local government decisions disapproving or modifying erosion control plans to designated employees of the Department, the Commission shall designate an erosion control plan review committee consisting of three members of the Commission. The person submitting the erosion control plan may appeal the decision of an employee of the Department who has heard an appeal of a local government action disapproving or modifying an erosion control plan to the erosion plan review committee of the Commission. Judicial review of the final action of the erosion plan review committee of the Commission may be had in the superior court of the county in which the local government is situated.

(d) Repealed by Session Laws 1989, c. 676, s. 4. (1973, c. 392, s. 12; 1979, c. 922, s. 1; 1989, c. 676, s. 4; 1993 (Reg. Sess., 1994), c. 776, ss. 8, 9; 1998-221, s. 1.11(b); 1999-379, s. 3.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Session Laws 1998-221, s. 5.2, contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective November 5, 1998, added the present first sentence of subsection (b1).

Session Laws 1999-379, s. 3, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, in the introductory paragraph of subsection (b1), added the present first sentence and substituted "implementation of the plan" for "the plan, when implemented" in the present second sentence.

Legal Periodicals. — For survey of 1979 administrative law, see 58 N.C.L. Rev. 1185 (1980).

§ 113A-61.1. Inspection of land-disturbing activity; notice of violation.

(a) The Commission, a local government that administers an erosion and sediment control program approved under G.S. 113A-60, or other approving authority shall provide for inspection of land-disturbing activities to ensure compliance with this Article and to determine whether the measures required in an erosion control plan are effective in controlling erosion and sediment resulting from the land-disturbing activity. Notice of this right of inspection shall be included in the certificate of approval of each erosion control plan.

(b) No person shall willfully resist, delay, or obstruct an authorized representative of the Commission, an authorized representative of a local government, or an employee or an agent of the Department while the representative, employee, or agent is inspecting or attempting to inspect a land-disturbing activity under this section.

(c) If the Secretary, a local government that administers an erosion and sediment control program approved under G.S. 113A-60, or other approving authority determines that the person engaged in the land-disturbing activity has failed to comply with this Article, the Secretary, local government, or other approving authority shall immediately serve a notice of violation upon that person. The notice may be served by any means authorized under G.S. 1A-1, Rule 4. A notice of violation shall specify a date by which the person must comply with this Article and inform the person of the actions that need to be taken to comply with this Article. Any person who fails to comply within the time specified is subject to additional civil and criminal penalties for a continuing violation as provided in G.S. 113A-64. (1989, c. 676, s. 5; 1993 (Reg. Sess., 1994), c. 776, s. 10; 1999-379, s. 6.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Effect of Amendments. — Session Laws 1999-379, s. 6, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, in the last sentence in subsection (c), substituted "additional civil" for "the civil," and inserted "for a continuing violation as."

§ 113A-62. Cooperation with the United States.

The Commission is authorized to cooperate and enter into agreements with any agency of the United States government in connection with plans for erosion control with respect to land-disturbing activities on lands that are under the jurisdiction of such agency. (1973, c. 392, s. 13.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-63. Financial and other assistance.

The Commission and local governments are authorized to receive from federal, State, and other public and private sources financial, technical, and other assistance for use in accomplishing the purposes of this Article. (1973, c. 392, s. 14.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-64. Penalties.

(a) Civil Penalties. —

(1) Any person who violates any of the provisions of this Article or any ordinance, rule, or order adopted or issued pursuant to this Article by the Commission or by a local government, or who initiates or continues a land-disturbing activity for which an erosion control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty. The maximum civil penalty for a violation is five thousand dollars ($5,000). A civil penalty may be assessed from the date of the violation. Each day of a continuing violation shall constitute a separate violation.

(2) The Secretary or a local government that administers an erosion and sediment control program approved under G.S. 113A-60 shall determine the amount of the civil penalty and shall notify the person who is assessed the civil penalty of the amount of the penalty and the reason for assessing the penalty. The notice of assessment shall be served by any means authorized under G.S. 1A-1, Rule 4, and shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes. If a violator does not pay a civil penalty assessed by the Secretary within 30 days after it is due, the Department shall request the Attorney General to institute a civil action to recover the amount of the assessment. If a violator does not pay a civil penalty assessed by a local government within 30 days after it is due, the local government may institute a civil action to recover the amount of the assessment. The civil action may be brought in the superior court of any county where the violation occurred or the violator's residence or principal place of business is

located. A civil action must be filed within three years of the date the assessment was due. An assessment that is not contested is due when the violator is served with a notice of assessment. An assessment that is contested is due at the conclusion of the administrative and judicial review of the assessment.

(3) In determining the amount of the penalty, the Secretary shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by noncompliance, whether the violation was committed willfully and the prior record of the violator in complying or failing to comply with this Article.

(4) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 776, s. 11.

(5) The clear proceeds of civil penalties collected by the Department or other State agency under this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. Civil penalties collected by a local government under this subsection shall be credited to the general fund of the local government as nontax revenue.

(b) Criminal Penalties. — Any person who knowingly or willfully violates any provision of this Article or any ordinance, rule, regulation, or order duly adopted or issued by the Commission or a local government, or who knowingly or willfully initiates or continues a land-disturbing activity for which an erosion control plan is required, except in accordance with the terms, conditions, and provisions of an approved plan, shall be guilty of a Class 2 misdemeanor which may include a fine not to exceed five thousand dollars ($5,000). (1973, c. 392, s. 15; 1977, c. 852; 1987, c. 246, s. 3; 1987 (Reg. Sess., 1988), c. 1000, s. 5; 1989, c. 676, s. 6; 1991, c. 412, s. 2; c. 725, s. 5; 1993, c. 539, s. 873; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 776, s. 11; 1998-215, s. 52; 1999-379, s. 4.)

Editor's Note. — Subsection (a) of this section was amended by Session Laws 1987 (Reg. Sess., 1988), c. 1000, s. 5, in the coded bill drafting format provided by § 120-20.1. It was set out in the form above at the direction of the Revisor of Statutes.

For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, at the beginning of subdivision (a)(5), added "The clear proceeds of" and substituted "remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2" for "credited to the General Fund as nontax revenue."

Session Laws 1999-379, s. 4, effective October 1, 1999, and applicable to land-disturbing activity that occurs on or after that date, rewrote subdivision (a)(1).

Legal Periodicals. — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

CASE NOTES

Administrative Agencies' Power to Assess Civil Penalties Is Constitutional. — N.C. Const., Art. IV, § 3 does not prohibit the legislature from conferring the power on administrative agencies to assess civil penalties. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

Administrative Agencies' Power to Exercise Discretion in Determining Civil Penalties. — N.C. Const., Art. IV, § 3 does not prohibit the legislature from conferring on administrative agencies the power to exercise discretion in determining civil penalties within an authorized range, provided that adequate guiding standards accompany that discretion. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 324 N.C. 373, 379 S.E.2d 30 (1989).

Lack of Formally Adopted Guidelines Did Not Affect Substantial Right. — No substantial right of petitioners would have been prejudiced by a civil penalty based upon the secretary's application of the stated penalty factors absent formally adopted guidelines; petitioners did not have a substantial right to

calculate in advance, to the penny, whether the financial benefits of violating this Article would outweigh the possible expense of civil penalties. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

Defendant Entitled to Jury Trial in Civil Action under Subdivision (a)(2). — Where the Attorney General, on behalf of the Department, filed action for the collection of civil penalties under subdivision (a)(2) of this section and for the imposition of an order enforcing compliance with this Article and an injunction under § 113A-66, the action was a civil action, not one for review of a final agency decision, and defendant, who requested a jury trial in his answer, was therefore entitled to jury trial on all factual issues. State ex rel. Lee v. Williams, 55 N.C. App. 80, 284 S.E.2d 572 (1981).

This Section Provides Sufficient Guidance for Promulgation of Penalty Factors. — This Article in general, and this section in particular, provides sufficient guidance for department's promulgation of penalty factors based on its experience and expertise in enforcing the Article; it is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

Penalty Factors Reasonably Related to Administration and Enforcement of Article. — Department's assessment was not based upon the secretary's "absolute" discretion, but instead upon numerous penalty factors which were reasonably related to the Article's administration and enforcement and resulted in a fair and reasoned penalty assessment. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

Penalty Held Not Arbitrary or Capricious. — Where the penalty assessed by the Department of Natural Resources and Community Development (now Environment, Health, and Natural Resources) was within the statutory limits provided in this section, and the record evidenced the secretary's reasoned weighing of the penalty factors announced in 15 N.C. Adm. Code 4C.006, which were reasonably related to the Article's administration and enforcement, the department's assessment of the monetary penalty was not arbitrary and capricious. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

The department's assessment was not rendered arbitrary and capricious because it was based on penalty factors set forth in a properly adopted administrative regulation rather than in this section itself. In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act, 92 N.C. App. 1, 373 S.E.2d 572 (1988), rev'd on other grounds, 324 N.C. 373, 379 S.E.2d 30 (1989).

Applicable Statute of Limitations. — The one-year statute of limitations contained in § 1-54(2) does not apply to the assessment of a civil penalty by the Secretary of the Department of Environment, Health and Natural Resources pursuant to subdivision (a) because the assessment of the penalty is not an "action or proceeding" as those terms are used in § 1-54. Ocean Hill Joint Venture v. North Carolina Dep't of Environment, Health & Natural Resources, 333 N.C. 318, 426 S.E.2d 274 (1993).

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983); State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995).

§ 113A-64.1. Restoration of areas affected by failure to comply.

The Secretary or a local government that administers a local erosion and sediment control program approved under G.S. 113A-60 may require a person who engaged in a land-disturbing activity and failed to retain sediment generated by the activity, as required by G.S. 113A-57(3), to restore the waters and land affected by the failure so as to minimize the detrimental effects of the resulting pollution by sedimentation. This authority is in addition to any other civil or criminal penalty or injunctive relief authorized under this Article. (1993 (Reg. Sess., 1994), c. 776, s. 12.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-65. Injunctive relief.

(a) Violation of State Program. — Whenever the Secretary has reasonable cause to believe that any person is violating or is threatening to violate the requirements of this Article he may, either before or after the institution of any other action or proceeding authorized by this Article, institute a civil action for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the superior court of the county in which the violation or threatened violation is occurring or about to occur, and shall be in the name of the State upon the relation of the Secretary.

(b) Violation of Local Program. — Whenever the governing body of a local government having jurisdiction has reasonable cause to believe that any person is violating or is threatening to violate any ordinance, rule, regulation, or order adopted or issued by the local government pursuant to this Article, or any term, condition or provision of an erosion control plan over which it has jurisdiction, may, either before or after the institution of any other action or proceeding authorized by this Article, institute a civil action in the name of the local government for injunctive relief to restrain the violation or threatened violation. The action shall be brought in the superior court of the county in which the violation is occurring or is threatened.

(c) Abatement, etc., of Violation. — Upon determination by a court that an alleged violation is occurring or is threatened, the court shall enter any order or judgment that is necessary to abate the violation, to ensure that restoration is performed, or to prevent the threatened violation. The institution of an action for injunctive relief under subsections (a) or (b) of this section shall not relieve any party to the proceeding from any civil or criminal penalty prescribed for violations of this Article. (1973, c. 392, s. 16; 1993 (Reg. Sess., 1994), c. 776, s. 13.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

§ 113A-65.1. Stop-work orders.

(a) The Secretary may issue a stop-work order if he finds that a land-disturbing activity is being conducted in violation of this Article or of any rule adopted or order issued pursuant to this Article, that the violation is knowing and willful, and that either:

(1) Off-site sedimentation has eliminated or severely degraded a use in a lake or natural watercourse or that such degradation is imminent.

(2) Off-site sedimentation has caused severe damage to adjacent land or that such damage is imminent.

(3) The land-disturbing activity is being conducted without an approved plan.

(b) The stop-work order shall be in writing and shall state what work is to be stopped and what measures are required to abate the violation. The order shall include a statement of the findings made by the Secretary pursuant to subsection (a) of this section, and shall list the conditions under which work that has been stopped by the order may be resumed. The delivery of equipment and materials which does not contribute to the violation may continue while the stop-work order is in effect. A copy of this section shall be attached to the order.

(c) The stop-work order shall be served by the sheriff of the county in which the land-disturbing activity is being conducted or by some other person duly authorized by law to serve process as provided by G.S. 1A-1, Rule 4, and shall be served on the person at the site of the land-disturbing activity who is in

operational control of the land-disturbing activity. The sheriff or other person duly authorized by law to serve process shall post a copy of the stop-work order in a conspicuous place at the site of the land-disturbing activity. The Department shall also deliver a copy of the stop-work order to any person that the Department has reason to believe may be responsible for the violation.

(d) The directives of a stop-work order become effective upon service of the order. Thereafter, any person notified of the stop-work order who violates any of the directives set out in the order may be assessed a civil penalty as provided in G.S. 113A-64(a). A stop-work order issued pursuant to this section may be issued for a period not to exceed five days.

(e) The Secretary shall designate an employee of the Department to monitor compliance with the stop-work order. The name of the employee so designated shall be included in the stop-work order. The employee so designated, or the Secretary, shall rescind the stop-work order if all the violations for which the stop-work order are issued are corrected, no other violations have occurred, and all measures necessary to abate the violations have been taken. The Secretary shall rescind a stop-work order that is issued in error.

(f) The issuance of a stop-work order shall be a final agency decision subject to judicial review in the same manner as an order in a contested case pursuant to Article 4 of Chapter 150B of the General Statutes. The petition for judicial review shall be filed in the superior court of the county in which the land-disturbing activity is being conducted.

(g) As used in this section, days are computed as provided in G.S. 1A-1, Rule 6. Except as otherwise provided, the Secretary may delegate any power or duty under this section to the Director of the Division of Land Resources of the Department or to any person who has supervisory authority over the Director. The Director may delegate any power or duty so delegated only to a person who is designated as acting Director.

(h) The Attorney General shall file a cause of action to abate the violations which resulted in the issuance of a stop-work order within two days of the service of the stop-work order. The cause of action shall include a motion for an ex parte temporary restraining order to abate the violation and to effect necessary remedial measures. The resident superior court judge, or any judge assigned to hear the motion for the temporary restraining order, shall hear and determine the motion within two days of the filing of the complaint. The clerk of superior court shall accept complaints filed pursuant to this section without the payment of filing fees. Filing fees shall be paid to the clerk of superior court within 30 days of the filing of the complaint. (1991, c. 412, s. 1; 1998-99, s. 2.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

Effect of Amendments. — The 1998 amendment, effective October 1, 1998, substituted "five days" for "three days" in the last sentence of subsection (d).

CASE NOTES

The authority to assess civil penalties under § 113A-64 is still necessary to the enforcement of the Sedimentation Pollution Control Act (SPCA). State ex rel. Cobey v. Cook, 118 N.C. App. 70, 453 S.E.2d 553 (1995).

§ 113A-66. Civil relief.

(a) Any person injured by a violation of this Article or any ordinance, rule, or order duly adopted by the Secretary or a local government, or by the initiation or continuation of a land-disturbing activity for which an erosion control plan is required other than in accordance with the terms, conditions,

and provisions of an approved plan, may bring a civil action against the person alleged to be in violation (including the State and any local government). The action may seek:

(1) Injunctive relief;

(2) An order enforcing the law, rule, ordinance, order, or erosion control plan violated; or

(3) Damages caused by the violation; or

(4) Both damages and an enforcement order.

If the amount of actual damages as found by the court or jury in suits brought under this subsection is five thousand dollars ($5,000) or less, the plaintiff shall be awarded costs of litigation including reasonable attorneys fees and expert witness fees.

(b) Civil actions under this section shall be brought in the superior court of the county in which the alleged violations occurred.

(c) The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation (including reasonable attorney and expert-witness fees) to any party, whenever it determines that such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require, the filing of a bond or equivalent security, the amount of such bond or security to be determined by the court.

(d) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek injunctive or other relief. (1973, c. 392, s. 17; 1987 (Reg. Sess., 1988), c. 1000, s. 6.)

Editor's Note. — For conditional or temporary exemptions to this section, see the Editor's notes under § 113A-1.

CASE NOTES

Defendant Held Entitled to Jury Trial. — Where the Attorney General, on behalf of the Department, filed an action for the collection of civil penalties under § 113A-64(a)(2) and for the imposition of an order enforcing compliance with this Article and an injunction under this section, the action was a civil action, not one for review of a final agency decision, and defendant, who requested a jury trial in his answer, was therefore entitled to jury trial on all factual issues. State ex rel. Lee v. Williams, 55 N.C. App. 80, 284 S.E.2d 572 (1981).

Punitive Damages Not Recoverable. — The Act only provides for the recovery of "damages caused by the violation," and because punitive damages are designed to punish a party and are not awarded as compensation, they are not recoverable under the Act. Huberth v. Holly, 120 N.C. App. 348, 462 S.E.2d 239 (1995).

Stated in State ex rel. Grimsley v. Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983).

§§ 113A-67 through 113A-71: Reserved for future codification purposes.

Article 5.

North Carolina Appalachian Trails System Act.

§ 113A-72. Short title.

This Article may be cited as the North Carolina Appalachian Trails System Act. (1973, c. 545, s. 1.)

§ 113A-73. Policy and purpose.

(a) In order to provide for the ever-increasing outdoor recreation needs of an expanded population and in order to promote public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas of the State, the Appalachian Trail should be protected in North Carolina as a segment of the National Scenic Trails System.

(b) The purpose of this Article is to provide the means for attaining these objectives by instituting a North Carolina Appalachian Trail System, designating the Appalachian Trail lying or located in the North Carolina Counties of Avery, Mitchell, Yancey, Madison, Haywood, Swain, Graham, Macon, and Clay, as defined in the Federal Register of the National Trails Act as the basic component of that System, and by prescribing the methods by which, and standards according to which, additional connecting trails may be added to the System. (1973, c. 545, s. 2.)

§ 113A-74. Appalachian Trails System; connecting or side trails; coordination with the National Trails System Act.

Connecting or side trails may be established, designated and marked as components of the Appalachian Trail System by the Department of Environment and Natural Resources in consultation with the federal agencies charged with the responsibility for the administration and management of the Appalachian Trail in North Carolina. Criteria and standards of establishment will coincide with those set forth in the National Trails System Act (PL 90-543). (1973, c. 545, s. 3; 1977, c. 771, s. 4; 1989, c. 727, s. 218(61); 1997-443, s. 11A.119(a).)

§ 113A-75. Assistance under this Article with the National Trails System Act (PL 90-543).

(a) The Department of Administration in cooperation with other appropriate State departments shall consult with the federal agencies charged with the administration of the Appalachian Trail in North Carolina and develop a mutually agreeable plan for the orderly and coordinated acquisition of Appalachian Trail right-of-way and the associated tracts, as needed, to provide a suitable environment for the Appalachian Trail in North Carolina.

(b) The Department of Environment and Natural Resources and the federal agencies charged with the responsibility of the administration of the Appalachian Trail in North Carolina shall give due consideration to the conservation of the environment of the Appalachian Trail and, in accordance with the National Trails System Act, may obtain advice and assistance from local governments, Carolina Mountain Club, Nantahala Hiking Club, Piedmont Appalachian Trail Hikers, Appalachian Trail Conference, other interested organizations and individuals, landowners and land users concerned.

(c) The Board of Transportation shall cooperate and assist in carrying out the purposes of this Article and the National Trails System Act where their highway projects cross or may be adjacent to any component of the Appalachian Trail System.

(d) Lands acquired by the State of North Carolina within the 200-feet right-of-way of the Appalachian Trail and within the exterior boundaries of the Pisgah or Nantahala National Forests, will be conveyed to the United States Forest Service as the federal agency charged with the responsibility for the administration and management of the Appalachian Trail within these specific areas.

(e) Lands acquired by the State of North Carolina outside of the boundaries of the Appalachian Trail right-of-way will be administered by the appropriate State department in such a manner as to preserve and enhance the environment of the Appalachian Trail.

(f) In consultation with the Department of Environment and Natural Resources, the federal agency charged with the responsibility of the administration of the Appalachian Trail in North Carolina shall establish use regulations in accordance with the National Trails System Act.

(g) The use of motor vehicles on the trails of the North Carolina Appalachian Trail System may be authorized when such use is necessary to meet emergencies or to enable adjacent landowners to have reasonable access to their lands and timber rights provided that the granting of this access is in accordance with limitations and conditions of such use set forth in the National Trails System Act. (1973, c. 507, s. 5; c. 545, s. 4; 1977, c. 771, s. 4; 1989, c. 727, s. 218(62); 1997-443, s. 11A.119(a).)

§ 113A-76. Acquisition of rights-of-way and lands; manner of acquiring.

The State of North Carolina may use lands for trail purposes within the boundaries of areas under its administration that are included in the rights-of-way selected for the Appalachian Trail System. The Department of Administration may acquire lands or easements by donation or purchase with funds donated or appropriated for such purpose. (1973, c. 545, s. 5.)

§ 113A-77. Expenditures authorized.

The Department is authorized to spend any federal, State, local or private funds available for this purpose to the Department for acquisition and development of the Appalachian Trail System. (1973, c. 545, s. 6; 1977, c. 771, s. 4; 1989, c. 727, s. 125.)

§§ 113A-78 through 113A-82: Reserved for future codification purposes.

Article 6.

North Carolina Trails System.

§ 113A-83. Short title.

This Article shall be known and may be cited as the "North Carolina Trails System Act." (1973, c. 670, s. 1.)

§ 113A-84. Declaration of policy and purpose.

(a) In order to provide for the ever-increasing outdoor recreation needs of an expanded population and in order to promote public access to, travel within, and enjoyment and appreciation of the outdoor, natural and remote areas of the State, trails should be established in natural, scenic areas of the State, and in and near urban areas.

(b) The purpose of this Article is to provide the means for attaining these objectives by instituting a State system of scenic and recreation trails, coordinated with and complemented by existing and future local trail segments or systems, and by prescribing the methods by which, and standards

according to which, components may be added to the State trails system. (1973, c. 670, s. 1; 1993, c. 184, s. 1.)

§ 113A-85. Definitions.

Except as otherwise required by context, the following terms when used in this Article shall be construed respectively to mean:

(1) "Department" means the North Carolina Department of Environment and Natural Resources.

(2) "Political subdivision" means any county, any incorporated city or town, or other political subdivision.

(3) "Scenic easement" means a perpetual easement in land which
   a. Is held for the benefit of the people of North Carolina,
   b. Is specifically enforceable by its holder or beneficiary, and
   c. Limits or obligates the holder of the servient estate, his heirs, and assigns with respect to their use and management of land and activities conducted thereon, the object of such limitations and obligations being the maintenance or enhancement of the natural beauty of the land in question or of areas affected by it.

(4) "Secretary" means the Secretary of Environment and Natural Resources, except as otherwise specified in this Article.

(5) "State trails system" means the trails system established in this Article or pursuant to the State Parks Act, Article 2C of Chapter 113 of the General Statutes, and including all trails and trail segments, together with their rights-of-way, added by any of the procedures described in this Article or Article 2C of Chapter 113 of the General Statutes.

(6) "Trail" means:
   a. Park trail. — A trail designated and managed as a unit of the North Carolina State Parks System under Article 2C of Chapter 113 of the General Statutes.
   b. Designated trail. — A trail designated by the Secretary pursuant to this Article as a component of the State trails system and that is managed by another governmental agency or by a corporation listed with the Secretary of State.
   c. A State scenic trail, State recreation trail, or State connecting trail under G.S. 113A-86 when the intended primary use of the trail is to serve as a park trail or designated trail.
   d. Any other trail that is open to the public and that the owner, lessee, occupant, or person otherwise in control of the land on which the trail is located allows to be used as a trail without compensation, including a trail that is not designated by the Secretary as a component of the State trails system. (1973, c. 670, s. 1; 1977, c. 771, s. 4; 1989, c. 727, s. 218(63); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1993, c. 184, s. 2; 1997-443, s. 11A.119(a).)

§ 113A-86. Composition of State trails system.

The State trails system shall be composed of designated:

(1) State scenic trails, which are defined as extended trails so located as to provide maximum potential for the appreciation of natural areas and for the conservation and enjoyment of the significant scenic, historic, natural, ecological, geological or cultural qualities of the areas through which such trails may pass.

(2) State recreation trails, which are defined as trails planned principally for recreational value and may include trails for foot travel, horse-

back, nonmotorized bicycles, nonmotorized water vehicles, and two-wheel- and four-wheel-drive motorized vehicles. More than one of the aforesaid types of travel may be permitted on a single trail in the discretion of the Secretary.

(3) Connecting or side trails, which will provide additional points of public access to State recreation or State scenic trails or which will provide connections between such trails. (1973, c. 670, s. 1; 1993, c. 184, s. 3.)

§ 113A-87. Authority to designate trails.

The Department may establish and designate trails on:

(1) Lands administered by the Department,

(2) Lands under the jurisdiction of a State department, political subdivision, or federal agency, or

(3) Private lands provided, fee-simple title, lesser estates, scenic easements, easements of surface ingress and egress running with the land, leases, or other written agreements are obtained from landowners through which a State trail may pass. (1973, c. 670, s. 1; 1979, c. 6, s. 1; 1991, c. 115, s. 1; 1993, c. 184, s. 4.)

§ 113A-88. North Carolina Trails Committee; composition; meetings and functions.

(a) Repealed by Session Laws 1973, c. 1262, s. 82.

(b) The Committee shall meet in various sections of the State not less than two times annually to advise the Department on all matters directly or indirectly pertaining to trails, their use, extent, location, and the other objectives and purposes of this Article.

(c) The Committee shall coordinate trail development among local governments, and shall assist local governments in the formation of their trail plans and advise the Department quarterly of its findings.

(d) The Secretary, with advice of the Committee, shall study trail needs and potentials, and make additions to the State Trails System as needed. He shall submit an annual report to the Governor and General Assembly on trail activities by the Department, including rights-of-way that have been established and on the program for implementing this Article. Each report shall include a short statement on the significance of the various trails to the System. The Secretary shall make such rules as to trail development, management, and use that are necessary for the proper implementation of this Article. (1973, c. 670, s. 1; c. 1262, s. 82; 1987, c. 827, s. 132.)

Cross References. — As to the creation, composition, powers and duties of the North Carolina Trails Committee, see §§ 143B-333, 143B-334.

§ 113A-89. Location of trails.

The process of locating routes of designated trails to be added to the system shall be as follows:

For State scenic trails, the Secretary or a designee, after consulting with the Committee, shall recommend a route. For State recreation trails and for connecting or side trails, the Secretary or a designee, after consulting with the Committee, shall select the route. The Secretary may provide technical assistance to political subdivisions or private, nonprofit organizations that develop, construct, or maintain designated trails or other public trails that complement the State trails system. When a route shall traverse land within the jurisdiction of a governmental unit or political subdivision, the Depart-

ment shall consult with such unit or such subdivision prior to its final determination of the location of the route. The selected route shall be compatible with preservation or enhancement of the environment it traverses. Reasonable effort shall be made to minimize any adverse effects upon adjacent landowners and users. Notice of the selected route shall be published by the Department in a newspaper of general circulation in the area in which the trail is located, together with appropriate maps and descriptions to be conspicuously posted at the appropriate courthouse. Such publication shall be prior to the designation of the trail by the Secretary. (1973, c. 670, s. 1; 1993, c. 184, s. 5.)

§ 113A-90. Scenic easements within right-of-way.

Within the boundaries of the right-of-way, the Secretary of the North Carolina Department of Administration may acquire, on behalf of the State of North Carolina, lands in fee title, or interest in land in the form of scenic easements, cooperative agreements, easements of surface ingress and egress running with the land, leases, or less than fee estates. Acquisition of land or of interest therein may be by gift, purchased with donated funds or funds appropriated by the governmental agencies for this purpose, proceeds from the sale of bonds or exchange. Any change in value of land resulting from the grant of an easement shall be taken into consideration in the assessment of the land for tax purposes. (1973, c. 670, s. 1.)

§ 113A-91. Trails within parks; conflict of laws.

Any component of the System that is or shall become a part of any State park, recreation area, wildlife management area, or similar area shall be subject to the provisions of this Article as well as any other laws under which the other areas are administered, and in the case of conflict between the provisions the more restrictive provisions shall apply. (1973, c. 670, s. 1.)

§ 113A-92. Uniform trail markers.

The Department, in consultation with the Committee, shall establish a uniform marker for trails contained in the System. An additional appropriate symbol characterizing specific trails may be included on the marker. The markers shall be placed at all access points, together with signs indicating the modes of locomotion that are prohibited for the trail, provided that where the trail constitutes a portion of a national scenic trail, use of the national scenic trail uniform marker shall be considered sufficient. The route of the trail and the boundaries of the right-of-way shall be adequately marked. (1973, c. 670, s. 1.)

§ 113A-92.1. Adopt-A-Trail Program.

The Department shall establish an Adopt-A-Trail Program to coordinate with the Trails Committee and local groups or persons on trail development and maintenance. Local involvement shall be encouraged, and interested groups are authorized to "adopt-a-trail" for such purposes as placing trail markers, trail building, trail blazing, litter control, resource protection, and any other activities related to the policies and purposes of this Article. (1987, c. 738, s. 153(a).)

§ 113A-93. Administrative policy.

The North Carolina Trails System shall be administered by the Department according to the policies and criteria set forth in this Article. The Department

shall, in addition, have or designate the responsibility for maintaining the trails, building bridges, campsites, shelters, and related public-use facilities where required. (1973, c. 670, s. 1.)

§ 113A-94. Incorporation in National Trails System.

Nothing in this Article shall preclude a component of the State Trails System from becoming a part of the National Trails System. The Secretary shall coordinate the State Trails System with the National Trails System and is directed to encourage and assist any federal studies for inclusion of North Carolina trails in the National Trails System. The Department may enter into written cooperative agreements for joint federal-State administration of a North Carolina component of the National Trails System, provided such agreements for administration of land uses are not less restrictive than those set forth in this Article. (1973, c. 670, s. 1.)

§ 113A-95. Trail use liability.

(a) Any person, as an owner, lessee, occupant, or otherwise in control of land, who allows without compensation another person to use the land for designated trail or other public trail purposes or to construct, maintain, or cause to be constructed or maintained a designated trail or other public trail owes the person the same duty of care he owes a trespasser.

(b) Any person who without compensation has constructed, maintained, or caused to be constructed or maintained a designated trail or other public trail pursuant to a written agreement with any person who is an owner, lessee, occupant, or otherwise in control of land on which a trail is located shall owe a person using the trail the same duty of care owed a trespasser.

(c) Repealed by Session Laws 1993, c. 184, s. 6, effective July 21, 1993. (1987, c. 498, s. 1; 1991, c. 38, s. 1; 1993, c. 184, s. 6.)

§§ 113A-96 through 113A-99: Reserved for future codification purposes.

Article 7.

Coastal Area Management.

Part 1. Organization and Goals.

§ 113A-100. Short title.

This Article shall be known as the Coastal Area Management Act of 1974. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

Legal Periodicals. — For article analyzing and evaluating this Article in the light of the Federal Coastal Zone Management Act of 1972, see 53 N.C.L. Rev. 275 (1974).

For article, "The Coastal Area Management Act in the Courts: A Preliminary Analysis," see 53 N.C.L. Rev. 303 (1974).

For article, "A Legislative History of the Coastal Area Management Act," see 53 N.C.L. Rev. 345 (1974).

For comment, "Urban Planning and Land Use Regulation: The Need For Consistency," see 14 Wake Forest L. Rev. 81 (1978).

For survey of 1978 administrative law, see 57 N.C.L. Rev. 831 (1979).

For survey of 1978 constitutional law, see 57 N.C.L. Rev. 958 (1979).

For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legis-

lation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

CASE NOTES

Right to Trial by Jury. — This Article, the Coastal Area Management Act (CAMA) provides for a trial by jury only where a party owning land affected by a final decision of the Coastal Resources Commission petitions the superior court alleging a taking; there is no other statutory authority in CAMA, nor in the Dredge and Fill Act, granting a right to trial by jury. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

Trial court erred in granting defendant's demand for a jury trial in state-initiated proceeding seeking mandatory injunctive relief under this Article, the Coastal Area Management Act (CAMA) and the Dredge and Fill Act for the removal of fill material on defendant's property. Since such an action neither existed at common law nor by statute at the time of the adoption of the Constitution of 1868, N.C. Const., Art. I, § 25 did not apply. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

In an action brought by the State seeking preliminary injunction to require removal of sign and compliance with Coastal Area Management Act (CAMA), sign company was not entitled to trial by jury since it had not asserted a "right and remedy" existing when State Constitution was adopted and since CAMA did not provide statutory right to jury trial. State ex rel. Rhodes v. Givens, 101 N.C. App. 695, 400 S.E.2d 745 (1991).

The basic thrust of this Article is directed toward protecting areas of environmental concern by requiring permits for development in those areas. Rankin v. Coleman, 394 F. Supp. 647 (E.D.N.C. 1975), modified on other grounds, 401 F. Supp. 664 (E.D.N.C. 1975).

The coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

This Article, the Coastal Area Management Act of 1974, is a general law which the General Assembly had power to enact. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

This Article, the Coastal Area Management Act of 1974, properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Balancing of Costs and Benefits Not Appropriate. — In enacting the Coastal Area Management Act, the General Assembly has established its priorities through a comprehensive regulatory scheme, completely prohibiting, e.g., construction of bulkheads and other stabilization structures in wetlands, or the filling of wetlands therein; in that context, it is inappropriate, under the statute and the rules promulgated pursuant to it, for the courts to attempt to balance the private costs of restoration against the benefits of the coastal wetlands environment. State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Cited in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986); Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986); Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990); Ballance v. North Carolina Coastal Resources Comm'n, 108 N.C. App. 288, 423 S.E.2d 815 (1992); Coastal Ready-Mix Concrete Co. v. North Carolina Coastal Resources Comm'n, 116 N.C. App. 119, 446 S.E.2d 823 (1994); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995); Walker v. North Carolina Coastal Resources Comm'n, 124 N.C. App. 1, 476 S.E.2d 138 (1996), cert. denied, 346 N.C. 185, 486 S.E.2d 220 (1997); King ex rel. Warren v. State, 125 N.C. App. 379, 481 S.E.2d 330 (1997).

§ 113A-101. Cooperative State-local program.

This Article establishes a cooperative program of coastal area management between local and State governments. Local government shall have the initiative for planning. State government shall establish areas of environmental concern. With regard to planning, State government shall act primarily in a supportive standard-setting and review capacity, except where local governments do not elect to exercise their initiative. Enforcement shall be a concurrent State-local responsibility. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

CASE NOTES

Quoted in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-102. Legislative findings and goals.

(a) Findings. — It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina.

In the implementation of the coastal area management plan, the public's opportunity to enjoy the physical, esthetic, cultural, and recreational qualities of the natural shorelines of the State shall be preserved to the greatest extent feasible; water resources shall be managed in order to preserve and enhance water quality and to provide optimum utilization of water resources; land resources shall be managed in order to guide growth and development and to minimize damage to the natural environment; and private property rights shall be preserved in accord with the Constitution of this State and of the United States.

(b) Goals. — The goals of the coastal area management system to be created pursuant to this Article are as follows:

(1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;

(2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;

(3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;

(4) To establish policies, guidelines and standards for:

a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to intensive use or development, as well as areas of significant natural value;

b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;

c. Recreation and tourist facilities and parklands;

d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;

f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;

g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

CASE NOTES

Commission Has Been Given Adequate Guidelines. — The goals, policies and criteria outlined in this section and § 113A-113 provide the members of the Coastal Resources Commission with an adequate notion of the legislative parameters within which they are to operate in the exercise of their delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The declarations of legislative findings and goals articulated in this section and the criteria for designating areas of environmental concern in § 113A-113 are as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Scope of Regulation. — The Coastal Area Management Act does not merely regulate significant development, but all development in North Carolina's coastal wetlands. State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Revised zoning ordinance which prohibited further development of wet and dry boat storage at marinas was within the police power of the State and consistent with this Article, the Coastal Area Management Act. Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986).

Quoted in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986).

Cited in State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

§ 113A-103. Definitions.

As used in this Article:

(1) "Advisory Council" means the Coastal Resources Advisory Council created by G.S. 113A-105.

(1a) "Boat" means a vessel or watercraft of any type or size specifically designed to be self-propelled, whether by engine, sail, oar, or paddle or other means, which is used to travel from place to place by water.

(2) "Coastal area" means the counties that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean (extending offshore to the limits of State jurisdiction, as may be identified by rule of the Commission for purposes of this Article, but in no event less than three geographical miles offshore) or any coastal sound. The Governor, in accordance with the standards set forth in

this subdivision and in subdivision (3) of this section, shall designate the counties that constitute the "coastal area," as defined by this section, and his designation shall be final and conclusive. On or before May 1, 1974, the Governor shall file copies of a list of said coastal-area counties with the chairmen of the boards of commissioners of each county in the coastal area, with the mayors of each incorporated city within the coastal area (as so defined) having a population of 2,000 or more and of each incorporated city having a population of less than 2,000 whose corporate boundaries are contiguous with the Atlantic Ocean, and with the Secretary of State. The said coastal-area counties and cities shall thereafter transmit nominations to the Governor of members of the Coastal Resources Commission as provided in G.S. 113A-104(d).

(3) "Coastal sound" means Albemarle, Bogue, Core, Croatan, Currituck, Pamlico and Roanoke Sounds. For purposes of this Article, the inland limits of a sound on a tributary river shall be defined as the limits of seawater encroachment on said tributary river under normal conditions. "Normal conditions" shall be understood to include regularly occurring conditions of low stream flow and high tide, but shall not include unusual conditions such as those associated with hurricane and other storm tides. Unless otherwise determined by the Commission, the limits of seawater encroachment shall be considered to be the confluence of a sound's tributary river with the river or creek entering it nearest to the farthest inland movement of oceanic salt water under normal conditions. For purposes of this Article, the aforementioned points of confluence with tributary rivers shall include the following:

a. On the Chowan River, its confluence with the Meherrin River;
b. On the Roanoke River, its confluence with the northeast branch of the Cashie River;
c. On the Tar River, its confluence with Tranters Creek;
d. On the Neuse River, its confluence with Swift Creek;
e. On the Trent River, its confluence with Ready Branch.

Provided, however, that no county shall be considered to be within the coastal area which: (i) is adjacent to, adjoining or bounded by any of the above points of confluence and lies entirely west of said point of confluence; or (ii) is not bounded by the Atlantic Ocean and lies entirely west of the westernmost of the above points of confluence.

(4) "Commission" means the Coastal Resources Commission created by G.S. 113A-104.

(4a) "Department" means the Department of Environment and Natural Resources.

(5)a. "Development" means any activity in a duly designated area of environmental concern (except as provided in paragraph b of this subdivision) involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes; alteration of the shore, bank, or bottom of the Atlantic Ocean or any sound, bay, river, creek, stream, lake, or canal; or placement of a floating structure in an area of environmental concern identified in G.S. 113A-113(b)(2) or (b)(5).

b. The following activities including the normal and incidental operations associated therewith shall not be deemed to be development under this section:

1. Work by a highway or road agency for the maintenance of an existing road, if the work is carried out on land within the boundaries of the existing right-of-way;

2. Work by any railroad company or by any utility and other persons engaged in the distribution and transmission of petroleum products, water, telephone or telegraph messages, or electricity for the purpose of inspecting, repairing, maintaining, or upgrading any existing substations, sewers, mains, pipes, cables, utility tunnels, lines, towers, poles, tracks, and the like on any of its existing railroad or utility property or rights-of-way, or the extension of any of the above distribution-related facilities to serve development approved pursuant to G.S. 113A-121 or 113A-122;
3. Work by any utility and other persons for the purpose of construction of facilities for the development, generation, and transmission of energy to the extent that such activities are regulated by other law or by present or future rules of the State Utilities Commission regulating the siting of such facilities (including environmental aspects of such siting), and work on facilities used directly in connection with the above facilities;
4. The use of any land for the purposes of planting, growing, or harvesting plants, crops, trees, or other agricultural or forestry products, including normal private road construction, raising livestock or poultry, or for other agricultural purposes except where excavation or filling affecting estuarine waters (as defined in G.S. 113-229) or navigable waters is involved;
5. Maintenance or repairs (excluding replacement) necessary to repair damage to structures caused by the elements or to prevent damage to imminently threatened structures by the creation of protective sand dunes.
6. The construction of any accessory building customarily incident to an existing structure if the work does not involve filling, excavation, or the alteration of any sand dune or beach;
7. Completion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to ratification of this Article and which development was initiated prior to the ratification of this Article;
8. Completion of installation of any utilities or roads or related facilities not otherwise in violation of law, within a subdivision that was duly approved and recorded prior to the ratification of this Article and which installation was initiated prior to the ratification of this Article;
9. Construction or installation of any development, not otherwise in violation of law, for which an application for a building or zoning permit was pending prior to the ratification of this Article and for which a loan commitment (evidenced by a notarized document signed by both parties) had been made prior to the ratification of this Article; provided, said building or zoning application is granted by July 1, 1974;
10. It is the intention of the General Assembly that if the provisions of any of the foregoing subparagraphs 1 to 10 of this paragraph are held invalid as a grant of an exclusive or separate emolument or privilege or as a denial of the equal protection of the laws, within the meaning of Article I, Secs. 19 and 32 of the North Carolina Constitution, the remainder of this Article shall be given effect without the invalid provision or provisions.

c. The Commission shall define by rule (and may revise from time to time) certain classes of minor maintenance and improvements which shall be exempted from the permit requirements of this Article, in addition to the exclusions set forth in paragraph b of this subdivision. In developing such rules the Commission shall consider, with regard to the class or classes of units to be exempted:

1. The size of the improved or scope of the maintenance work;
2. The location of the improvement or work in proximity to dunes, waters, marshlands, areas of high seismic activity, areas of unstable soils or geologic formations, and areas enumerated in G.S. 113A-113(b)(3); and
3. Whether or not dredging or filling is involved in the maintenance or improvement.

(5a) "Floating structure" means any structure, not a boat, supported by a means of floatation, designed to be used without a permanent foundation, which is used or intended for human habitation or commerce. A structure shall be considered a floating structure when it is inhabited or used for commercial purposes for more than thirty days in any one location. A boat may be considered a floating structure when its means of propulsion has been removed or rendered inoperative.

(6) "Key facilities" include the site location and the location of major improvement and major access features of key facilities, and mean:

a. Public facilities, as determined by the Commission, on nonfederal lands which tend to induce development and urbanization of more than local impact, including but not limited to:

1. Any major airport designed to serve as a terminal for regularly scheduled air passenger service or one of State concern;
2. Major interchanges between the interstate highway system and frontage-access streets or highways; major interchanges between other limited-access highways and frontage-access streets or highways;
3. Major frontage-access streets and highways, both of State concern; and
4. Major recreational lands and facilities;

b. Major facilities on nonfederal lands for the development, generation, and transmission of energy.

(7) "Lead regional organizations" means the regional planning agencies created by and representative of the local governments of a multicounty region, and designated as lead regional organizations by the Governor.

(8) "Local government" means the governing body of any county or city which contains within its boundaries any lands or waters subject to this Article.

(9) "Person" means any individual, citizen, partnership, corporation, association, organization, business trust, estate, trust, public or municipal corporation, or agency of the State or local government unit, or any other legal entity however designated.

(10) Repealed by Session Laws 1987, c. 827, s. 133.

(11) "Secretary" means the Secretary of Environment and Natural Resources, except where otherwise specified in this Article. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 913, s. 1; c. 932, s. 2.1; 1987, c. 827, s. 133; 1989, c. 727, s. 126; 1991 (Reg. Sess., 1992), c. 839, ss. 1, 4; 1995, c. 509, s. 58; 1997-443, s. 11A.119(a).)

Cross References. — As to the Coastal Reserve Program, see § 113A-129.2.

Editor's Note. — Subdivisions (1a) and (5a) were so designated at the direction of the Revisor of Statutes, the subdivisions in the act having been designated (12) and (13), respectively.

CASE NOTES

"Coastal Area." — The boundaries of the coastal area could not be formulated with mathematical exactness. The criterion ultimately chosen by the General Assembly to distinguish the salty coastal sounds from the fresh water coastal rivers which fed into the sounds was "the limit of seawater encroachment" on a given coastal river under normal conditions. The western boundary of the coastal zone as determined by use of the seawater encroachment criterion is reasonably related to the purpose of this Article. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The definition in subdivision (2) accurately reflects the unique geography of the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Inland Limits of Coastal Sounds Are Western Boundary of Coastal Zone. — The inland limits of the coastal sounds in effect constitute the western boundaries of the coastal zone for purposes of this Article. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Jones and Pitt Counties Excluded. — Two counties, Jones and Pitt, were excluded from this Article as the result of the General Assembly excluding from the coverage of this Article all counties which adjoined a point of confluence and lay entirely west of said point. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The slight extent of seawater encroachment into Jones and Pitt counties was of no significance to an accurate and reasonable definition of the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The purpose of the exception of subparagraph (5)b7 was to exempt projects that were already underway and were so far along in their development that to require a permit under this Article would be unfair and possibly a denial of constitutionally protected vested private property rights. Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986).

Applicability of Subparagraph (5)b7. — The exception in subparagraph (5)b7 did not apply to replacement of decking merely because original marina and pilings were built before the ratification of this Article, the Coastal Area Management Act, as petitioner had to obtain a new building permit from the Town of Bath prior to building this decking, which permit was issued after the ratification of CAMA. Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986).

Quoted in State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Cited in In re Coastal Resources Comm'n, 96 N.C. App. 468, 386 S.E.2d 92 (1989).

§ 113A-104. Coastal Resources Commission.

(a) Established. — The General Assembly hereby establishes within the Department of Environment and Natural Resources a commission to be designated the Coastal Resources Commission.

(b) Composition. — The Coastal Resources Commission shall consist of 15 members appointed by the Governor, as follows:

(1) One who shall at the time of appointment be actively connected with or have experience in commercial fishing.

(2) One who shall at the time of appointment be actively connected with or have experience in wildlife or sports fishing.

(3) One who shall at the time of appointment be actively connected with or have experience in marine ecology.

(4) One who shall at the time of appointment be actively connected with or have experience in coastal agriculture.

(5) One who shall at the time of appointment be actively connected with or have experience in coastal forestry.
(6) One who shall at the time of appointment be actively connected with or have experience in coastal land development.
(7) One who shall at the time of appointment be actively connected with or have experience in marine-related business (other than fishing and wildlife).
(8) One who shall at the time of appointment be actively connected with or have experience in engineering in the coastal area.
(9) One who shall at the time of appointment be actively associated with a State or national conservation organization.
(10) One who shall at the time of appointment be actively connected with or have experience in financing of coastal land development.
(11) Two who shall at the time of appointment be actively connected with or have experience in local government within the coastal area.
(12) Three at-large members.

(c) Appointment of Members. — Appointments to the Commission shall be made to provide knowledge and experience in a diverse range of coastal interests. The members of the Commission shall serve and act on the Commission solely for the best interests of the public and public trust, and shall bring their particular knowledge and experience to the Commission for that end alone.

The Governor shall appoint in his sole discretion those members of the Commission whose qualifications are described in subdivisions (6) and (10), and one of the three members described in subdivision (12) of subsection (b) of this section.

The remaining members of the Commission shall be appointed by the Governor after completion of the nominating procedures prescribed by subsection (d) of this section. The members of the Commission whose qualifications are described in subdivisions (1) through (5), (9), and (11), shall be persons who do not derive any significant portion of their income from land development, construction, real estate sales, or lobbying and do not otherwise serve as agents for development-related business activities. The Governor shall require adequate disclosure of potential conflicts of interest by members. The Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons under this section.

(d) Nominations for Membership. — On or before May 1 in every even-numbered year the Governor shall designate and transmit to the board of commissioners in each county in the coastal area four nominating categories applicable to that county for that year. Said nominating categories shall be selected by the Governor from among the categories represented, respectively by subdivisions (1), (2), (3), (4), (5), (7), (8), (9), (11) — two persons, and (12) — two persons, of subsection (b) of this section (or so many of the above-listed paragraphs as may correspond to vacancies by expiration of term that are subject to being filled in that year). On or before June 1 in every even-numbered year the board of commissioners of each county in the coastal area shall nominate (and transmit to the Governor the names of) one qualified person in each of the four nominating categories that was designated by the Governor for that county for that year. In designating nominating categories from biennium to biennium, the Governor shall equitably rotate said categories among the several counties of the coastal area as in his judgment he deems best; and he shall assign, as near as may be, an even number of nominees to each nominating category and shall assign in his best judgment any excess above such even number of nominees. On or before June 1 in every even-numbered year the governing body of each incorporated city within the coastal

area shall nominate and transmit to the Governor the name of one person as a nominee to the Commission. In making nominations, the boards of county commissioners and city governing bodies shall give due consideration to the nomination of women and minorities. The Governor shall appoint 12 persons from among said city and county nominees to the Commission. The several boards of county commissioners and city governing bodies shall transmit the names, addresses, and a brief summary of the qualifications of their nominees to the Governor on or before June 1 in each even-numbered year, beginning in 1974; provided, that the Governor, by registered or certified mail, shall notify the chairman or the mayors of the said local governing boards by May 20 in each such even-numbered year of the duties of local governing boards under this sentence. If any board of commissioners or city governing body fails to transmit its list of nominations to the Governor by June 1, the Governor may add to the nominations a list of qualified nominees in lieu of those that were not transmitted by the board of commissioners or city governing body; Provided however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean. Within the meaning of this section, the "governing body" is the mayor and council of a city as defined in G.S. 160A-66. The population of cities shall be determined according to the most recent annual estimates of population as certified to the Secretary of Revenue by the Secretary of Administration.

(e) Residential Qualifications. — All nominees of the several boards of county commissioners and city governing bodies must reside within the coastal area, but need not reside in the county from which they were nominated. No more than one of those members appointed by the Governor from among said nominees may reside in a particular county. No more than two members of the entire Commission, at any time, may reside in a particular county. No more than two members of the entire Commission, at any time, may reside outside the coastal area.

(f) Office May Be Held Concurrently with Others. — Membership on the Coastal Resources Commission is hereby declared to be an office that may be held concurrently with other elective or appointive offices in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.

(g) Terms. — The members shall serve staggered terms of office of four years. At the expiration of each member's term, the Governor shall reappoint or replace the member with a new member of like qualification (as specified in subsection (b) of this section), in the manner provided by subsections (c) and (d) of this section. The initial term shall be determined by the Governor in accordance with customary practice but eight of the initial members shall be appointed for two years and seven for four years.

(h) Vacancies. — In the event of a vacancy arising otherwise than by expiration of term, the Governor shall appoint a successor of like qualification (as specified in subsection (b) of this section) who shall then serve the remainder of his predecessor's term. When any such vacancy arises, the Governor shall immediately notify the board of commissioners of each county in the coastal area and the governing body of each incorporated city within the coastal area. Within 30 days after receipt of such notification each such county board and city governing body shall nominate and transmit to the Governor the name and address of one person who is qualified in the category represented by the position to be filled, together with a brief summary of the qualifications of the nominee. The Governor shall make the appointment from among said city and county nominees. If any county board or city governing body fails to make a timely transmittal of its nominee, the Governor may add to the nominations a qualified person in lieu of said nominee; Provided

however, the Governor may not add to the list a nominee in lieu of one not transmitted by an incorporated city within the coastal area that neither has a population of 2,000 or more nor is contiguous with the Atlantic Ocean.

(i) Officers. — The chairman shall be designated by the Governor from among the members of the Commission to serve as chairman at the pleasure of the Governor. The vice-chairman shall be elected by and from the members of the Commission and shall serve for a term of two years or until the expiration of his regularly appointed term.

(j) Compensation. — The members of the Commission shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5.

(k) In making appointments to and filling vacancies upon the Commission, the Governor shall give due consideration to securing appropriate representation of women and minorities.

(*l*) Regular attendance at Commission meetings is a duty of each member. The Commission shall develop procedures for declaring any seat on the Commission to be vacant upon failure by a member to perform this duty. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; c. 486, ss. 1-6; 1981, c. 932, s. 2.1; 1989, c. 505; c. 727, s. 218(64); 1997-443, s. 11A.119(a).)

CASE NOTES

Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Cited in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986); Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990).

§ 113A-105. Coastal Resources Advisory Council.

(a) Creation. — There is hereby created and established a council to be known as the Coastal Resources Advisory Council.

(b) The Coastal Resources Advisory Council shall consist of not more than 45 members appointed or designated as follows:

(1) Two individuals designated by the Secretary from among the employees of the Department;

(1a) The Secretary of Commerce or person designated by the Secretary of Commerce;

(2) The Secretary of Administration or person designated by the Secretary of Administration;

(3) The Secretary of Transportation or person designated by the Secretary of Transportation; and one additional member selected by the Secretary of Transportation from the Department of Transportation;

(4) The State Health Director or the person designated by the State Health Director;

(5) The Commissioner of Agriculture or person designated by the Commissioner of Agriculture;

(6) The Secretary of Cultural Resources or person designated by the Secretary of Cultural Resources;

(7) One member from each of the four multi-county planning districts of the coastal area to be appointed by the lead regional agency of each district;

(8) One representative from each of the counties in the coastal area to be designated by the respective boards of county commissioners;

(9) No more than eight additional members representative of cities in the coastal area and to be designated by the Commission;

(10) Three members selected by the Commission who are marine scientists or technologists;

(11) One member who is a local health director selected by the Commission upon the recommendation of the Secretary.

(c) Functions and Duties. — The Advisory Council shall assist the Secretary and the Secretary of Administration in an advisory capacity:

(1) On matters which may be submitted to it by either of them or by the Commission, including technical questions relating to the development of rules, and

(2) On such other matters arising under this Article as the Council considers appropriate.

(d) Multiple Offices. — Membership on the Coastal Resources Advisory Council is hereby declared to be an office that may be held concurrently with other elective or appointive offices (except the office of Commission member) in addition to the maximum number of offices permitted to be held by one person under G.S. 128-1.1.

(e) Chairman and Vice-Chairman. — A chairman and vice-chairman shall be elected annually by the Council.

(f) Compensation. — The members of the Advisory Council who are not State employees shall receive per diem and necessary travel and subsistence expenses in accordance with the provisions of G.S. 138-5. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 249, ss. 1, 2; 1989, c. 727, s. 127; c. 751, s. 8(14a); 1991 (Reg. Sess., 1992), c. 959, s. 26; 1995, c. 123, s. 4; c. 504, s. 7.)

CASE NOTES

Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Part 2. Planning Processes.

§ 113A-106. Scope of planning processes.

Planning processes covered by this Article include the development and adoption of State guidelines for the coastal area and the development and adoption of a land-use plan for each county within the coastal area, which plans shall serve as criteria for the issuance or denial of development permits under Part 4. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Cited in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-106.1. Adoption of Coastal Habitat Protection Plans.

The Commission shall approve Coastal Habitat Protection Plans as provided in G.S. 143B-279.8. (1997-400, s. 3.3.)

Editor's Note. — Session Laws 1997-400, s. 6.15, made this section effective July 1, 1998.

Session Laws 1997-400, s. 1.1, provides: "This act shall be known as the 'Fisheries Reform Act of 1997'."

Session Laws 1997-400, s. 6.10, provides that, unless otherwise expressly provided, every agency to which the act applies shall adopt rules to implement the provisions of that act only in accordance with the provisions of Chapter 150B of the General Statutes, that the act constitutes a recent act of the General Assembly within the meaning of G.S. 150B-21.1, that every agency to which the act applies that is authorized to adopt rules to implement the provisions of the act may adopt temporary rules to implement the provisions of the act, and that s. 6.10 of that act shall continue in effect until all rules necessary to implement the provisions of the act have become effective as either temporary rules or permanent rules.

Session Laws 1997-400, s. 6.13, is a severability clause.

§ 113A-107. State guidelines for the coastal area.

(a) State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area. Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102. They shall give particular attention to the nature of development which shall be appropriate within the various types of areas of environmental concern that may be designated by the Commission under Part 3. Land and water areas addressed in the State guidelines may include underground areas and resources, and airspace above the land and water, as well as the surface of the land and surface waters. Such guidelines shall be used in the review of applications for permits issued pursuant to this Article and for review of and comment on proposed public, private and federal agency activities that are subject to review for consistency with State guidelines for the coastal area. Such comments shall be consistent with federal laws and regulations.

(b) The Commission shall be responsible for the preparation, adoption, and amendment of the State guidelines. In exercising this function it shall be furnished such staff assistance as it requires by the Secretary of Environment and Natural Resources and the Secretary of the Department of Administration, together with such incidental assistance as may be requested of any other State department or agency.

(c) The Commission shall mail proposed as well as adopted rules establishing guidelines for the coastal area to all cities, counties, and lead regional organizations within the area and to all State, private, federal, regional, and local agencies the Commission considers to have special expertise on the coastal area. A person who receives a proposed rule may send written comments on the proposed rule to the Commission within 30 days after receiving the proposed rule. The Commission shall consider any comments received in determining whether to adopt the proposed rule.

(d), (e) Repealed by Session Laws 1987, c. 827, s. 134.

(f) The Commission shall review its rules establishing guidelines for the coastal area at least every five years to determine whether changes in the rules are needed. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1975, 2nd Sess., c. 983, ss. 75, 76; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, s. 134; 1989, c. 313; c. 727, s. 218(65); 1997-443, s. 11A.119(a).)

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

CASE NOTES

Legislative Intent — Amendment of Rules. — Commission offered no support for its argument that recodified § 113A-107 did not apply to amendment of existing guidelines; the legislature did not intend to create differing obligations to give notice in the adoption of new rules and the amendment of existing rules. Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

Authority Properly Delegated. — This Article, the Coastal Area Management Act of 1974, properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The purpose of CAMA's input and review provisions is to curb arbitrary and unreasoned action by the CRC. Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

Input and Review Provisions Guard Against Arbitrary Commission Action. — The broad provisions in this section for input and review by groups representing all levels and types of agencies and interests provide a substantial curb against arbitrary and unreasoned action by the Coastal Resources Commission. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Commission Rules Subject to Review. — Pursuant to former § 120-30.24 et seq., all rules adopted by the Coastal Resources Commission are subject to review by a permanent committee of the Legislative Research Commission known as the Administrative Rules Committee. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Construction with Administrative Procedure Act. — The mandatory provisions of the Administrative Procedure Act, § 150B-1 et seq., must be read as complementing the procedural safeguards in this Article, the Coastal Area Management Act of 1974. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Amendments to the State guidelines by the Coastal Resources Commission are considered administrative rulemaking and are thus subject to the comprehensive additional safeguards contained in § 150B-1 et seq., the Administrative Procedure Act. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Temporary Rules Must Comply with APA and CAMA. — A temporary rule issued under former § 150B-13 of the Administrative Procedure Act (APA) failed to comply with Coastal Area Management Act's (CAMA's) notice and comment provisions; the mandatory provisions of the APA complement the procedural safeguards in the CAMA; the temporary rule provisions of § 150B-13 exempt agencies only from the APA notice and comment requirements; clearly, the General Assembly did not intend that the Commission use APA temporary rules to circumvent public review and comment on major projects that could affect the State's coastal resources. Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

§ 113A-108. Effect of State guidelines.

All local land-use plans adopted pursuant to this Article within the coastal area shall be consistent with the State guidelines. No permit shall be issued under Part 4 of this Article which is inconsistent with the State guidelines. Any State land policies governing the acquisition, use and disposition of land by State departments and agencies shall take account of and be consistent with the State guidelines adopted under this Article, insofar as lands within the coastal area are concerned. Any State land classification system which shall be promulgated shall take account of and be consistent with the State guidelines adopted under this Article, insofar as it applies to lands within the coastal area. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

CASE NOTES

This Article, the Coastal Area Management Act of 1974, properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The authority delegated to the Coastal Resources Commission is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies and procedural safeguards. The General Assembly properly delegated to the Commission the authority to prepare and adopt State guidelines for the coastal area. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Purpose of State Guidelines. — The State guidelines are designed to facilitate State and local government compliance with the planning and permit-letting aspects of this Article. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Cited in Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

§ 113A-109. County letter of intent; timetable for preparation of land-use plan.

Within 120 days after July 1, 1974, each county within the coastal area shall submit to the Commission a written statement of its intent to develop a land-use plan under this Article or its intent not to develop such a plan. If any county states its intent not to develop a land-use plan or fails to submit a statement of intent within the required period, the Commission shall prepare and adopt a land-use plan for that county. If a county states its intent to develop a land-use plan, it shall complete the preparation and adoption of such plan within 480 days after adoption of the State guidelines. In the event of failure by any county to complete its required plan within this time, the Commission shall promptly prepare and adopt such a plan.

In any case where the Commission has adopted a land-use plan for a county that county may prepare its own land-use plan in accordance with the procedures of this Article, and upon approval of such plan by the Commission it shall supersede the Commission's plan on a date specified by the Commission. (1973, c. 1284, s. 1; 1975, c. 452, ss. 1, 5; 1981, c. 932, s. 2.1.)

CASE NOTES

Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-110. Land-use plans.

(a) A land-use plan for a county shall, for the purpose of this Article, consist of statements of objectives, policies, and standards to be followed in public and private use of land within the county, which shall be supplemented by maps showing the appropriate location of particular types of land or water use and their relationships to each other and to public facilities and by specific criteria for particular types of land or water use in particular areas. The plan shall give special attention to the protection and appropriate development of areas of environmental concern designated under Part 3. The plan shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102 and with the State guidelines adopted by the Commission under G.S. 113A-107. The plan shall be adopted, and may be amended from time to time, in accordance with the procedures set forth in this section.

(b) The body charged with preparation and adoption of a county's land-use plan (whether the county government or the Commission) may delegate some or all of its responsibilities to the lead regional organization for the region of

which the county is a part. Any such delegation shall become effective upon the acceptance thereof by the lead regional organization. Any county proposing a delegation to the lead regional organization shall give written notice thereof to the Commission at least two weeks prior to the date on which such action is to be taken. Any city or county within the coastal area may also seek the assistance or advice of its lead regional organization in carrying out any planning activity under this Article.

(c) The body charged with preparation and adoption of a county's land-use plan (whether the county or the Commission or a unit delegated such responsibility) may either (i) delegate to a city within the county responsibility for preparing those portions of the land-use plan which affect land within the city's zoning jurisdiction or (ii) receive recommendations from the city concerning those portions of the land-use plan which affect land within the city's zoning jurisdiction, prior to finally adopting the plan or any amendments thereto or (iii) delegate responsibility to some cities and receive recommendations from other cities in the county. The body shall give written notice to the Commission of its election among these alternatives. On written application from a city to the Commission, the Commission shall require the body to delegate plan-making authority to that city for land within the city's zoning jurisdiction if the Commission finds that the city is currently enforcing its zoning ordinance, its subdivision regulations, and the State Building Code within such jurisdiction.

(d) The body charged with adoption of a land-use plan may either adopt it as a whole by a single resolution or adopt it in parts by successive resolutions; said parts may either correspond with major geographical sections or divisions of the county or with functional subdivisions of the subject matters of the plan. Amendments and extensions to the plan may be adopted in the same manner.

(e) Prior to adoption or subsequent amendment of any land-use plan, the body charged with its preparation and adoption (whether the county or the Commission or a unit delegated such responsibility) shall hold a public hearing at which public and private parties shall have the opportunity to present comments and recommendations. Notice of the hearing shall be given not less than 30 days before the date of the hearing and shall state the date, time, and place of the hearing; the subject of the hearing; the action which is proposed; and that copies of the proposed plan or amendment are available for public inspection at a designated office in the county courthouse during designated hours. Any such notice shall be published at least once in a newspaper of general circulation in the county.

(f) No land-use plan shall become finally effective until it has been approved by the Commission. The county or other unit adopting the plan shall transmit it, when adopted, to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the plan, and shall review and consider each county land-use plan in light of such objections and comments, the State guidelines, the requirements of this Article, and any generally applicable standards of review adopted by rule of the Commission. Within 45 days after receipt of a county land-use plan the Commission shall either approve the plan or notify the county of the specific changes which must be made in order for it to be approved. Following such changes, the plan may be resubmitted in the same manner as the original plan.

(g) Copies of each county land-use plan which has been approved, and as it may have been amended from time to time, shall be maintained in a form available for public inspection by (i) the county, (ii) the Commission, and (iii) the lead regional organization of the region which includes the county. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

Legal Periodicals. — For comment on public participation in local land use planning, see 53 N.C.L. Rev. 975 (1975).

CASE NOTES

Revised zoning ordinance which prohibited further development of wet and dry boat storage at marinas was within the police power of the State and consistent with this Article, the Coastal Area Management Act. Issuance of Cama Minor Dev. Permit No. 82-0010 v. Town of Bath, 82 N.C. App. 32, 345 S.E.2d 699 (1986).

Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-111. Effect of land-use plan.

No permit shall be issued under Part 4 of this Article for development which is inconsistent with the approved land-use plan for the county in which it is proposed. No local ordinance or other local regulation shall be adopted which, within an area of environmental concern, is inconsistent with the land-use plan of the county or city in which it is effective; any existing local ordinances and regulations within areas of environmental concern shall be reviewed in light of the applicable local land-use plan and modified as may be necessary to make them consistent therewith. All local ordinances and other local regulations affecting a county within the coastal area, but not affecting an area of environmental concern, shall be reviewed by the Commission for consistency with the applicable county and city land-use plans and, if the Commission finds any such ordinance or regulation to be inconsistent with the applicable land-use plan, it shall transmit recommendations for modification to the adopting local government. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

Legal Periodicals. — For article discussing a practical interpretation of North Carolina's comprehensive plan requirement for zoning regulations, see 7 Campbell L. Rev. 1 (1984).

CASE NOTES

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Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-112. Planning grants.

The Secretary of Environment and Natural Resources is authorized to make annual grants to local governmental units for the purpose of assisting in the development of local plans and management programs under this Article. The Secretary shall develop and administer generally applicable criteria under which local governments may qualify for such assistance. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1989, c. 727, s. 218(66); 1997-443, s. 11A.119(a).)

Part 3. Areas of Environmental Concern.

§ 113A-113. Areas of environmental concern; in general.

(a) The Coastal Resources Commission shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof, in the manner provided in this Part.

(b) The Commission may designate as areas of environmental concern any one or more of the following, singly or in combination:

(1) Coastal wetlands as defined in G.S. 113-229(n)(3) and contiguous areas necessary to protect those wetlands;

(2) Estuarine waters, that is, all the water of the Atlantic Ocean within the boundary of North Carolina and all the waters of the bays, sounds, rivers, and tributaries thereto seaward of the dividing line between coastal fishing waters and inland fishing waters, as set forth in the most recent official published agreement adopted by the Wildlife Resources Commission and the Department of Environment and Natural Resources;

(3) Renewable resource areas where uncontrolled or incompatible development which results in the loss or reduction of continued long-range productivity could jeopardize future water, food or fiber requirements of more than local concern, which may include:

a. Watersheds or aquifers that are present sources of public water supply, as identified by the Department or the Environmental Management Commission, or that are classified for water-supply use pursuant to G.S. 143-214.1;

b. Capacity use areas that have been declared by the Environmental Management Commission pursuant to G.S. 143-215.13(c) and areas wherein said Environmental Management Commission (pursuant to G.S. 143-215.3(d) or 143-215.3(a)(8)) has determined that a generalized condition of water depletion or water or air pollution exists;

c. Prime forestry land (sites capable of producing 85 cubic feet per acre-year, or more, of marketable timber), as identified by the Department.

(4) Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important historic, cultural, scientific or scenic values or natural systems, which may include:

a. Existing national or State parks or forests, wilderness areas, the State Nature and Historic Preserve, or public recreation areas; existing sites that have been acquired for any of the same, as identified by the Secretary; and proposed sites for any of the same, as identified by the Secretary, provided that the proposed site has been formally designated for acquisition by the governmental agency having jurisdiction;

b. Present sections of the natural and scenic rivers system;

c. Stream segments that have been classified for scientific or research uses by the Environmental Management Commission, or that are proposed to be so classified in a proceeding that is pending before said Environmental Management Commission pursuant to G.S. 143-214.1 at the time of the designation of the area of environmental concern;

d. Existing wildlife refuges, preserves or management areas, and proposed sites for the same, as identified by the Wildlife Re-

sources Commission, provided that the proposed site has been formally designated for acquisition (as hereinafter defined) or for inclusion in a cooperative agreement by the governmental agency having jurisdiction;

e. Complex natural areas surrounded by modified landscapes that do not drastically alter the landscape, such as virgin forest stands within a commercially managed forest, or bogs in an urban complex;

f. Areas that sustain remnant species or aberrations in the landscape produced by natural forces, such as rare and endangered botanical or animal species;

g. Areas containing unique geological formations, as identified by the State Geologist; and

h. Historic places that are listed, or have been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966; historical, archaeological, and other places and properties owned, managed or assisted by the State of North Carolina pursuant to Chapter 121; and properties or areas that are or may be designated by the Secretary of the Interior as registered natural landmarks or as national historic landmarks;

(5) Areas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights, and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Sec. 5 of the North Carolina Constitution;

(6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include:

a. Sand dunes along the Outer Banks;

b. Ocean and estuarine beaches and the shoreline of estuarine and public trust waters;

c. Floodways and floodplains;

d. Areas where geologic and soil conditions are such that there is a substantial possibility of excessive erosion or seismic activity, as identified by the State Geologist;

e. Areas with a significant potential for air inversions, as identified by the Environmental Management Commission.

(7) Areas which are or may be impacted by key facilities.

(8) Outstanding Resource Waters as designated by the Environmental Management Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary for the purpose of maintaining the exceptional water quality and outstanding resource values identified in the designation.

(9) Primary Nursery Areas as designated by the Marine Fisheries Commission and such contiguous land as the Coastal Resources Commission reasonably deems necessary to protect the resource values identified in the designation including, but not limited to, those values contributing to the continued productivity of estuarine and marine fisheries and thereby promoting the public health, safety and welfare.

(c) In those instances where subsection (b) of this section refers to locations identified by a specified agency, said agency is hereby authorized to make the indicated identification from time to time and is directed to transmit the identification to the Commission; provided, however, that no designation of an area of environmental concern based solely on an agency identification of a

proposed location may remain effective for longer than three years unless, in the case of paragraphs (4)a and d of subsection (b) of this section, the proposed site has been at least seventy-five percent (75%) acquired. Within the meaning of this section, "formal designation for acquisition" means designation in a formal resolution adopted by the governing body of the agency having jurisdiction (or by its chief executive, if it has no governing body), together with a direction in said resolution that the initial step in the land acquisition process be taken (as by filing an application with the Department of Administration to acquire property pursuant to G.S. 146-23).

(d) Additional grounds for designation of areas of environmental concern are prohibited unless enacted into law by an act of the General Assembly. (1973, c. 476, s. 128; c. 1262, ss. 23, 86; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 518, s. 1; 1989, c. 217, s. 1; c. 727, s. 128; 1997-443, s. 11A.119(a).)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Commission Has Been Given Adequate Guidelines. — The goals, policies and criteria outlined in § 113A-102 and this section provide the members of the Coastal Resources Commission with an adequate notion of the legislative parameters within which they are to operate in the exercise of their delegated powers. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

The declarations of legislative findings and goals articulated in § 113A-102 and the criteria for designating areas of environmental concern in this section are as specific as the circumstances permit. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Stated in Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990).

Cited in State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989); Coastal Ready-Mix Concrete Co. v. North Carolina Coastal Resources Comm'n, 116 N.C. App. 119, 446 S.E.2d 823 (1994); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

§ 113A-114: Repealed by Session Laws 1983, c. 518, s. 2.

§ 113A-115. Designation of areas of environmental concern.

(a) Prior to adopting any rule permanently designating any area of environmental concern the Secretary and the Commission shall hold a public hearing in each county in which lands to be affected are located, at which public and private parties shall have the opportunity to present comments and views. Hearings required by this section are in addition to the hearing required by Article 2 of Chapter 150B of the General Statutes. The following provisions shall apply for all such hearings:

(1) Notice of any such hearing shall be given not less than 30 days before the date of such hearing and shall state the date, time and place of the hearing, the subject of the hearing, and the action to be taken. The notice shall specify that a copy of the description of the area or areas of environmental concern proposed by the Secretary is available for public inspection at the county courthouse of each county affected.

(2) Any such notice shall be published at least once in one newspaper of general circulation in the county or counties affected at least 30 days before the date on which the public hearing is scheduled to begin.

(3) Any person who desires to be heard at such public hearing shall give notice thereof in writing to the Secretary on or before the first date set for the hearing. The Secretary is authorized to set reasonable time limits for the oral presentation of views by any one person at any such hearing. The Secretary shall permit anyone who so desires to file a written argument or other statement with him in relation to any proposed plan any time within 30 days following the conclusion of any public hearing or within such additional time as he may allow by notice given as prescribed in this section.

(4) Upon completion of the hearing and consideration of submitted evidence and arguments with respect to any proposed action pursuant to this section, the Commission shall adopt its final action with respect thereto and shall file a duly certified copy thereof with the Attorney General and with the board of commissioners of each county affected thereby.

(b) In addition to the notice required by G.S. 113A-115(a)(2) notice shall be given to any interested State agency and to any citizen or group that has filed a request to be notified of a public hearing to be held under this section.

(c) The Commission shall review the designated areas of environmental concern at least biennially. New areas may be designated and designated areas may be deleted, in accordance with the same procedures as apply to the original designations of areas under this section. Areas shall not be deleted unless it is found that the conditions upon which the original designation was based shall have been found to be substantially altered. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1975, 2nd Sess., c. 983, s. 78; 1981, c. 932, s. 2.1; 1987, c. 827, s. 135.)

CASE NOTES

There was no justiciable controversy in a declaratory judgment action on the question of whether there was an unconstitutional taking of the plaintiffs' land as the result of the designation of their land as an interim area of environmental concern where, at the time the case was tried, the plaintiffs had no occasion to seek development permits, variances, or exemptions from coverage, and could only speculate as to the effect the act would have on the usefulness and value of their specific plots of land. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978), decided under former § 113A-114.

The designation of land as an interim area of environmental concern does not subject development to a permit requirement; it merely requires the developer to give the State 60 days notice before undertaking the proposed activity. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978), decided under former § 113A-114.

Part 4. Permit Letting and Enforcement.

§ 113A-116. Local government letter of intent.

Within two years after July 1, 1974, each county and city within the coastal area shall submit to the Commission a written statement of its intent to act, or not to act, as a permit-letting agency under G.S. 113A-121. If any city or county states its intent not to act as a permit-letting agency or fails to submit a statement of intent within the required period, the Secretary shall issue permits therein under G.S. 113A-121; provided that a county may submit a letter of intent to issue permits in any city within said county that disclaims its intent to issue permits or fails to submit a letter of intent. Provided, however,

should any city or county fail to become a permit-letting agency for any reason, but shall later express its desire to do so, it shall be permitted by the Coastal Resources Commission to qualify as such an agency by following the procedure herein set forth for qualification in the first instance. (1973, c. 1284, s. 1; 1975, c. 452, ss. 2, 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1989, c. 727, s. 129.)

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

§ 113A-117. Implementation and enforcement programs.

(a) The Secretary shall develop and present to the Commission for consideration and to all cities and counties and lead regional organizations within the coastal area for comment a set of criteria for local implementation and enforcement programs. In the preparation of such criteria, the Secretary shall emphasize the necessity for the expeditious processing of permit applications. Said criteria may contain recommendations and guidelines as to the procedures to be followed in developing local implementation and enforcement programs, the scope and coverage of said programs, minimum standards to be prescribed in said programs, staffing of permit-letting agencies, permit-letting procedures, and priorities of regional or statewide concern. Within 20 months after July 1, 1974, the Commission shall adopt and transmit said criteria (with any revisions) to each coastal-area county and city that has filed an applicable letter of intent, for its guidance.

(b) The governing body of each city in the coastal area that filed an affirmative letter of intent shall adopt an implementation and enforcement plan with respect to its zoning area within 36 months after July 1, 1974. The board of commissioners of each coastal-area county that filed an affirmative letter of intent shall adopt an implementation plan with respect to portions of the county outside city zoning areas within 36 months after July 1, 1974, provided, however, that a county implementation and enforcement plan may also cover city jurisdictions for those cities within the counties that have not filed affirmative letters of intent pursuant to G.S. 113A-116. Prior to adopting the implementation and enforcement program the local governing body shall hold a public hearing at which public and private parties shall have the opportunity to present comments and views. Notice of the hearing shall be given not less than 15 days before the date of the hearing, and shall state the date, time and place of the hearing, the subject of the hearing, and the action which is to be taken. The notice shall state that copies of the proposed implementation and enforcement program are available for public inspection at the county courthouse. Any such notice shall be published at least once in one newspaper of general circulation in the county at least 15 days before the date on which the public hearing is scheduled to begin.

(c) Each coastal-area county and city shall transmit its implementation and enforcement program when adopted to the Commission for review. The Commission shall afford interested persons an opportunity to present objections and comments regarding the program, and shall review and consider each local implementation and enforcement program submitted in light of such objections and comments, the Commission's criteria and any general standards of review applicable throughout the coastal area as may be adopted by the Commission. Within 45 days after receipt of a local implementation and enforcement program the Commission shall either approve the program or notify the county or city of the specific changes that must be made in order for it to be approved. Following such changes, the program may be resubmitted in the same manner as the original program.

(d) If the Commission determines that any local government is failing to administer or enforce an approved implementation and enforcement program, it shall notify the local government in writing and shall specify the deficiencies of administration and enforcement. If the local government has not taken corrective action within 90 days of receipt of notification from the Commission, the Commission shall assume enforcement of the program until such time as the local government indicates its willingness and ability to resume administration and enforcement of the program. (1973, c. 1284, s. 1; 1975, c. 452, ss. 3, 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1989, c. 727, s. 130.)

§ 113A-118. Permit required.

(a) After the date designated by the Secretary pursuant to G.S. 113A-125, every person before undertaking any development in any area of environmental concern shall obtain (in addition to any other required State or local permit) a permit pursuant to the provisions of this Part.

(b) Under the expedited procedure provided for by G.S. 113A-121, the permit shall be obtained from the appropriate city or county for any minor development; provided, that if the city or county has not developed an approved implementation and enforcement program, the permit shall be obtained from the Secretary.

(c) Permits shall be obtained from the Commission or its duly authorized agent.

(d) Within the meaning of this Part:

(1) A "major development" is any development which requires permission, licensing, approval, certification or authorization in any form from the Environmental Management Commission, the Department of Environment and Natural Resources, the Department of Administration, the North Carolina Mining Commission, the North Carolina Pesticides Board, the North Carolina Sedimentation Control Board, or any federal agency or authority; or which occupies a land or water area in excess of 20 acres; or which contemplates drilling for or excavating natural resources on land or under water; or which occupies on a single parcel a structure or structures in excess of a ground area of 60,000 square feet.

(2) A "minor development" is any development other than a "major development."

(e) If, within the meaning of G.S. 113A-103(5)b3, the siting of any utility facility for the development, generation or transmission of energy is subject to regulation under this Article rather than by the State Utilities Commission or by other law, permits for such facilities shall be obtained from the Coastal Resources Commission rather than from the appropriate city or county.

(f) The Secretary may issue special emergency permits under this Article. These permits may only be issued in those extraordinary situations in which life or structural property is in imminent danger as a result of storms, sudden failure of man-made structures, or similar occurrence. These permits may carry any conditions necessary to protect the public interest, consistent with the emergency situation and the impact of the proposed development. If an application for an emergency permit includes work beyond that necessary to reduce imminent dangers to life or property, the emergency permit shall be limited to that development reasonably necessary to reduce the imminent danger; all further development shall be considered under ordinary permit procedures. This emergency permit authority of the Secretary shall extend to all development in areas of environmental concern, whether major or minor development, and the mandatory notice provisions of G.S. 113A-119(b) shall not apply to these emergency permits. To the extent feasible, these emergency

permits shall be coordinated with any emergency permits required under G.S. 113-229(e1). (1973, c. 476, s. 128; c. 1282, ss. 23, 33; c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1979, c. 253, s. 5; 1981, c. 932, s. 2.1; 1983, c. 173; c. 518, s. 3; 1987, c. 827, s. 136; 1989, c. 727, s. 131; 1997-443, s. 11A.119(a).)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

The designation of land as an interim area of environmental concern does not subject development to a permit requirement; it merely requires the developer to give the State 60 days notice before undertaking the proposed activity. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978), decided under former § 113A-114.

Rescission of Permit Upheld. — Trial court's rescission of Coastal Area Management Act Development permit was affirmed where there were a variety of ecological concerns, potential environmental damage, and interference with public access to and use of the affected waters, and the whole record showed that the only basis for issuing the permit was that it would make the public waters adjacent to the permittee's condominium project more convenient for the permittee's use. Ballance v. North Carolina Coastal Resources Comm'n, 108 N.C. App. 288, 423 S.E.2d 815 (1992), petition for reconsideration dismissed, 333 N.C. 789, 431 S.E.2d 21 (1993).

Quoted in Pamlico Marine Co. v. North Carolina Dep't of Natural Resources & Community Dev., 80 N.C. App. 201, 341 S.E.2d 108 (1986); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Stated in State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Cited in Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990).

§ 113A-118.1. General permits.

(a) The Commission may, by rule, designate certain classes of major and minor development for which a general or blanket permit may be issued. In developing these rules, the Commission shall consider:

(1) The size of the development;
(2) The impact of the development on areas of environmental concern;
(3) How often the class of development is carried out;
(4) The need for onsite oversight of the development; and
(5) The need for public review and comment on individual development projects.

(b) General permits may be issued by the Commission. Individual developments carried out under the provisions of general permits shall not be subject to the mandatory notice provisions of G.S. 113A-119.

(c) The Commission may impose reasonable notice provisions and other appropriate conditions and safeguards on any general permit it issues.

(d) The variance, appeals, and enforcement provisions of this Article shall apply to any individual development projects undertaken under a general permit. (1983, c. 171; c. 442, s. 1; 1987, c. 827, s. 137.)

CASE NOTES

Quoted in Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

§ 113A-118.2. Development in Primary Nursery Areas and Outstanding Resource Waters areas of environmental concern.

Public notice, opportunity for public comment, and agency review shall be required for all development within the Primary Nursery Areas or Outstanding Resource Waters areas of environmental concern. Provided, however, that the Coastal Resources Commission may by rule exempt or issue general permits for minor maintenance and improvement projects as defined in G.S. 113A-103(5)c and for single-family residential development pursuant to use standards or conditions adopted by the Coastal Resources Commission. (1989, c. 217, s. 2.)

§ 113A-119. Permit applications generally.

(a) Any person required to obtain a permit under this Part shall file with the Secretary and (in the case of a permit sought from a city or county) with the designated local official an application for a permit in accordance with the form and content designated by the Secretary and approved by the Commission. The applicant must submit with the application a check or money order payable to the Department or the city or county, as the case may be, constituting a fee set by the Commission pursuant to G.S. 113A-119.1.

(b) Upon receipt of any application, a significant modification to an application for a major permit, or an application to modify substantially a previously issued major permit, the Secretary shall issue public notice of the proposed development (i) by mailing a copy of the application or modification, or a brief description thereof together with a statement indicating where a detailed copy of the proposed development may be inspected, to any citizen or group which has filed a request to be notified of the proposed development, and to any interested State agency; (ii) by posting or causing to be posted a notice at the location of the proposed development stating that an application, a modification of an application for a major permit, or an application to modify a previously issued major permit for development has been made, where the application or modification may be inspected, and the time period for comments; and (iii) by publishing notice of the application or modification at least once in one newspaper of general circulation in the county or counties wherein the development would be located at least 20 days before final action on a major permit and at least seven days before final action on a permit under G.S. 113A-121 or before the beginning of the hearing on a permit under G.S. 113A-122. The notice shall set out that any comments on the development should be submitted to the Secretary by a specified date, not less than 15 days from the date of the newspaper publication of the notice or 15 days after mailing of the mailed notice, whichever is later. Public notice under this subsection is mandatory, except for a proposed modification to an application for a minor permit or proposed modification of a previously issued minor permit that does not substantially alter the original project.

(c) Within the meaning of this Part, the "designated local official" is the official who has been designated by the local governing body to receive and consider permit applications under this Part. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 307; 1985, c. 372; 1989, c. 53; c. 727, s. 132; 1989 (Reg. Sess., 1990), c. 987, s. 1.)

§ 113A-119.1. Permit fees.

(a) The Commission shall have the power to establish a graduated fee schedule for the processing of applications for permits, renewals of permits,

modifications of permits, or transfers of permits issued pursuant to this Article. In determining the fee schedule, the Commission shall consider the administrative and personnel costs incurred by the Department for processing the applications, related compliance activities, and the complexity of the development sought to be undertaken for which a permit is required under this Article. The fee to be charged for processing an application may not exceed four hundred dollars ($400.00). The total funds collected from fees authorized by the Commission pursuant to this section in any fiscal year shall not exceed thirty-three and one-third percent (33 ⅓%) of the total personnel and administrative costs incurred by the Department for permit processing and compliance programs within the Division of Coastal Area Management.

(b) Fees collected under this section shall be applied to the costs of administering this Article.

(c) Repealed by Session Laws 1991 (Regular Session, 1992), c. 1039, s. 4.

(1989 (Reg. Sess., 1990), c. 987, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 4.)

§ 113A-120. Grant or denial of permits.

(a) The responsible official or body shall deny an application for a permit upon finding:

(1) In the case of coastal wetlands, that the development would contravene an order that has been or could be issued pursuant to G.S. 113-230.

(2) In the case of estuarine waters, that a permit for the development would be denied pursuant to G.S. 113-229(e).

(3) In the case of a renewable resource area, that the development will result in loss or significant reduction of continued long-range productivity that would jeopardize one or more of the water, food or fiber requirements of more than local concern identified in subdivisions a through c of G.S. 113A-113(b)(3).

(4) In the case of a fragile or historic area, or other area containing environmental or natural resources of more than local significance, that the development will result in major or irreversible damage to one or more of the historic, cultural, scientific, environmental or scenic values or natural systems identified in subdivisions a through h of G.S. 113A-113(b)(4).

(5) In the case of areas covered by G.S. 113A-113(b)(5), that the development will jeopardize the public rights or interests specified in said subdivision.

(6) In the case of natural hazard areas, that the development would occur in one or more of the areas identified in subdivisions a through e of G.S. 113A-113(b)(6) in such a manner as to unreasonably endanger life or property.

(7) In the case of areas which are or may be impacted by key facilities, that the development is inconsistent with the State guidelines or the local land-use plans, or would contravene any of the provisions of subdivisions (1) to (6) of this subsection.

(8) In any case, that the development is inconsistent with the State guidelines or the local land-use plans.

(9) In any case, that considering engineering requirements and all economic costs there is a practicable alternative that would accomplish the overall project purposes with less adverse impact on the public resources.

(10) In any case, that the proposed development would contribute to cumulative effects that would be inconsistent with the guidelines set

forth in subdivisions (1) through (9) of this subsection. Cumulative effects are impacts attributable to the collective effects of a number of projects and include the effects of additional projects similar to the requested permit in areas available for development in the vicinity.

(b) In the absence of such findings, a permit shall be granted. The permit may be conditioned upon the applicant's amending his proposal to take whatever measures or agreeing to carry out whatever terms of operation or use of the development that are reasonably necessary to protect the public interest with respect to the factors enumerated in subsection (a) of this section.

(b1) **(Effective until July 1, 2000)** In addition to those factors set out in subsection (a) of this section or of G.S. 113A-120.2, and notwithstanding the provisions of subsection (b) of this section or of G.S. 113A-120.2, the responsible official or body may deny an application for a permit upon finding that an applicant, or any parent or subsidiary corporation if the applicant is a corporation:

(1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;

(2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b1) **(Effective July 1, 2000)** In addition to those factors set out in subsection (a) of this section, and notwithstanding the provisions of subsection (b) of this section, the responsible official or body may deny an application for a permit upon finding that an applicant, or any parent or subsidiary corporation if the applicant is a corporation:

(1) Is conducting or has conducted any activity causing significant environmental damage for which a major development permit is required under this Article without having previously obtained such permit or has received a notice of violation with respect to any activity governed by this Article and has not complied with the notice within the time specified in the notice;

(2) Has failed to pay a civil penalty assessed pursuant to this Article, a local ordinance adopted pursuant to this Article, or Article 17 of Chapter 113 of the General Statutes which is due and for which no appeal is pending;

(3) Has been convicted of a misdemeanor pursuant to G.S. 113A-126, G.S. 113-229(k), or any criminal provision of a local ordinance adopted pursuant to this Article; or

(4) Has failed to substantially comply with State rules or local ordinances and regulations adopted pursuant to this Article or with other federal and state laws, regulations, and rules for the protection of the environment.

(b2) For purposes of subsection (b1) of this section, an applicant's record may be considered for only the two years prior to the application date.

(c) Repealed by Session Laws 1989, c. 676, s. 7. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1; 1983, c. 518, ss. 4, 5; 1987, c. 827, s. 138; 1989, c. 51; c. 676, s. 7; 1997-337, s. 2; 1997-456, s. 55.2B; 1997-496, s. 2.)

Subsection (b1) Set Out Twice. — The first version of subsection (b1) set out above is effective until July 1, 2000. The second version of subsection (b1) set out above is effective July 1, 2000.

Editor's Note. — The first instance of the word "State" in both versions of subdivision (b1)(4) above was designated as "state" in Session Laws 1997-496, s. 2; it has been capitalized at the direction of the Revisor of Statutes.

Session Laws 1997-337, s. 3, as amended by Session Laws 1997-456, s. 55.2B, provides that the 1997 amendment to this section is effective July 25, 1997, expires July 1, 2000, and is applicable to permits granted or applications submitted prior to July 1, 2000, which shall be transferable.

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislation, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For 1997 Legislative Survey, see 20 Campbell L. Rev. 450.

CASE NOTES

Formal findings are not required when a permit is issued. Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

Evidence Required When Opposing Issuance of Permit. — The failure to include evidence supporting Division of Coastal Management's (DCM's) decision to issue a permit in the DCM record is not relevant on the issue before Coastal Resources Commission (CRC) of whether an organization opposed to issuance of the permit was entitled to a contested case hearing. The only relevant evidence on this issue is evidence of whether there has been a violation of some substantive statute, rule or regulation. Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

Quoted in Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228 (1990).

Stated in State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Cited in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

§ 113A-120.1. Variances.

Any person may petition the Commission for a variance granting permission to use his land in a manner otherwise prohibited by rules, standards, or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. When it finds that (i) practical difficulties or unnecessary hardships would result from strict application of the guidelines, rules, standards, or other restrictions applicable to the property, (ii) such difficulties or hardships result from conditions which are peculiar to the property involved, (iii) such conditions could not reasonably have been anticipated when the applicable guidelines, rules, standards, or restrictions were adopted or amended, the Commission may vary or modify the application of the restrictions to the property so that the spirit, purpose, and intent of the restrictions are preserved, public safety and welfare secured, and substantial justice preserved. In granting a variance, the Commission may impose reasonable and appropriate conditions and safeguards upon any permit it issues. The Commission may conduct a hearing within 45 days from the receipt of the petition and shall notify such persons and agencies that may have an interest in the subject matter of the time and place of the hearing. (1989, c. 676, s. 8.)

§ 113A-120.2. (Expires July 1, 2000) Permits for urban waterfront redevelopment in historically urban areas.

(a) Notwithstanding any other provision of law, any person may apply to the Commission for a permit for major development granting permission to use the person's land for a nonwater dependent use that is otherwise prohibited by rules, standards, or limitations prescribed by the Commission, or orders issued by the Commission, pursuant to this Article. The procedure to apply for the permit shall be as provided by G.S. 113A-119.

(b) Notwithstanding G.S. 113A-120(a), the Commission shall grant a permit for nonwater dependent development in public trust areas designated pursuant to G.S. 113A-113(b)(5) if the following criteria are met:

(1) The land is waterfront property located in a municipality.

(2) The land has a history of urban-level development as evidenced by any of the following:

a. The land is a historic place that is listed, or has been approved for listing by the North Carolina Historical Commission, in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966.

b. The land is a historical, archaeological, and other site owned, managed, or assisted by the State of North Carolina pursuant to Chapter 121 of the General Statutes.

c. The land has a central business district zoning classification, or any other classification that may be designated as acceptable by the Commission.

(3) The proposed development is sponsored in part or in whole by the local jurisdiction in which the development would be located for the purpose of significantly increasing public access consistent with the Coastal Area Management guidelines.

(4) The municipality in which the activity would occur has determined that the development will not have a significant adverse impact on the environment.

(5) The development as requested is consistent with a local urban waterfront development plan, local development regulations, public access plans, and other applicable local authority.

(c) Except as otherwise provided by this section, all other provisions of this Article apply to a permit applied for under this section, including the provisions of G.S. 113A-120(b1) and (b2). (1997-337, s. 1; 1997-456, s. 55.2B.)

Editor's Note. — Session Laws 1997-337, s. 3, as amended by Session Laws 1997-456, s. 55.2B, provides that this section is effective July 25, 1997, expires July 1, 2000, and is applicable to permits granted or applications submitted prior to July 1, 2000, which shall be transferable.

§ 113A-121. Permits for minor developments under expedited procedures.

(a) Applications for permits for minor developments shall be expeditiously processed so as to enable their promptest feasible disposition.

(b) In cities and counties that have developed approved implementation and enforcement programs, applications for permits for minor developments shall be considered and determined by the designated local official of the city or county as the case may be. In cities and counties that have not developed approved implementation and enforcement programs, such applications shall be considered and determined by the Secretary. Minor development projects

proposed to be undertaken by a local government within its own permit-letting jurisdiction shall be considered and determined by the Secretary.

(c) Failure of the Secretary or the designated local official (as the case may be) to approve or deny an application for a minor permit within 25 days from receipt of application shall be treated as approval of the application, except that the Secretary or the designated local official (as the case may be) may extend the deadline by not more than an additional 25 days in exceptional cases. No waiver of the foregoing time limitation (or of the time limitation established in G.S. 113A-122(c)) shall be required of any applicant.

(d) Repealed by Session Laws 1981, c. 913, s. 2. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 913, s. 2; c. 932, s. 2.1; 1983, c. 172, s. 1; c. 399; 1989, c. 727, s. 133.)

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Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-121.1. Administrative review of permit decisions.

(a) An applicant for a minor or major development permit who is dissatisfied with the decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. When a local official makes a decision to grant or deny a minor development permit and the Secretary is dissatisfied with the decision, the Secretary may file a petition for a contested case within 20 days after the decision is made.

(b) A person other than a permit applicant or the Secretary who is dissatisfied with a decision to deny or grant a minor or major development permit may file a petition for a contested case hearing only if the Commission determines that a hearing is appropriate. A request for a determination of the appropriateness of a contested case hearing shall be made in writing and received by the Commission within 20 days after the disputed permit decision is made. A determination of the appropriateness of a contested case shall be made within 15 days after a request for a determination is received and shall be based on whether the person seeking to commence a contested case:

(1) Has alleged that the decision is contrary to a statute or rule;
(2) Is directly affected by the decision; and
(3) Has alleged facts or made legal arguments that demonstrate that the request for the hearing is not frivolous.

If the Commission determines a contested case is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination. A determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes. If, on judicial review, the court determines that the Commission erred in determining that a contested case would not be appropriate, the court shall remand the matter for a contested case hearing under G.S. 150B-23 and final Commission decision on the permit pursuant to G.S. 113A-122. Decisions in such cases shall be rendered pursuant to those rules, regulations, and other applicable laws in effect at the time of the commencement of the contested case.

(c) A permit is suspended from the time a person seeks administrative review of the decision concerning the permit until the Commission determines that the person seeking the review cannot commence a contested case or the Commission makes a final decision in a contested case, as appropriate, and no action may be taken during that time that would be unlawful in the absence of

a permit. (1981, c. 913, s. 3; 1983, c. 400, ss. 1, 2; 1987, c. 827, s. 139; 1995, c. 409, s. 1.)

Local Modification. — New Hanover: 1998-212, s. 14.9D.

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Section 150B-43 provides no authority for permitting plaintiff to bypass the requirements of this section because by enacting the provisions for administrative review of rules, the legislature wisely determined that the agency itself should have the first opportunity to review the propriety and applicability of its own rules, and so long as the statutory procedures provide an effective means of review of the agency action, the courts will require parties to exhaust their administrative remedies. Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

Final Decision by Coastal Resources Commission Required. — This section requires that a party entitled to its provisions must first challenge a decision to deny or grant a permit by way of a petition to the Coastal Resources Commission, and only after a final decision by the Coastal Resources Commission, may a party invoke the jurisdiction of the superior court. Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

Burden of Proof. — If a party other than the applicant or Secretary is dissatisfied with the decision to issue a permit, the party may request a contested case hearing. The party requesting the hearing has the burden of alleging that the permit decision is contrary to a statute or rule, of showing that the party is directly affected by the permit decision, and of showing that the party has a substantial likelihood of prevailing in a contested case. Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

In order to obtain a modification or reversal of an agency decision, the party alleging error has the burden of showing that the agency's final decision may have prejudiced that party's substantial rights in that the agency's findings, inferences, conclusions, or decisions are defective because of one of the six reasons stated under § 150B-51. Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

Relevant Evidence for Entitlement to Contested Case Hearing. — The failure to include evidence supporting Division of Coastal Management's (DCM's) decision to issue a permit in the DCM record is not relevant on the issue before Coastal Resources Commission (CRC) of whether an organization opposed to issuance of the permit was entitled to a contested case hearing. The only relevant evidence on this issue is evidence of whether there has been a violation of some substantive statute, rule or regulation. Pamlico Tar River Found., Inc. v. Coastal Resources Comm'n, 103 N.C. App. 24, 404 S.E.2d 167 (1991).

Commission's Denial of Contested Case Hearing Held Contrary to Subsection (b). — Where petitioners argued that the North Carolina Coastal Resources Commission (CRC) failed to comply with the procedures for adopting a temporary rule under former § 150B-13, vice-chairman's order was arbitrary and capricious because it required petitioners to specifically allege that the CRC either acted arbitrarily and capriciously or abused its discretion; this finding did not address the merits of petitioners' claim and imposed on petitioners an additional burden that subsection (b) of this section did not require. Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

Appellants were entitled to a contested case hearing under the Coastal Area Management Act (CAMA) to contest the Department of Transportation's decisions as to what measures would be appropriate to protect the southern end of the Herbert C. Bonner Bridge from erosion. Conservation Council v. Haste, 102 N.C. App. 411, 402 S.E.2d 447 (1991).

Applied in Ballance v. North Carolina Coastal Resources Comm'n, 108 N.C. App. 288, 423 S.E.2d 815 (1992).

Cited in 115 N.C. App. 349, 444 S.E.2d 636 (1994); Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

§ 113A-122. Procedure for hearings on permit decisions.

(a) Repealed by Session Laws 1987, c. 827, s. 140.

(b) The following provisions shall be applicable in connection with hearings pursuant to this section:

(1), (2) Repealed by Session Laws 1987, c. 827, s. 140.

(3) A full and complete record of all proceedings at any hearing under this section shall be taken by a reporter appointed by the Commission or by other method approved by the Attorney General. Any party to a proceeding shall be entitled to a copy of such record upon the payment of the reasonable cost thereof as determined by the Commission.

(4) to (6) Repealed by Session Laws 1987, c. 827, s. 140.

(7) The burden of proof at any hearing on a decision granting a permit shall be upon the person who requested the hearing.

(8), (9) Repealed by Session Laws 1987, c. 827, s. 140.

(10) The Commission shall grant or deny the permit in accordance with the provisions of G.S. 113A-120. All such orders and decisions of the Commission shall set forth separately the Commission's findings of fact and conclusions of law and shall, wherever necessary, cite the appropriate provision of law or other source of authority on which any action or decision of the Commission is based.

(11) The Commission shall have the authority to adopt a seal which shall be the seal of said Commission and which shall be judicially noticed by the courts of the State. Any document, proceeding, order, decree, special order, rule, rule of procedure or any other official act or records of the Commission or its minutes may be certified by the Executive Director under his hand and the seal of the Commission and when so certified shall be received in evidence in all actions or proceedings in the courts of the State without further proof of the identity of the same if such records are competent, relevant and material in any such action to proceedings. The Commission shall have the right to take official notice of all studies, reports, statistical data or any other official reports or records of the federal government or of any sister state and all such records, reports and data may be placed in evidence by the Commission or by any other person or interested party where material, relevant and competent.

(c) Failure of the Commission to approve or deny an application for a permit pursuant to this section within 75 days from receipt of application shall be treated as approval of the application, except the Commission may extend the deadline by not more than an additional 75 days in exceptional cases.

Failure of the Commission to dispose of an appeal pursuant to this section within 90 days from notice of appeal shall be treated as approval of the action appealed from, except that the Commission may extend the deadline by not more than an additional 90 days if necessary to properly consider the appeal.

(d) All notices which are required to be given by the Secretary or Commission or by any party to a proceeding under this section shall be given by registered or certified mail to all persons entitled thereto. The date of receipt or refusal for such registered or certified mail shall be the date when such notice is deemed to have been given. Notice by the Commission may be given to any person upon whom a summons may be served in accordance with the provisions of law covering civil actions in the superior courts of this State. The Commission may prescribe the form and content of any particular notice. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1979, c. 253, s. 6; 1981, c. 913, ss. 4-6; 1981, c. 932, s. 2.1; 1983, c. 172, s. 2; 1987, c. 827, s. 140.)

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Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

§ 113A-123. Judicial review.

(a) Any person directly affected by any final decision or order of the Commission under this Part may appeal such decision or order to the superior court of the county where the land or any part thereof is located, pursuant to the provisions of Chapter 150B of the General Statutes. Pending final disposition of any appeal, no action shall be taken which would be unlawful in the absence of a permit issued under this Part.

(b) Any person having a recorded interest or interest by operation of law in or registered claim to land within an area of environmental concern affected by any final decision or order of the Commission under this Part may, within 90 days after receiving notice thereof, petition the superior court to determine whether the petitioner is the owner of the land in question, or an interest, therein, and in case he is adjudged the owner of the subject land, or an interest therein, the court shall determine whether such order so restricts the use of his property as to deprive him of the practical uses thereof, being not otherwise authorized by law, and is therefore an unreasonable exercise of the police power because the order constitutes the equivalent of taking without compensation. The burden of proof shall be on petitioner as to ownership and the burden of proof shall be on the Commission to prove that the order is not an unreasonable exercise of the police power, as aforesaid. Either party shall be entitled to a jury trial on all issues of fact, and the court shall enter a judgment in accordance with the issues, as to whether the Commission order shall apply to the land of the petitioner. The Secretary shall cause a copy of such finding to be recorded forthwith in the register of deeds office in the county where the land is located. The method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be exclusive and such issue shall not be determined in any other proceeding. Any action authorized by this subsection shall be calendared for trial at the next civil session of superior court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session. It is the duty of the presiding judge to expedite the trial of these actions and to give them a preemptory setting over all others, civil or criminal. From any decision of the superior court either party may appeal to the court of appeals as a matter of right.

(c) After a finding has been entered that such order shall not apply to certain land as provided in the preceding subsection, the Department of Administration, upon the request of the Commission and upon finding that sufficient funds are available therefor, and with the consent of the Governor and Council of State may take the fee or any lesser interest in such land in the name of the State by eminent domain under the provisions of Chapter 146 of the General Statutes and hold the same for the purposes set forth in this Article. (1973, c. 1284, s. 1; c. 1331, s. 3; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, s. 1; 1989, c. 727, s. 134.)

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

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Construction with Other Provisions. — This section does not set forth the scope of review but instead provides that judicial review is available pursuant to the provisions of Chapter 150B of the Administrative Procedure Act. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Right to Trial by Jury. — This Article, the Coastal Area Management Act (CAMA), provides for a trial by jury only where a party

owning land affected by a final decision of the Coastal Resources Commission petitions the superior court alleging a taking. There is no other statutory authority in CAMA, nor in the Dredge and Fill Act, granting a right to trial by jury. State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

Summary judgment is consistent with this section and does not render the statute meaningless. Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228, cert. denied, 326 N.C. 601, 393 S.E.2d 890 (1990).

Failure to Object or Seek Review of Findings. — Where plaintiff failed to object to or seek judicial review of commission's findings of fact pursuant to subsection (a) of this section, the findings were binding on plaintiff in a proceeding filed pursuant to subsection (b) of this section. Weeks v. North Carolina Dep't of Natural Resources & Community Dev., 97 N.C. App. 215, 388 S.E.2d 228, cert. denied, 326 N.C. 601, 393 S.E.2d 890 (1990).

Review of Commission Decisions. — Argument that subsection (a) of this section provides adequate procedure for judicial review of final decisions or orders of Coastal Resources Commission is without merit; adequate procedure for judicial review would exist under subsection (a) only if the scope of review provided therein were at least equal to that provided by Article 4 of chapter 150B. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Quoted in Leeuwenburg v. Waterway Inv. Ltd. Partnership, 115 N.C. App. 541, 445 S.E.2d 614 (1994).

Stated in Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978); Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 444 S.E.2d 636, cert. granted, 337 N.C. 691, 448 S.E.2d 522 (1994), review improvidently granted, 340 N.C. 357, 457 S.E.2d 599 (1995).

Cited in State ex rel. Rhodes v. Givens, 101 N.C. App. 695, 400 S.E.2d 745 (1991); King ex rel. Warren v. State, 125 N.C. App. 379, 481 S.E.2d 330 (1997).

§ 113A-124. Additional powers and duties.

(a) The Secretary shall have the following additional powers and duties under this Article:

(1) To conduct or cause to be conducted, investigations of proposed developments in areas of environmental concern in order to obtain sufficient evidence to enable a balanced judgment to be rendered concerning the issuance of permits to build such developments.

(2) To cooperate with the Secretary of the Department of Administration in drafting State guidelines for the coastal area.

(3) To keep a list of interested persons who wish to be notified of proposed developments and proposed rules designating areas of environmental concern and to so notify these persons of such proposed developments by regular mail. A reasonable registration fee to defray the cost of handling and mailing notices may be charged to any person who so registers with the Commission.

(4) To propose rules to implement this Article for consideration by the Commission.

(5) To delegate such of his powers as he may deem appropriate to one or more qualified employees of the Department or to any local government, provided that the provisions of any such delegation of power shall be set forth in departmental rules.

(6) To delegate the power to conduct a hearing, on his behalf, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the record of the hearing to the Secretary for decision or action.

(b) In order to carry out the provisions of this Article the secretaries of Administration and of Environment and Natural Resources may employ such clerical, technical and professional personnel, and consultants with such qualifications as the Commission may prescribe, in accordance with the State personnel rules and budgetary laws, and are hereby authorized to pay such personnel from any funds made available to them through grants, appropria-

tions, or any other sources. In addition, the said secretaries may contract with any local governmental unit or lead regional organization to carry out the planning provisions of this Article.

(c) The Commission shall have the following additional powers and duties under this Article:

(1) To recommend to the Secretary the acceptance of donations, gifts, grants, contributions and appropriations from any public or private source to use in carrying out the provisions of this Article.

(2) To recommend to the Secretary of Administration the acquisition by purchase, gift, condemnation, or otherwise, lands or any interest in any lands within the coastal area.

(3) To hold such public hearings as the Commission deems appropriate.

(4) To delegate the power to conduct a hearing, on behalf of the Commission, to any member of the Commission or to any qualified employee of the Department. Any person to whom a delegation of power is made to conduct a hearing shall report his recommendations with the evidence and the record of the hearing to the Commission for decision or action.

(5) Repealed by Session Laws 1987, c. 827, s. 141.

(6) To delegate the power to determine whether a contested case hearing is appropriate in accordance with G.S. 113A-121.1(b).

(7) To delegate the power to grant or deny requests for declaratory rulings under G.S. 150B-4 in accordance with standards adopted by the Commission.

(8) To adopt rules to implement this Article.

(d) The Attorney General shall act as attorney for the Commission and shall initiate actions in the name of, and at the request of, the Commission, and shall represent the Commission in the hearing of any appeal from or other review of any order of the Commission. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 141; 1989, c. 727, s. 135; 1991 (Reg. Sess., 1992), c. 839, s. 2; 1997-443, s. 11A.119(a).)

§ 113A-125. Transitional provisions.

(a) Existing regulatory permits shall continue to be administered within the coastal area by the agencies presently responsible for their administration until a date (not later than 44 months after July 1, 1974), to be designated by the Secretary of Natural and Economic Resources as the permit changeover date. Said designation shall be effective from and after its filing with the Secretary of State.

(b) From and after the "permit changeover date," all existing regulatory permits within the coastal area shall be administered in coordination and consultation with (but not subject to the veto of) the Commission. No such existing permit within the coastal area shall be issued, modified, renewed or terminated except after consultation with the Commission. The provisions of this subsection concerning consultation and coordination shall not be interpreted to authorize or require the extension of any deadline established by this Article or any other law for completion of any permit, licensing, certification or other regulatory proceedings.

(c) Within the meaning of this section, "existing regulatory permits" include dredge and fill permits issued pursuant to G.S. 113-229; sand dune permits issued pursuant to G.S. 104B-4; air pollution control and water pollution control permits, special orders or certificates issued pursuant to G.S. 143-215.1 and 143-215.2, or any other permits, licenses, authorizations, approvals or certificates issued by the Board of Water and Air Resources pursuant to Chapter 143; capacity use area permits issued pursuant to G.S. 143-215.15;

final approval of dams pursuant to G.S. 143-215.30; floodway permits issued pursuant to G.S. 143-215.54; water diversion authorizations issued pursuant to G.S. 143-354(c); oil refinery permits issued pursuant to G.S. 143-215.99; mining operating permits issued pursuant to G.S. 74-51; permissions for construction of wells issued pursuant to G.S. 87-88; and rules concerning pesticide application within the coastal area issued pursuant to G.S. 143-458; approvals by the Department of Health and Human Services of plans for water supply, drainage or sewerage, pursuant to G.S. 130-161.1 and 130-161.2; standards and approvals for solid waste disposal sites and facilities, adopted by the Department of Health and Human Services pursuant to Chapter 130, Article 13B; permits relating to sanitation of shellfish, crustacea or scallops issued pursuant to Chapter 130, Articles 14A or 14B; permits, approvals, authorizations and rules issued by the Department of Health and Human Services pursuant to Articles 23 or 24 of Chapter 130 with reference to mosquito control programs or districts; any permits, licenses, authorizations, rules, approvals or certificates issued by the Department of Health and Human Services relating to septic tanks or water wells; oil or gas well rules and orders issued for the protection of environmental values or resources pursuant to G.S. 113-391; a certificate of public convenience and necessity issued by the State Utilities Commission pursuant to Chapter 62 for any public utility plant or system, other than a carrier of persons or property; permits, licenses, leases, options, authorization or approvals relating to the use of State forestlands, State parks or other state-owned land issued by the State Department of Administration, the State Department of Natural and Economic Resources or any other State department, agency or institution; any approvals of erosion control plans that may be issued by the North Carolina Sedimentation Control Commission pursuant to G.S. 113A-60 or 113A-61; and any permits, licenses, authorizations, rules, approvals or certificates issued by any State agency pursuant to any environmental protection legislation not specified in this subsection that may be enacted prior to the permit changeover date.

(d) The Commission shall conduct continuing studies addressed to developing a better coordinated and more unified system of environmental and land-use permits in the coastal area, and shall report its recommendations thereon from time to time to the General Assembly. (1973, c. 1284, s. 1; 1975, c. 452, ss. 4, 5; 1979, c. 299; 1981, c. 932, s. 2.1; 1987, c. 827, ss. 125, 142; 1997-443, s. 11A.122.)

Editor's Note. — Section 104B-4, referred to in subsection (c) of this section, section 143-215.99 and Chapter 130 have all been repealed. For provisions relating to the public health, see now Chapter 130A.

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

§ 113A-126. Injunctive relief and penalties.

(a) Upon violation of any of the provisions of this Article or of any rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission. Neither the institution of the action nor any of

the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(b) Upon violation of any of the provisions of this Article relating to permits for minor developments issued by a local government, or of any rule or order adopted under the authority of this Article relating to such permits, the designated local official may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the affected local government upon the relation of the designated local official for injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission. Neither the institution of the action nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty prescribed by this Article for any violation of same.

(c) Any person who shall be adjudged to have knowingly or willfully violated any provision of this Article, or any rule or order adopted pursuant to this Article, shall be guilty of a Class 2 misdemeanor. In addition, if any person continues to violate or further violates, any such provision, rule or order after written notice from the Secretary or (in the case of a permit for a minor development issued by a local government) written notice from the designated local official, the court may determine that each day during which the violation continues or is repeated constitutes a separate violation subject to the foregoing penalties.

(d)(1) A civil penalty of not more than two hundred fifty dollars ($250.00) for a minor development violation and two thousand five hundred dollars ($2,500) for a major development violation may be assessed by the Commission against any person who:

a. Is required but fails to apply for or to secure a permit required by G.S. 113A-118, or who violates or fails to act in accordance with the terms, conditions, or requirements of such permit.

b. Fails to file, submit, or make available, as the case may be, any documents, data or reports required by the Commission pursuant to this Article.

c. Refuses access to the Commission or its duly designated representative, who has sufficiently identified himself by displaying official credentials, to any premises, not including any occupied dwelling house or curtilage, for the purpose of conducting any investigations provided for in this Article.

d. Violates a rule of the Commission implementing this Article.

(2) For each willful action or failure to act for which a penalty may be assessed under this subsection, the Commission may consider each day the action or inaction continues after notice is given of the violation as a separate violation; a separate penalty may be assessed for each such separate violation.

(3) The Commission may assess the penalties provided for in this subsection. The Commission shall notify a person who is assessed a penalty by registered or certified mail. The notice shall state the reasons for the penalty. A person may contest a penalty by filing a petition for a contested case under G.S. 150B-23 within 20 days after receiving the notice of assessment. If a person fails to pay a penalty, the Commission shall refer the matter to the Attorney General for collection. An action to collect a penalty must be filed within three years after the date the final agency decision was served on the violator.

(4) In determining the amount of the penalty the Commission shall consider the degree and extent of harm caused by the violation and the cost of rectifying the damage.

(5) The clear proceeds of penalties assessed pursuant to this subsection shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1977, c. 771, s. 4; 1981, c. 932, s. 2.1; 1983, c. 485, ss. 1-3; c. 518, s. 6; 1987, c. 827, ss. 11, 143; 1991, c. 725, s. 6; 1991 (Reg. Sess., 1992), c. 839, s. 3; c. 890, s. 8; 1993, c. 539, s. 874; 1994, Ex. Sess., c. 24, s. 14(c); 1998-215, s. 53(a).)

Editor's Note. — At the direction of the Revisor of Statutes, in 1987 subdivision (d)(3) was set out as rewritten by Session Laws 1987, c. 827, s. 143.

Session Laws 1991 (Reg. Sess., 1992), c. 839, which amended this section, in s. 5 provides: "All civil penalties and interest recovered by the Commission, together with the costs thereof, shall be paid into the General Fund of the State treasury, as nontax revenue."

Effect of Amendments. — The 1998 amendment, effective October 31, 1998, added subdivision (d)(5).

Legal Periodicals. — For note, "The Forty-Two Hundred Dollar Question: 'May State Agencies Have Discretion in Setting Civil Penalties Under the North Carolina Constitution?'," see 68 N.C.L. Rev. 1035 (1990).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

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Legislative Intent. — In enacting the 1992 amendment, the legislature intended to clarify, not change, the meaning of subsection (a) of this section. State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

Trial Court Without Jurisdiction. — The trial court was without jurisdiction in a declaratory judgment action to pass upon the question of whether subdivision (d)(1)c of this section authorizes warrantless searches in violation of U.S. Const., Amend. XIV where the plaintiffs did not allege that they had been subject to actual searches or that they had been fined for refusing access to investigators. Adams v. North Carolina Dep't of Natural & Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978).

Violation Held Willful. — Evidence was sufficient to support Commission's finding that unlawful filling of estuarine waters for 19 days after deadline prescribed in Division of Coastal Management Notice of Violation constituted a willful violation of this Article where, among other things, violator received a certified letter notifying him of the violation at least a month prior to the deadline, only partial work on a dam had been completed five days after the deadline, and a final working dam was not in place until 21 days after the deadline. In re Coastal Resources Comm'n, 96 N.C. App. 468, 386 S.E.2d 92 (1989), cert. denied, 326 N.C. 364, 389 S.E.2d 810 (1990).

Applied in Gaskill v. State ex rel. Cobey, 109 N.C. App. 656, 428 S.E.2d 474 (1993).

Cited in State ex rel. Rhodes v. Simpson, 325 N.C. 514, 385 S.E.2d 329 (1989).

§ 113A-127. Coordination with the federal government.

All State agencies shall keep informed of federal and interstate agency plans, activities, and procedures within their area of expertise that affect the coastal area. Where federal or interstate agency plans, activities or procedures conflict with State policies, all reasonable steps shall be taken by the State to preserve the integrity of its policies. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1.)

§ 113A-128. Protection of landowners' rights.

Nothing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States. (1973, c. 1284, s. 1; 1975, c. 452, s. 5; 1981, c. 932, s. 2.1; 1987, c. 827, s. 144.)

Legal Periodicals. — For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Cited in State ex rel. Cobey v. Simpson, 333 N.C. 81, 423 S.E.2d 759 (1992).

§ 113A-129: Reserved for future codification purposes.

Part 5. Coastal Reserves.

§ 113A-129.1. Legislative findings and purposes.

(a) Findings. — It is hereby determined and declared as a matter of legislative finding that the coastal area of North Carolina contains a number of important undeveloped natural areas. These areas are vital to continued fishery and wildlife protection, water quality maintenance and improvement, preservation of unique and important coastal natural areas, aesthetic enjoyment, and public trust rights such as hunting, fishing, navigation, and recreation. Such land and water areas are necessary for the preservation of estuarine areas of the State, constitute important research facilities, and provide public access to waters of the State.

(b) Purposes. — Important public purposes will be served by the preservation of certain of these areas in an undeveloped state. Such areas would thereafter be available for research, education, and other consistent public uses. These areas would also continue to contribute perpetually to the natural productivity and biological, economic, and aesthetic values of North Carolina's coastal area. (1989, c. 344, s. 1.)

Legal Periodicals. — For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Public Trust Rights. — The legislature recognized public trust rights in its legislative finding that the undeveloped natural areas on the North Carolina coast are vital to ... public trust rights such as hunting, fishing, navigation and recreation. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Public Uses. — The term "other public uses" means uses in the nature of public trust rights, such as those enumerated in this section and § 113A-129.2(e), thus, the placement of nine wells, together with associated underground utilities and access roads, is not a use in the nature of public trust rights and is prohibited by § 113A-129.2(e). Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Recreational Activities. — Like research and education, hunting, fishing, navigation, and recreation are activities which preserve the land in an undeveloped and natural state; these activities require only a temporary presence on the reserve and do not necessitate alteration of the undeveloped and natural state, they are recreational activities enjoyed by individuals, thus the impact of these activities on the natural resources of the area is minimal. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

§ 113A-129.2. Coastal Reserve Program.

(a) There is hereby created a North Carolina Coastal Reserve System for the purpose of acquiring, improving, and maintaining undeveloped coastal land and water areas in a natural state.

(b) This system shall be established and administered by the Department of Environment and Natural Resources. In so doing the Department shall consult with and seek the ongoing advice of the Coastal Resources Commission. The Department may by rule define the areas to be included in this system and set standards for its use.

(c) This system shall be established within the coastal area as defined by G.S. 113A-103(2).

(d) All acquisitions or dispositions of property for lands within this system shall be in accordance with the provisions of Chapter 146 of the General Statutes.

(e) All lands and waters within the system shall be used primarily for research and education. Other public uses, such as hunting, fishing, navigation, and recreation, shall be allowed to the extent consistent with these primary uses. Improvements and alterations to the lands shall be limited to those consistent with these uses. (1989, c. 344, s. 1; c. 727, s. 218(58); 1997-443, s. 11A.119(a).)

CASE NOTES

Purpose. — The purpose of subsection (e) of this section, as gleaned from § 113A-129.1 and subsection (a) of this section, is to preserve, improve, and maintain undeveloped coastal land and water areas in an undeveloped and natural state so that these areas can serve important public purposes; the primary public purpose or use served by the preservation of these areas in an undeveloped state is research and education. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Public Use. — Like research and education, hunting, fishing, navigation, and recreation are activities which preserve the land in an undeveloped and natural state; these activities require only a temporary presence on the reserve and do not necessitate alteration of the undeveloped and natural state, they are recreational activities enjoyed by individuals, thus the impact of these activities on the natural resources of the area is minimal. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

Other Public Uses. — The term "other public uses" means uses in the nature of public trust rights, such as those enumerated in subsection (e) and § 113A-129.1(a), thus, the placement of nine wells, together with associated underground utilities and access roads, is not a use in the nature of public trust rights and is prohibited by this section. Friends of Hatteras Island Nat'l Historic Maritime Forest Land Trust for Preservation, Inc. v. Coastal Resources Comm'n, 117 N.C. App. 556, 452 S.E.2d 337 (1995).

§ 113A-129.3. Coordination.

(a) To the extent feasible, this system shall be carried out in coordination with the National Estuarine Reserve Research System established by 16 U.S.C. § 1461.

(b) To the extent feasible, lands and waters within this system shall be dedicated as components of the "State Nature and Historic Preserve" as provided in Article XIV, Section 5, of the Constitution and as nature reserves pursuant to G.S. 113A-164.1 to G.S. 113A-164.11. (1989, c. 344, s. 1; c. 770, s. 47.)

§§ 113A-130 through 113A-134: Reserved for future codification purposes.

Part 6. Public Beach and Coastal Waterfront Access Program.

§ 113A-134.1. Legislative findings.

(a) The General Assembly finds that there are many privately owned lots or tracts of land in close proximity to the Atlantic Ocean and the coastal waters in North Carolina that have been and will be adversely affected by hazards such as erosion, flooding, and storm damage. The sand dunes on many of these lots provide valuable protective functions for public and private property and serve as an integral part of the beach sand supply system. Placement of permanent substantial structures on these lots will lead to increased risks of loss of life and property, increased public costs, and potential eventual encroachment of structures onto the beach.

(b) The public has traditionally fully enjoyed the State's beaches and coastal waters and public access to and use of the beaches and coastal waters. The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State. The General Assembly finds that the beaches and coastal waters are resources of statewide significance and have been customarily freely used and enjoyed by people throughout the State. Public access to beaches and coastal waters in North Carolina is, however, becoming severely limited in some areas. Also, the lack of public parking is increasingly making the use of existing public access difficult or impractical in some areas. The public interest would best be served by providing increased access to beaches and coastal waters and by making available additional public parking facilities. There is therefore, a pressing need in North Carolina to establish a comprehensive program for the identification, acquisition, improvement, and maintenance of public accessways to the beaches and coastal waters. (1981, c. 925, s. 1; 1983, c. 751, s. 13; 1989, c. 344; s. 2; 1995, c. 183, s. 2.)

Editor's Note. — Session Laws 1989, c. 344, s. 2, effective June 19, 1989, redesignated former Article 7A of Chapter 113A, §§ 113A-134.1 to 113A-134.3, as Part 6 of Article 7 of Chapter 113A.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see 64 N.C.L. Rev. 159 (1985).

For article, "Coastal Management Law in North Carolina: 1974-1994," see 72 N.C.L. Rev. 1413 (1994).

CASE NOTES

Cited in Concerned Citizens of Brunswick County Ass'n v. State ex rel. Rhodes, 329 N.C. 37, 404 S.E.2d 677 (1991).

§ 113A-134.2. Creation of program; administration; purpose; definitions.

(a) There is created the Public Beach and Coastal Waterfront Access Program, to be administered by the Commission and the Department, for the purpose of acquiring, improving, and maintaining property along the Atlantic Ocean and coastal waterways to which the public has rights-of-access or public trust rights as provided in this Part.

(b) As used in this Part:

(1) "Public trust resources" has the same meaning as in G.S. 113-131(e).

(2) "Public trust rights" has the same meaning as in G.S. 1-45.1. (1981, c. 925, s. 1; 1983, c. 757, s. 13; 1989, c. 344, s. 2; c. 727, s. 136; c. 751, s. 13; 1995, c. 183, s. 3.)

CASE NOTES

Cited in Concerned Citizens of Brunswick County Ass'n v. State ex rel. Rhodes, 329 N.C. 37, 404 S.E.2d 677 (1991).

§ 113A-134.3. Standards for public access program.

(a) The Commission, with the support of the Department, shall establish and carry out a program to assure the acquisition, improvement, and maintenance of a system of public access to coastal beaches and public trust waters. This public access program shall include standards to be adopted by the Commission for the acquisition of property and the use and maintenance of the property. The standards shall be written to assure that land acquisition funds shall only be used to purchase interests in property that will be of benefit to the general public. Priority shall be given to acquisition of lands that due to adverse effects of natural hazards, such as past and potential erosion, flooding, and storm damage, are unsuitable for the placement of permanent structures, including lands for which a permit for improvements has been denied under rules adopted pursuant to State law. The program shall be designed to provide and maintain reasonable public access and necessary parking, within the limitations of the resources available, to all coastal beaches and public trust waters where access is compatible with the natural resources involved and where reasonable access is not available.

(b) To the maximum extent possible, this program shall be coordinated with State and local beach and coastal water management and recreational programs and shall be carried out in cooperation with local governments. Prior to the purchase of any interests in property, the Secretary or his designee shall make a written finding of the public purpose to be served by the acquisition. Once property is purchased, the Department may allow property, without charge, to be controlled and operated by the county or municipality in which the property is located, subject to an agreement requiring that the local government use and maintain the property for its intended public purpose.

(c) Subject to any restrictions imposed by law, any funds appropriated or otherwise made available to the Public Beach and Coastal Waterfront Access Program may be used to meet matching requirements for federal or other funds. The Department shall make every effort to obtain funds from sources other than the General Fund to implement this program. Funds may be used to acquire or develop land for pedestrian access including parking and to make grants to local governments to accomplish the purposes of this Part. All acquisitions or dispositions of property made pursuant to this Part shall be in accordance with the provisions of Chapter 146 of the General Statutes. All grants to local governments pursuant to this Part for land acquisitions shall be made on the condition that the local government agrees to transfer title to any real property acquired with the grant funds to the State if the local government uses the property for a purpose other than beach or coastal waters access. (1981, c. 925, s. 1; 1983, c. 334; c. 757, s. 13; 1987, c. 827, s. 145; 1989, c. 344, s. 2; c. 727, s. 137; c. 751, s. 13; 1995, c. 183, s. 4.)

Editor's Note. — Session Laws 1995, c. 183, s. 4, amended this section by adding subsection (b) and (c) designations, but failed to add a subsection (a) designation; the subsection (a) designation was added at the direction of the Revisor of Statutes.

Legal Periodicals. — For comment, "Sunbathers Versus Property Owners: Public Access to North Carolina Beaches," see N.C.L. Rev. 159 (1985).

For article, "The Pearl in the Oyster: The Public Trust Doctrine in North Carolina," see 12 Campbell L. Rev. 23 (1989).

CASE NOTES

Cited in Coastal Ready-Mix Concrete Co. v. North Carolina Coastal Resources Comm'n, 116 N.C. App. 119, 446 S.E.2d 823 (1994); King ex rel. Warren v. State, 125 N.C. App. 379, 481 S.E.2d 330 (1997).

§§ 113A-134.4 through 113A-134.9: Reserved for future codification purposes.

Article 7A.

[Redesignated.]

Editor's Note. — Article 7A of Chapter 113A, consisting of §§ 113A-134.1 to 113A-134.3, was redesignated as Part 6 of Article 7 of Chapter 113A by Session Laws 1989, c. 344, s. 2, effective June 19, 1989.

Article 7B.

Bogue Inlet Access Program.

§ 113A-134.10: Repealed by Session Laws 1991, c. 365, s. 1.

Article 8.

North Carolina Land Conservancy Corporation.

§§ 113A-135 through 113A-149: Repealed by Session Laws 1983 (Regular Session, 1984), c. 995, s. 4.

Article 9.

Land Policy Act.

§ 113A-150. Short title.

This Article shall be known as the Land Policy Act of 1974. (1973, c. 1306, s. 1.)

Legal Periodicals. — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

§ 113A-151. Findings, intent and purpose.

(a) Findings. — The General Assembly hereby finds that:

(1) The land of North Carolina is a resource basic to the welfare of her people.

(2) A lack of coordination of governmental action; a lack of clearly stated, sound, and widely understood guidelines for planning; and a lack of systematic collection, classification, and utilization of information regarding the land resource have led to inconsistencies in policy and inadequacies in planning for the present and future uses of the land resource.

(3) Governmental agencies responsible for controlling land use and private and public users of the land resource are often unable to independently develop guidelines for land-use practices which provide adequate and meaningful provision for future demands on the land resource, while allowing current needs to be met.

(4) Systematic and sound decisions as to the location and nature of major public investments in key facilities cannot be made without a comprehensive State policy regarding the land resource.

(5) Those affected by State land-use policy and decisions must be given an opportunity for full participation in the policy- and decision-making process. Such a process must allow for the final implementation of policy by local governments. The State should take whatever steps necessary to encourage and assist local governments in meeting their obligation to control current uses and plan for future uses of the land resource.

(b) Intent and Purpose. — The General Assembly declares that it is the intent of this Article to undertake the continuing development and implementation of a State land-use policy, incorporating environmental, esthetic, economic, social, and other factors so as to promote the public interest, to preserve and enhance environmental quality, to protect areas of natural beauty and historic sites, to encourage beneficial economic development, and to protect and promote the public health, safety, and welfare. Such policy shall serve as a guide for decision-making in State and federally assisted programs which affect land use, and shall provide a framework for the development of land-use policies and programs by local governments. It is the purpose of this Article to:

(1) Promote patterns of land use which are in accord with a State land-use policy which encourages the wise and balanced use of the State's resources;

(2) Establish a State policy to give local governments guidance and assistance in the establishment and implementation of local land planning and management programs so as to effectively meet their responsibilities for economically and environmentally sound land-use management;

(3) Establish a State land-use policy which seeks to provide essential public services equitably to all persons within the State and to assure that citizens shall have, consistent with sound principles of land resource use, maximum freedom and opportunity to live and conduct their activities in locations of their personal choice;

(4) Condition the distribution of certain federal and State funds on meeting reasonable and flexible State requirements for basic land planning; such conditions to include a clear statement of the State's authority and responsibility for review of planning and management by local governments;

(5) Develop and maintain coordination of all State programs having a land-use impact, including joint planning and management of State

lands with adjacent nonstate lands, so as to ensure consistency with the purposes of this Article;

(6) Promote the development of systematic methods for the exchange of land-use, environmental, economic, and social information among all levels of government, and among agencies at all levels of government. (1973, c. 1306, s. 1.)

Legal Periodicals. — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

§ 113A-152. Definitions.

Unless the context otherwise requires, the following terms as used in this Article are defined as follows:

(1) "Areas of environmental concern" means: those areas of this State where uncontrolled development, unregulated use, or other man-related activities could result in major or irreversible damage to important environmental, historic, cultural, scientific or scenic values, or natural systems or processes which are of more than local significance, or could unreasonably endanger life or property as a result of natural hazards, or could result in loss of continued long-range productivity in renewable resource areas.

(2) "Principal officer" means the duly appointed or elected public official in responsible charge of a principal department of State government.

(3) "Key facilities" means public facilities which tend to induce development and urbanization of more than local impact and includes, but is not limited to, major facilities for the development, generation, and transmission of energy, for communication, and for transportation.

(4) "Local government" means any county, incorporated village, town, or city, or any combination of counties, incorporated villages, towns, and cities, acting through a joint program pursuant to the provisions of this Article.

(5) "New communities and large-scale developments" means private development which, because of its magnitude or the magnitude of its effect on the surrounding environment, is likely to present issues of more than local significance.

(6) "Project of regional impact" means land use, public development, and private development on government or nongovernmental lands for which there is a demonstrable impact affecting the interests of constituents of more than one local unit of government.

(7) "Region" or "regional" means or refers to one or more of the official planning regions established pursuant to the laws of this State. (1973, c. 1306, s. 1.)

§ 113A-153. North Carolina Land Policy Council.

(a), (b) Repealed by Session Laws 1981, c. 881, s. 3.

(c) Duties. —

(1) To assemble and analyze significant existing laws, policies and programs in State and local government as they pertain to or have substantial effect upon the use, management, development or conservation of all lands and waters, public and private, within the State of North Carolina.

(2) To define and cause to be prepared and periodically revised, a system of information and data concerning the land resources of the entire

State, including, but not limited to, esthetic, economic, ecological, demographic, geologic, and physical conditions, both current and projected, as well as a continuing inventory of governmental and private needs and priorities for the use of land resources. All State agencies and units of local government including the register of deeds of each county shall make all pertinent data in their custody available to the Land Policy Council.

(3) To consider, and to consult with the federal government and relevant states on, the interstate aspects of land-use issues of more than intrastate concern.

(4) To prepare, and revise on a continuing basis, an inventory of public and private institutional and financial resources available for land-use planning and management within the State and of State and local programs, projects, and activities which have a regional impact of more than local concern.

(5) To establish a method for identifying new community and large-scale development and land-use projects with regional impact.

(6) To prepare, in consultation with concerned State agencies and other recognized authorities, principles and guidelines for the systematic identification of areas of environmental concern.

(7) To provide technical assistance and training programs for State and local agency personnel concerned with the development and implementation of State and local land-use programs.

(8) To establish a method for coordinating all State and local agency programs and services which significantly affect land use.

(9) To prepare, in conjunction with the Advisory Committee on Land Policy as described in G.S. 113A-154, and following procedures established by this Article, a State land policy as defined in G.S. 113A-155.

(10) To prepare, in conjunction with the Advisory Committee on Land Policy as described in G.S. 113A-154, and after consultation with the duly constituted and authorized planning agencies of local governments, and following procedures established by this Article, a State land policy and State land classification system as defined further in this Article.

(11) To prepare and recommend to the General Assembly a system of valuation of property for tax purposes related to the range of public services available or to be made available to properties designated in each of the several land classifications.

(d) Hearings. — The Council shall conduct such public hearings as it shall determine to be necessary or appropriate to the development of the State land policy and the State land classification system, provided only that there be no fewer than six such hearings held, two in each of the three major physiographic regions of the State. The Council shall give adequate public notice of each hearing at least 30 calendar days prior to the date of the hearing and shall consider all relevant statements and matters presented at hearings.

The Council shall designate the place and time of hearing and may adopt appropriate rules of procedure governing the conduct of the hearing, including the presentation of oral and written statements, and the form, content and method of giving notice of hearing.

(e) Acceptance and Administration of Federal or Private Funds. — The Department of Environment and Natural Resources shall have power and authority to accept, receive and administer, on behalf of the Council, any funds, gifts, bequests, or other financial assistance given, granted or provided by legislative appropriation, or under any federal act or acts or from any federal agency, or from foundations or private sources, and to comply with all conditions and requirements necessary for the receipt, acceptance and use of

said funds to the extent not inconsistent with the laws of this State and the rules thereunder pertaining to land-use planning and management. The Council shall have authority to formulate plans and projects for the approval of all funding agencies and institutions and to enter into such contracts and agreements as may be necessary for such purposes or to enter into joint agreements with any other agency or division of government for such purposes and to furnish such information as may be requested for any project or program related to or conducted pursuant to such plans and contracts. Such funds received by the Council pursuant to this provision shall be deposited in the State treasury to the account of the Council and shall remain in such account until used by the Council. (1973, c. 1306, s. 1; 1977, c. 771, ss. 4, 15; 1979, c. 44, s. 1; 1981, c. 47, s. 1; c. 881, s. 3; 1987, c. 827, s. 146; 1989, c. 727, s. 218(67); 1997-443, s. 11A.119(a).)

Editor's Note. — The Land Policy Council referred to above has been abolished. Section 113A-154, referred to in this section, has been repealed.

§ 113A-154: Repealed by Session Laws 1981, c. 881, s. 3.

§ 113A-155. State land policy.

(a) Content. — The State land policy of North Carolina shall consist of the following:

(1) Consistent, comprehensive, and coordinated principles, guidelines, and methods for the transaction of all matters and affairs by any agency of State or local government dealing with, or related to, the acquisition, ownership, use, management, and disposition, in part or whole, of title or interests in state-owned and other public lands;

(2) A compilation of all appropriate State laws, appellate court decisions, and current administrative practices, policies and principles, as established by precedent or administrative order, when accepted and recognized as such by the Land Policy Council; and

(3) Principles, guidelines and methods regarding specific land-use and management problems identified by the Land Policy Council, which shall include, but not be limited to, the following:

a. Specific policies and principles for early acquisition of a reserve of lands to form a resource base from which needs for parklands, recreation sites, water reservoirs, key facilities, and other public needs may be met.

b. Specific policies and principles for the location, coordination, consolidation and joint use of utility rights-of-way, of whatever sort, whether above, below, or on the surface of the ground.

c. Specific policies regarding large-scale and special public projects and assemblage of land therefor.

d. Specific policies for determination and certification of areas of environmental concern.

e. Specific policies regarding new communities and large-scale developments on nongovernment lands.

f. Specific policies regarding projects of regional impact.

g. Other similar and related policies and directives as may be necessary to carry out the purpose of this Article.

(b) Effect. — Such policies, principles, directives and methods, when not inconsistent or in conflict with existing law or rules, shall guide and determine the administrative procedures, findings, decisions and objectives of all agencies of State and local government with regard to acquisition, management, and disposition of public lands and interests therein and the regulation of

private lands involved in or affected by areas of environmental concern, new communities, large-scale developments and projects of regional impact.

(c) Repealed by Session Laws 1987, c. 827, s. 147. (1973, c. 1306, s. 1; 1987, c. 827, s. 147.)

§ 113A-156. State land classification system.

(a) Purpose. — Within two years following July 1, 1974, the North Carolina Land Policy Council shall develop a State land classification system, which shall include comprehensive guidelines and policies and a method for the classification of all lands in the State for the purposes of:

(1) Providing to State and local governmental agencies a system for achieving the stated purposes of this Article.

(2) Promoting the orderly growth and development of the State in a manner consistent with the wise use and conservation of the land resources.

(3) Assuring that the use and development of land in areas of environmental concern within the State is not inconsistent with the State land policy.

(4) Assuring that the use of land for key facilities, new communities, and large-scale developments, or in areas which are or may be impacted by key facilities, new communities, and large-scale developments, is not inconsistent with the State land policy.

(b) Criteria for Classification. — The Council shall develop and adopt as a part of the classification system no fewer than four nor more than eight classifications which recognize all lands as a basic social and natural resource and which provide for the full range of private and public purposes in the use and conservation of the land resource. Emphasis shall be given to a harmonious relationship among the use potentials of the land, the physical and fiscal feasibility of providing necessary public services, and other facilities and social services. Areas of environmental concern, key facilities, projects of regional impact, new communities, and large-scale developments shall be recognized and made a part of the land classification system in order to further the stated purposes of this Article.

(c) Basis for Land Classification. — Full consideration shall be given, but shall not be limited to, the following aspects and characteristics of the lands of the State:

(1) Topographic features such as land elevations and gradients.

(2) Surface and underground waters, natural or artificial.

(3) Geological, chemical, mineral and physical characteristics of the land.

(4) The existing or potential utility of lands and sites having intrinsic historic, ecological, recreational, scenic or esthetic values or virtues.

(5) The availability or potential availability of public services, including key facilities, health, education, and other community facilities and social services.

(6) Areas of environmental concern, existing or potential key facilities, projects of regional impact, new communities, and large-scale development.

(d) Content. — The State land classification system shall include, but specifically is not limited to, the following:

(1) Concise and explicit descriptions of each of the classification categories.

(2) Guidelines and procedures for the preparation of official land-use plans by the land-planning agencies of local government, including a procedure for review by an appropriate State agency for sufficiency and consistency with the provisions of this Article, and a procedure for assembling local plans into regional plans.

(3) Rules and procedures for land reclassification together with an appellate procedure for property owners and other affected individuals, including officers of any level of government.

(e) Repealed by Session Laws 1987, c. 827, s. 148. (1973, c. 1306, s. 1; 1987, c. 827, s. 148.)

Legal Periodicals. — For article discussing a practical interpretation of North Carolina's comprehensive plan requirement for zoning regulations, see 7 Campbell L. Rev. 1 (1984).

§ 113A-157: Repealed by Session Laws 1981, c. 881, s. 3.

§ 113A-158. Protection of rights.

Nothing in this Article authorizes any governmental agency to adopt a rule or issue any order that constitutes a taking of property in violation of the Constitution of this State or of the United States, without payment of full compensation. (1973, c. 1306, s. 5; 1987, c. 827, s. 144.)

§ 113A-159. Interpretation.

It is the intention of the General Assembly that this Article be interpreted consistently with, and administered in coordination with, the Coastal Area Management Act of 1974. (1973, c. 1306, s. 6.)

§§ 113A-160 through 113A-164: Reserved for future codification purposes.

Article 9A.

Nature Preserves Act.

§ 113A-164.1. Short title.

This Article shall be known as the Nature Preserves Act. (1985, c. 216, s. 1.)

Cross References. — As to the Coastal Reserve Program, see § 113A-129.2.

§ 113A-164.2. Declaration of policy and purpose.

(a) The continued population growth and land development in North Carolina have made it necessary and desirable that areas of natural significance be identified and preserved before they are destroyed. These natural areas are irreplaceable as laboratories for scientific research, as reservoirs of natural materials for uses that may not now be known, as habitats for plant and animal species and biotic communities, as living museums where people may observe natural biotic and environmental systems and the interdependence of all forms of life, and as reminders of the vital dependence of the health of the human community on the health of the other natural communities.

(b) It is important to the people of North Carolina that they retain the opportunity to maintain contact with these natural communities and environmental systems of the earth and to benefit from the scientific, aesthetic, cultural, and spiritual values they possess. The purpose of this Article is to establish and maintain a State Registry of Natural Heritage Areas and to

prescribe methods by which nature preserves may be dedicated for the benefit of present and future citizens of the State. (1985, c. 216, s. 1.)

§ 113A-164.3. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Articles of dedication" means the writing by which any estate, interest, or right in a natural area is formally dedicated as a nature preserve as authorized in G.S. 113A-164.6.

(2) "Dedicate" means to transfer to the State an estate, interest, or right in a natural area in any manner authorized in G.S. 113A-164.6.

(3) "Natural area" means an area of land, water, or both land and water, whether publicly or privately owned, that (i) retains or has reestablished its natural character, (ii) provides habitat for rare or endangered species of plants or animals, (iii) or has biotic, geological, scenic, or paleontological features of scientific or educational value.

(4) "Nature preserve" means a natural area that has been dedicated pursuant to G.S. 113A-164.6.

(5) "Owner" means any individual, corporation, partnership, trust, or association, and all governmental units except the State, its departments, agencies or institutions.

(6) "Registration" means an agreement between the Secretary and the owner of a natural area to protect and manage the natural area for its specified natural heritage resource values.

(7) "Secretary" means the Secretary of Environment and Natural Resources. (1985, c. 216, s. 1; 1989, c. 727, s. 218(68); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-164.4. Powers and duties of the Secretary.

The Secretary shall:

(1) Establish by rule the criteria for selection, registration, and dedication of natural areas and nature preserves.

(2) Cooperate or contract with any federal, State, or local government agency, private conservation organization, or person in carrying out the purposes of this Article.

(3) Maintain a Natural Heritage Program to provide assistance in the selection and nomination for registration or dedication of natural areas. The Program shall include classification of natural heritage resources, an inventory of their locations, and a data bank for that information. The Program shall cooperate with the Department of Agriculture and Consumer Services in the selection and nomination of areas that contain habitats for endangered and rare plant species, and shall cooperate with the Wildlife Resources Commission in the selection and nomination of areas that contain habitats for endangered and rare animal species. Information from the natural heritage data bank may be made available to public agencies and private persons for environmental assessment and land management purposes. Use of the inventory data for any purpose inconsistent with the Natural Heritage Program may not be authorized. The Program shall include other functions as may be assigned for registration, dedication, and protection of natural areas and nature preserves.

(4) Prepare a Natural Heritage Plan that shall govern the Natural Heritage Program in the creation of a system of registered and dedicated natural areas.

(5) Publish and disseminate information pertaining to natural areas and nature preserves within the State.

(6) Appoint advisory committees composed of representatives of federal, State, and local governmental agencies, scientific and academic institutions, conservation organizations, and private business, to advise him on the identification, selection, registration, dedication, and protection of natural areas and nature preserves.

(7) Submit to the Governor and the General Assembly a biennial report on or before February 15, 1987, and on or before February 15 of subsequent odd-numbered years describing the activities of the past biennium and plans for the coming biennium, and detailing specific recommendations for action that the Secretary deems necessary for the improvement of the Program. (1985, c. 216, s. 1; 1987, c. 827, s. 152; 1997-261, s. 82.)

§ 113A-164.5. Registration of natural areas.

(a) The Secretary shall maintain a State Registry of voluntarily protected natural areas to be called the North Carolina Registry of Natural Heritage Areas. Registration of natural areas shall be accomplished through voluntary agreement between the owner of the natural area and the Secretary. State-owned lands may be registered by agreement with the agency to which the land is allocated. Registration agreements may be terminated by either party at any time, and termination removes the area from the Registry.

(b) A natural area shall be registered when an agreement to protect and manage the natural area for its specified natural heritage resource value has been signed by the owner and the Secretary. The owner of a registered natural area shall be given a certificate signifying the inclusion of the area in the Registry. (1985, c. 216, s. 1.)

§ 113A-164.6. Dedication of nature preserves.

(a) The State may accept the dedication of nature preserves on lands deemed by the Secretary to qualify as outstanding natural areas. Nature preserves may be dedicated by voluntary act of the owner. The owner of a qualified natural area may transfer fee simple title or other interest in land to the State. Nature preserves may be acquired by gift, grant, or purchase. Dedication of a preserve shall become effective only upon acceptance of the articles of dedication by the State. Articles of dedication shall be recorded in the office of the register of deeds in the county or counties in which the natural area is located.

(b) Articles of dedication may:

(1) Contain restrictions and other provisions relating to management, use, development, transfer, and public access, and may contain any other restrictions and provisions as may be necessary or advisable to further the purposes of this Article;

(2) Define, consistently with the purposes of this Article, the respective rights and duties of the owner and of the State and provide procedures to be followed in case of violation of the restrictions;

(3) Recognize and create reversionary rights, transfers upon conditions or with limitations, and gifts over; and

(4) Vary in provisions from one nature preserve to another in accordance with differences in the characteristics and conditions of the several areas.

(c) Subject to the approval of the Governor and Council of State, the State may enter into amendments of any articles of dedication upon finding that the amendment will not permit an impairment, disturbance, use, or development of the area inconsistent with the purposes of this Article. If the fee simple

estate in the nature preserve is not held by the State under this Article, no amendment may be made without the written consent of the owner of the other interests therein. (1985, c. 216, s. 1.)

§ 113A-164.7. Nature preserves held in trust.

Lands dedicated for nature preserves pursuant to this Article are held in trust by the State for those uses and purposes expressed in this Article for the benefit of the people of North Carolina. These lands shall be managed and protected according to regulations adopted by the Secretary. Lands dedicated as a nature preserve pursuant to G.S. 113A-164.6 may not be used for any purpose inconsistent with the provisions of this Article, or disposed of, by the State without a finding by the Governor and Council of State that the other use or disposition is in the best interest of the State. (1985, c. 216, s. 1.)

§ 113A-164.8. Dedication of state-owned lands to nature preserves; procedures.

Subject to the approval of the Governor and Council of State, state-owned lands may be dedicated as a nature preserve. State-owned lands shall be dedicated by allocation pursuant to the provisions of G.S. 143-341(4)g. Lands dedicated pursuant to this section may be removed from dedication upon the approval of the Governor and Council of State. (1985, c. 216, s. 1.)

§ 113A-164.9. Dedication of preserves by local governmental units.

All local units of government may dedicate lands as nature preserves by transfer of fee simple title or other interest in land to the State. (1985, c. 216, s. 1.)

§ 113A-164.10. Acquisition of land by State.

All acquisitions or dispositions of an interest in land by the State pursuant to this Article shall be subject to the provisions of Chapter 146 of the General Statutes. (1985, c. 216, s. 1.)

§ 113A-164.11. Assessment of land subject to permanent dedication agreement.

For purposes of taxation, privately owned land subject to a nature preserve dedication agreement shall be assessed on the basis of the true value of the land less any reduction in value caused by the agreement. (1985, c. 216, s. 1.)

ARTICLE 10.

Control of Outdoor Advertising near the Blue Ridge Parkway.

§ 113A-165. Advertisements prohibited within 1,000 feet of centerline; exceptions.

No advertisement or advertising structure shall be erected, constructed, installed, maintained or operated within 1,000 feet of the centerline of the Blue Ridge Parkway, except the following:

(1) Sign displays or devices which advertise sale, lease, rental, or development of the property on which it is located.

(2) On-premises Signs. — For the purpose of this Article, those signs, displays or devices which carry only advertisements strictly related to the lawful use of the property on which it is located including signs, displays or devices which identify the business transacted, services rendered, goods sold or produced on the property, name of the business, [and] name of the person, firm or corporation occupying or owning the property. The size of signs advertising the major business activity is not regulated hereunder. Signs which advertise brand-name products or service sold or offered for sale on the property shall not be displayed as on-premise[s] signs unless such signs are on or attached to the building in which such products are sold. All such signs permitted under this subsection shall be located not more than 150 feet from the building in which such business activity is carried on.

(3) Historic markers erected by duly constituted and authorized public authorities.

(4) Highway markers and signs erected or caused to be erected by the Board of Transportation or other authorized authorities in accordance with the law.

(5) Directional and official signs or notices erected and maintained by public officers or agencies pursuant to and in accordance with lawful authorization for the purpose of carrying out the official duty or responsibility.

(6) Signs located within a 1,000-foot radius of intersections created by the crossing of the centerline of the Blue Ridge Parkway with the centerlines of components of the National System of Interstate and Defense Highways, Federal Aid Primary Highway System, or the North Carolina System of Primary Highways, not, however, inconsistent with other provisions of the General Statutes. (1973, c. 507, s. 5; 1975, c. 385.)

§ 113A-166. Rules.

The Secretary of Environment and Natural Resources may adopt rules needed to implement this Article. (1975, c. 385; 1977, c. 771, s. 4; 1987, c. 827, s. 149; 1989, c. 727, s. 218(69); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-167. Existing billboards.

Any billboard in existence upon May 26, 1975, and which does not conform to the requirements of this Article may be maintained for the life of such advertisement or advertising structure, provided that: The Department of Environment and Natural Resources is authorized to acquire by purchase, gift or condemnation all outdoor advertising and all property rights pertaining thereto existing on May 26, 1975, which are nonconforming.

(1) In any acquisition, purchase or condemnation, just compensation to the owner of the outdoor advertising where the owner of the outdoor advertising does not own the fee shall be limited to the fair market value at the time of the taking of the outdoor advertising owner's interest in the real property on which the outdoor advertising is located and such value shall include the value of the outdoor advertising.

(2) In any acquisition, purchase or condemnation, just compensation to the owner of the fee or other interest in the real property upon which

the outdoor advertising is located where said owner does not own the outdoor advertising located thereon shall be limited to the difference in the fair market value of the entire tract immediately before and immediately after the taking by the Commission of the right to erect and maintain such outdoor advertising thereon, and in arriving at the fair market value after the taking, any special or general benefits accruing to the property by reason of the acquisition shall be taken into consideration.

(3) In any acquisition, purchase or condemnation, just compensation to the owner of the fee in the real property upon which the outdoor advertising is located where said owner also owns the outdoor advertising located thereon shall be limited to the fair market value of the outdoor advertising plus the difference in the fair market value of the entire tract immediately before and immediately after the taking by the Department of Environment and Natural Resources of the right to erect and maintain such outdoor advertising thereon and in arriving at the fair market value after the taking, any special or general benefits accruing to the property by reason of the acquisition shall be taken into consideration. (1975, c. 385; 1977, c. 771, s. 4; 1989, c. 727, s. 218(70); 1997-443, s. 11A.119(a).)

§ 113A-168. Removal, etc., of unlawful advertising.

Any outdoor advertising erected or established after May 26, 1975, in violation of the provisions of this Article shall be unlawful and shall constitute a nuisance. The Department of Environment and Natural Resources shall give 30 days' notice by certified mail to the owner of the nonconforming outdoor advertising structure, if such owner is known or can by reasonable diligence be ascertained, to move the outdoor advertising structure or to make it conform to the provisions of this Article and rules and regulations promulgated by the Department of Environment and Natural Resources hereunder. The Department or its agents shall have the right to remove or contract to have removed the nonconforming outdoor advertising at the expense of the said owner if the said owner fails to act within 30 days after receipt of such notice. The Department or its agents or contractor and his employees may enter upon private property for the purpose of removing outdoor advertising prohibited by this Article or its implementing rules without civil or criminal liability. (1975, c. 385; 1977, c. 771, s. 4; 1987, c. 827, s. 150; 1989, c. 727, s. 138; 1997-443, s. 11A.119(a).)

§ 113A-169. Condemnation procedure.

For the purposes of this Article, the Department of Environment and Natural Resources shall use the procedure for condemnation of property as provided for by Article 9 of Chapter 136 of the General Statutes. (1975, c. 385; 1977, c. 771, s. 4; 1989, c. 727, s. 218(71); 1997-443, s. 11A.119(a).)

§ 113A-170. Violation a misdemeanor; injunctive relief.

Any person, firm, corporation or association placing or erecting outdoor advertising structure or junkyard along the Blue Ridge Parkway in violation of this Article or a rule adopted under this Article shall be guilty of a Class 1 misdemeanor. In addition thereto, the Department of Environment and Natural Resources may seek injunctive relief in the superior court of the county in which the said nonconforming outdoor advertising is located and require the outdoor advertising to conform to the provisions of this Article or a

rule adopted under this Article, or require the removal of the said nonconforming outdoor advertising. (1975, c. 385; 1977, c. 771, s. 4; 1987, c. 827, s. 151; 1989, c. 727, s. 218(72); 1993, c. 539, s. 875; 1994, Ex. Sess., c. 24, s. 14(c); 1997-443, s. 11A.119(a).)

§§ 113A-171 through 113A-175: Reserved for future codification purposes.

Article 11.

Forest Development Act.

§ 113A-176. Title.

This Article shall be known as the "Forest Development Act." (1977, c. 562, s. 1.)

§ 113A-177. Statement of purpose.

(a) The General Assembly finds that:

(1) It is in the public interest of the State of North Carolina to encourage the development of the State's forest resources and the protection and improvement of the forest environment.

(2) Unfavorable environmental impacts, although currently of a local and sporadic nature, are occurring as a result of forest operations. It is in the State's interest that corrective action be developed now to prevent more serious problems in the future.

(3) Regeneration of potentially productive forest land is a high-priority problem requiring prompt attention and action.

(4) Growing demands on forests and related land resources cannot be met by intensive management of public and industrial forest lands alone.

(b) The purpose of this Article is to direct the Secretary of Environment and Natural Resources to implement a forest development program to:

(1) Provide financial assistance to eligible landowners to increase the productivity of the privately owned forests of the State through the application of forest renewal practices;

(2) Insure that forest operations in the State are conducted in a manner designed to protect the soil, air, and water resources, including but not limited to streams, lakes and estuaries through actions of landowners on lands for which assistance is sought under provisions in this Article;

(3) Implement a program of voluntary landowner participation through the use of a forest development fund to meet the above goals.

(c) It is the intent of the General Assembly that in implementing the program under this Article, the Secretary will cause it to be coordinated with other related programs in such a manner as to encourage the utilization of private agencies, firms and individuals furnishing services and materials needed in the application of practices included in the forest development program. (1977, c. 562, s. 2; c. 771, s. 4; 1989, c. 727, s. 218(73); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-178. Definitions.

As used in this Article:

(1) "Approved forest management plan" means the forest management plan submitted by the eligible landowner and approved by the Secretary. Such plan shall include forest management practices to insure both maximum forest productivity and environmental protection of the lands to be treated under the management plan.

(2) "Approved practices" mean those silvicultural practices approved by the Secretary for the purpose of commercially growing timber through the establishment of forest stands, or of insuring the proper regeneration of forest stands to commercial production levels following the harvest of mature timber. Such practices shall include those required to accomplish site preparation, natural and artificial forestation, noncommercial removal of residual stands for silvicultural purposes, and cultivation of established young growth of desirable trees. In each case, approved practices will be determined by the needs of the individual forest stand. These practices shall include existing practices and such practices as are developed in the future to insure both maximum forest productivity and environmental protection.

(3) "Department" means the Department of Environment and Natural Resources.

(3a) "Eligible land" means land owned by an eligible landowner.

(4) "Eligible landowner" means a private individual, group, association or corporation owning land suitable for forestry purposes. Where forest land is owned jointly by more than one individual, group, association or corporation, as tenants in common, tenants by the entirety, or otherwise, the joint owners shall be considered, for the purpose of this Article, as one eligible landowner and entitled to receive cost-sharing payments as provided herein only once during each fiscal year.

(5) Recodified as § 113A-178(3a).

(6) "Forest development assessment" means an assessment on primary forest products from timber severed in North Carolina for the funding of the provisions of this Article, as authorized by the General Assembly.

(7) "Forest development cost-sharing payment" means financial assistance to partially cover the costs of implementing approved practices in such amounts as the Secretary shall determine, subject to the limitations of this Article.

(8) "Forest development fund" means the Forest Development Fund created by G.S. 113A-183.

(8a) "Maintain" means to retain the reforested area as forestland for a 10-year period and to comply with the provisions in the approved forest management plan.

(9) "Secretary" means the Secretary of Environment and Natural Resources. (1977, c. 562, s. 3; c. 771, s. 4; 1989, c. 727, s. 218(74); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-352, s. 1; 1997-443, s. 11A.119(a).)

Editor's Note. — Former subdivision (5), defining "Eligible land", was recodified as subdivision (3a), and new subdivision (10), defining "Maintain", was recodified as subdivision (8a), at the direction of the Revisor of Statutes.

§ 113A-179. Powers and duties.

(a) The Secretary shall have the powers and duties to administer the provisions of this Article.

(b) The Department shall serve as the disbursing agency for funds to be expended from and deposited to the credit of the Forest Development Fund.

(c) Subject to the limitations set forth in G.S. 113A-183(d), the Secretary is authorized to employ administrative, clerical and field personnel to support the program created by this Article and to compensate such employees from the Forest Development Fund for services rendered in direct support of the program.

(d) The Secretary is authorized to purchase equipment for the implementation of this program from the Forest Development Fund subject to the limitations of G.S. 113A-183(e). All equipment purchased with these funds will be assigned to and used only for the forest development program, except for emergency use in forest fire suppression and other activities relating to the protection of life or property. The Forest Development Fund will be reimbursed from other program funds for equipment costs incurred during such emergency use. (1977, c. 562, s. 4.)

§ 113A-180. Administration of cost sharing.

The Secretary shall have authority to administer the cost sharing provisions of this Article, including but not limited to the following:

(1) Prescribe the manner and requirements of making application for cost sharing funds.

(2) Identify those approved forestry practices as defined in G.S. 113A-178(2) which shall be approved for cost sharing under the provisions of this Article.

(3) Review periodically the cost of forest development practices and establish allowable ranges for cost sharing purposes for approved practices under varying conditions throughout the State.

(4) Determine, prior to approving forest development cost sharing payments to any landowner, that all proposed practices are appropriate and are comparable in cost to the prevailing cost of those practices in the general area in which the land is located. Should the Secretary determine that the submitted cost of any practice is excessive, he shall approve forest development cost sharing payments based upon an allowable cost established under G.S. 113A-180(3).

(5) Determine, prior to approving forest development cost sharing payments, that an approved forest management plan as defined in G.S. 113A-178(1) for the eligible land has been filed with the Secretary and that the landowner has indicated in writing his intent to comply with the terms of such management plan.

(6) Determine, prior to approving forest development cost sharing payments, that the approved practices for which payment is requested have been completed in a satisfactory manner, conform to the approved forest management plan submitted under G.S. 113A-180(5), and otherwise meet the requirements of this Article.

(7) Disburse from the Forest Development Fund to eligible landowners cost sharing payments for satisfactory completion of practices provided for by this Article and the Secretary shall, insofar as is practicable, disburse the funds from the State's appropriation on a matching basis with the funds generated by the Primary Forest Product Assessment. (1977, c. 562, s. 5.)

§ 113A-180.1. Cost-share agreements.

(a) In order to receive forest development cost-share payments, an eligible landowner shall enter into a written agreement with the Department describing the eligible land, setting forth the approved practices implemented for the area and covered by the approved forest management plan, and agreeing to maintain those practices for a 10-year period.

(b) In the absence of Vis major or Act of God or other factors beyond the landowner's control, a landowner who fails to maintain the practice or practices for a 10-year period in accordance with the agreement set forth in subsection (a) of this section shall repay to the Fund all cost-sharing funds received for that area.

(c) If the landowner voluntarily relinquishes control or title to the land on which the approved practices have been established, the landowner shall:

(1) Obtain a written statement, or a form approved by the Department, from the new owner or transferee in which the new owner or transferee agrees to maintain the approved practices for the remainder of the 10-year period; or

(2) Repay to the Fund all cost-sharing funds received for implementing the approved practices on the land.

If a written statement is obtained from the new owner or transferee, the original landowner will no longer be responsible for maintaining the approved practices or repaying the cost-sharing funds. The responsibility for maintaining those practices for the remainder of the 10 years shall devolve to the new owner or transferee. (1997-352, s. 2.)

§ 113A-181. Limitation of payments.

(a) An eligible landowner may receive forest development cost sharing payments for satisfactory completion of approved practices as determined by the Secretary, except that the Secretary shall approve no assistance in an amount exceeding the lesser of (i) a sum equal to sixty percent (60%) of the landowner's actual per acre cost incurred in implementing the approved practice or (ii) a sum equal to sixty percent (60%) of the prevailing per acre cost as determined by the Secretary under G.S. 113A-180(3) for implementing that approved practice.

(b) The maximum amount of forest development cost sharing funds allowed to any landowner in one fiscal year will be the amount required to complete all approved practices on 100 acres of land at the prevailing cost sharing rate established under G.S. 113A-181(a).

(c) Eligible landowners may not use State cost sharing funds if funds from any federal cost sharing program are used on the same acreage for forestry practices during the same fiscal year. (1977, c. 562, s. 6.)

§ 113A-182. Participation by government political subdivisions.

No governmental agency, federal, State or local, will be eligible for forest development payments under the provision of this Article. (1977, c. 562, s. 7.)

§ 113A-183. Forest Development Fund.

(a) The Forest Development Fund is created in the Department of Environment and Natural Resources as a special fund. Revenue in the Fund does not revert at the end of a fiscal year, and interest and other investment income earned by the Fund accrues to it. The Fund is created to provide revenue to implement this Article. The Fund consists of the following revenue:

(1) Assessments on primary forest products collected under Article 12 of Chapter 113A of the General Statutes.
(2) General Fund appropriations.
(3) Gifts and grants made to the Fund.

(b), (c) Repealed by Sessions Laws 1997-352, s. 3.

(d) In any fiscal year, no more than five percent (5%) of the available funds generated by the Primary Forest Product Processor Assessment Act may be used for program support under the provisions of G.S. 113A-179(c).

(e) Funds used for the purchase of equipment under the provisions of G.S. 113A-179(d) shall be limited to appropriations from the General Fund to the Forest Development Fund designated specifically for equipment purchase. (1977, c. 562, s. 8; c. 771, s. 4; 1981, c. 1127, s. 45; 1989, c. 727, s. 218(75); 1997-352, s. 3; 1997-443, s. 11A.119(a).)

§§ 113A-184 through 113A-188: Reserved for future codification purposes.

Article 12.

Primary Forest Product Assessment Act.

§ 113A-189. Short title.

This Article shall be known as the Primary Forest Product Assessment Act. (1977, c. 573, s. 1.)

§ 113A-190. Statement of purpose.

(a) The purpose of this Article is to create an assessment on primary forest products processed from North Carolina timber to provide a source of funds to finance the forestry operations provided for in the Forest Development Act of 1977.

(b) All assessments levied under the provisions of this Article shall be used only for the purposes specified in G.S. 113A-193(c) and in the Forest Development Act. (1977, c. 573, s. 2.)

§ 113A-191. Definitions.

The following words, terms and phrases hereinafter used for the purpose of this Article are defined as follows:

(1) "Primary forest product" shall include those products of the tree after it is severed from the stump and cut to its first roundwood product for further conversion. These products include but are not limited to whole trees for chipping, whole tree logs, sawlogs, pulpwood, veneer bolts, and posts, poles and piling.
(2) "Processor" shall mean the individual, group, association, or corporation that procures primary forest products at their initial point of concentration for conversion to secondary products or for shipment to others for such conversion.
(3) "Forest Development Fund" shall mean the special fund established by the Forest Development Act of 1977.
(4) For the purpose of this Article, the following are not considered "primary forest products":
a. Christmas trees and associated greens;

b. Material harvested from an individual's own land and used on said land for the construction of fences, buildings or other personal use developments;

c. Fuel wood harvested for personal use or use in individual homes. (1977, c. 573, s. 3.)

§ 113A-192. Operation of assessment system.

(a) The General Assembly hereby levies an assessment on all primary forest products harvested from lands within the State of North Carolina.

(b) This assessment shall be at the rates as established in G.S. 113A-194(b) and the proceeds of such assessment shall be deposited in the Forest Development Fund.

(c) The collection of the assessment shall be suspended in any fiscal year in which the General Assembly fails to make general fund appropriations to the Forest Development Fund.

(d) The collection of the assessment shall be suspended in any fiscal year in which there is carried forward from previous years a balance of unobligated funds in the Forest Development Fund greater than twice the amount appropriated from the general fund for that fiscal year.

(e) If the assessment is suspended because of either clause (c) or (d) above that suspension shall cease when the condition causing the suspension no longer exists. (1977, c. 573, s. 4.)

§ 113A-193. Duties of Secretaries.

(a) The Secretary, Department of Revenue, shall:

(1) Develop the necessary administrative procedures to collect the assessment;

(2) Collect the assessment from the primary forest product processors;

(3) Deposit funds collected from the assessment in the Forest Development Fund;

(4) Audit the records of processors to determine compliance with the provisions of this Article.

(b) The Secretary of Environment and Natural Resources shall:

(1) Provide to the Secretary, Department of Revenue, lists of processors subject to the assessment;

(2) Advise the Secretary, Department of Revenue, of the appropriate methods to convert measurements of primary forest products by other systems to those authorized in this Article;

(3) Establish in November prior to those sessions in which the General Assembly considers the State budget, the estimated total assessment that will be collectible in the next budget period and so inform the Advisory Budget Commission and the General Assembly;

(4) Within 30 days of certification of the State budget, notify the Secretary, Department of Revenue, of the need to collect the assessment for those years covered by the approved budget.

(5) By January 15 of each odd-numbered year, report to the General Assembly on the number of acres reforested, type of owners assisted, geographic distribution of funds, the amount of funds encumbered and other matters. The report shall include the information by forestry district and statewide and shall be for the two fiscal years prior to the date of the report.

(c) The Secretary of Revenue shall be reimbursed for those actual expenditures incurred as a cost of collecting the assessment for the Forest Development Fund. This amount shall be transferred from the Forest Development

Fund in equal increments at the end of each quarter of the fiscal year to the Department of Revenue. This amount shall not exceed five percent (5%) of the total assessments collected on primary forest products during the preceding fiscal year. (1977, c. 573, s. 5; c. 771, s. 4; 1983, c. 761, s. 120; 1985, c. 526; 1989, c. 727, s. 218(76); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-194. Assessment rates.

(a) The assessment rates shall be based on the following standards:

(1) For primary forest products customarily measured in board feet, the "International ¼ Inch Log Rule" or equivalent will be used;

(2) For primary forest products customarily measured in cords, the standard cord of 128 cubic feet or equivalent will be used;

(3) For any other type of forest product separated from the soil, the Secretary of Environment and Natural Resources shall determine a fair unit assessment rate, based on the cubic foot volume of one thousand foot board measure, International ¼ Inch Log Rule or one standard cord, 128 cubic feet.

(b) The assessment levied on primary forest products shall be at the following rates:

(1) Fifty cents (50¢) per thousand board feet for softwood sawtimber, veneer logs and bolts, and all other softwood products normally measured in board feet;

(2) Forty cents (40¢) per thousand board feet for hardwood and bald cypress sawtimber, veneer, and all other hardwood and bald cypress products normally measured in board feet;

(3) Twenty cents (20¢) per cord for softwood pulpwood and other softwood products normally measured in cords;

(4) Twelve cents (12¢) per cord for hardwood pulpwood and other hardwood and bald cypress products normally measured in cords;

(5) All material harvested within North Carolina for shipment outside the State for primary processing will be assessed at a percentage of the invoice value. This percentage will be established to yield rates equal to those if the material were processed within the State. (1977, c. 573, s. 6; c. 771, s. 4; 1989, c. 727, s. 218(77); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1997-443, s. 11A.119(a).)

§ 113A-195. Collection of assessment.

(a) The assessment shall be levied against the processor of the primary forest product.

(b) The assessment shall be submitted on a quarterly basis of the State's fiscal year due and payable the last day of the month following the end of each quarter.

(c) The assessment shall be remitted to the Secretary, Department of Revenue, by check or money order, with such production reports as may be required by said Secretary.

(d) The processor shall maintain for a period of three fiscal years and make available to the Secretary, Department of Revenue, such production records necessary to verify proper reporting and payment of revenue due the Forest Development Fund.

(e) The production reports of the various processors shall be used only for assessment purposes. Production information will not be made a part of the public record on an individual processor basis.

(f) Any official or employee of the State who discloses information obtained from a production report, except as may be necessary for administration and

collection of the assessment, or in the performance of official duties, or in administration or judicial proceedings related to the levy or collection of the assessment, shall be guilty of a Class 3 misdemeanor punishable only by a fine not to exceed fifty dollars ($50.00). (1977, c. 573, s. 7; 1987, c. 523; 1993, c. 539, s. 876; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113A-196. Enforcement of collection.

The Secretary of Revenue shall enforce collection of the primary forest product assessment in accordance with the remedies and procedures contained in Article 9 of Chapter 105 of the General Statutes. (1977, c. 573, s. 8.)

§§ 113A-197 through 113A-201: Reserved for future codification purposes.

Article 13.

Toxic Substances Task Force and Incident Response Procedures.

§§ 113A-202 through 113A-204: Repealed by Session Laws 1979, 2nd Session, c. 1310, s. 3.

Cross References. — As to powers and duties of the Secretary of Crime Control and Public Safety with regard to man-made or natural disasters or accidents, see § 143B-476.

Editor's Note. — Former section 113A-204 had been reserved for future codification purposes.

Article 14.

Mountain Ridge Protection.

§ 113A-205. Short title.

This Article shall be known as the Mountain Ridge Protection Act of 1983. (1983, c. 676, s. 1.)

Legal Periodicals. — For article discussing the legislative history of the North Carolina Mountain Ridge Protection Act and analyzing its major provisions, see 63 N.C.L. Rev. 183 (1984).

For note on the regulatory impact of North Carolina's ridge law, see 63 N.C.L. Rev. 197 (1984).

For comment, "Legal Analysis of the Constitutionality of the Water Supply Watershed Protection Act of 1989 and the Hyde Bill," see 29 Wake Forest L. Rev. 1279 (1994).

§ 113A-206. Definitions.

Within the meaning of this Article:

(1) The word "person" includes any individual, partnership, firm, association, joint venture, public or private corporation, trust, estate, commission, board, public or private institution, utility, cooperative, interstate body, the State of North Carolina and its agencies and political subdivisions, or other legal entity.

(2) A person, as defined in this section, doing business or maintaining an office within a county is a resident of the county.

(3) "Tall buildings or structures" include any building, structure or unit within a multiunit building with a vertical height of more than 40 feet

measured from the top of the foundation of said building, structure or unit and the uppermost point of said building, structure or unit; provided, however, that where such foundation measured from the natural finished grade of the crest or the natural finished grade of the high side of the slope of a ridge exceeds 3 feet, then such measurement in excess of 3 feet shall be included in the 40-foot limitation described herein; provided, further, that no such building, structure or unit shall protrude at its uppermost point above the crest of the ridge by more than 35 feet. "Tall buildings or structures" do not include:

a. Water, radio, telephone or television towers or any equipment for the transmission of electricity or communications or both.
b. Structures of a relatively slender nature and minor vertical projections of a parent building, including chimneys, flagpoles, flues, spires, steeples, belfries, cupolas, antennas, poles, wires, or windmills.
c. Buildings and structures designated as National Historic Sites on the National Archives Registry.

(4) "Construction" includes reconstruction, alteration, or expansion.
(5) "Ridge" means the elongated crest or series of crests at the apex or uppermost point of intersection between two opposite slopes or sides of a mountain, and includes all land within 100 feet below the elevation of any portion of such line or surface along the crest.
(6) "Protected mountain ridges" are all mountain ridges whose elevation is 3,000 feet and whose elevation is 500 or more feet above the elevation of an adjacent valley floor; provided, however, that a county, or a city with a population of fifty thousand (50,000) or more, may elect to eliminate the requirement for an elevation of 3,000 feet, and such election shall apply both to an ordinance adopted under G.S. 113A-208 and the prohibition against construction under G.S. 113A-209; provided, further, that such ordinance shall be adopted pursuant to the procedures of G.S. 113A-208.
(7) "Crest" means the uppermost line of a mountain or chain of mountains from which the land falls away on at least two sides to a lower elevation or elevations. (1983, c. 676, s. 1; 1985, c. 713, s. 1.)

§ 113A-207. Legislative findings.

The construction of tall or major buildings and structures on the ridges and higher elevations of North Carolina's mountains in an inappropriate or badly designed manner can cause unusual problems and hazards to the residents of and to visitors to the mountains. Supplying water to, and disposing of the sewage from, buildings at high elevations with significant numbers of residents may infringe on the ground water rights and endanger the health of those persons living at lower elevations. Providing fire protection may be difficult given the lack of water supply and pressure and the possibility that fire will be fanned by high winds. Extremes of weather can endanger buildings, structures, vehicles, and persons. Tall or major buildings and structures located on ridges are a hazard to air navigation and persons on the ground and detract from the natural beauty of the mountains. (1983, c. 676, s. 1.)

§ 113A-208. Regulation of mountain ridge construction by counties and cities.

(a) Any county or city may adopt, effective not later than January 1, 1984, and may enforce an ordinance that regulates the construction of tall buildings or structures on protected mountain ridges by any person. The ordinance may

provide for the issuance of permits to construct tall buildings on protected mountain ridges, the conditioning of such permits, and the denial of permits for such construction. Any ordinance adopted hereunder shall be based upon studies of the mountain ridges within the county, a statement of objectives to be sought by the ordinance, and plans for achieving these objectives. Any such county ordinance shall apply countywide except as otherwise provided in G.S. 160A-360, and any such city ordinance shall apply citywide, to construction of tall buildings on protected mountain ridges within the city or county, as the case may be.

A city with a population of 50,000 or more may adopt, prior to January 1, 1986, an ordinance eliminating the requirement for an elevation of 3,000 feet, as permitted by G.S. 113A-206(6).

(b) Under the ordinance, permits shall be denied if a permit application (and shall be revoked if a project) fails to provide for:

(1) Sewering that meets the requirements of a public wastewater disposal system that it discharges into, or that is part of a separate system that meets applicable State and federal standards;

(2) A water supply system that is adequate for fire protection, drinking water and other projected system needs; that meets the requirements of any public water supply system that it interconnects with; and that meets any applicable State standards, requirements and approvals;

(3) Compliance with applicable State and local sedimentation control regulations and requirements; and

(4) Adequate consideration to protecting the natural beauty of the mountains, as determined by the local governing body.

(c) Permits may be conditioned to insure proper operation, to avoid or mitigate any of the problems or hazards recited in the findings of G.S. 113A-207, to protect natural areas or the public health, and to prevent badly designed, unsafe or inappropriate construction.

(d) An ordinance adopted under the authority of this section applies to all protected mountain ridges as defined in G.S. 113A-206. A county or city may apply the ordinance to other mountain ridges within its jurisdiction if it finds that this application is reasonably necessary to protect against some or all of the hazards or problems set forth in G.S. 113A-207. Additionally, a city with a population of 50,000 or more may apply the ordinance to other mountain ridges within its extraterritorial planning jurisdiction if it finds that this application is reasonably necessary to protect against some or all of the hazards or problems set forth in G.S. 113A-207.

(e) Determinations by the county or city governing board of heights or elevations under this Article shall be conclusive in the absence of fraud. Any county or city that adopts a ridge ordinance under the authority of this section or other authority shall send a copy of the ordinance to the Secretary of Environment and Natural Resources.

(f) Any county or city that adopts an ordinance pursuant to this section must hold a public hearing before adopting the ordinance upon the question of adopting the ordinance or of allowing the construction of tall buildings on protected mountain ridges to be governed by G.S. 113A-209. The public hearing required by this section shall be held upon at least 10 days' notice in a newspaper of general circulation in the unit adopting the ordinance. Testimony at the hearing shall be recorded and any and all exhibits shall be preserved within the custody of the governing body. The testimony and evidence shall be made available for inspection and scrutiny by any person.

(g) Any resident of a county or city that adopted an ordinance pursuant to this section, or of an adjoining county, may bring a civil action against the ordinance-adopting unit, contesting the ordinance as not meeting the requirements of this section. If the ordinance is found not to meet all of the

requirements of this section, the county or city shall be enjoined from enforcing the ordinance and the provisions of G.S. 113A-209 shall apply. Nothing in this Article authorizes the State of North Carolina or any of its agencies to bring a civil action to contest an ordinance, or for a violation of this Article or of an ordinance adopted pursuant to this Article. (1983, c. 676, s. 1; 1985, c. 713, ss. 2, 4; 1989, c. 727, s. 218(78); 1997-443, s. 11A.119(a).)

§ 113A-209. Certain buildings prohibited.

(a) This section applies beginning January 1, 1984, in any county or city that has failed to adopt a ridge protection ordinance pursuant to G.S. 113A-208 by January 1, 1984.

(b) No county or city may authorize the construction of, and no person may construct, a tall building or structure on any protected mountain ridge.

(c) No county or city may authorize the providing of the following utility services to any building or structure constructed in violation of subsection (b) of this section: electricity, telephone, gas, water, sewer, or septic system. (1983, c. 676, s. 1.)

§ 113A-210. Application to existing buildings.

General Statutes 113A-208 and 113A-209 apply to buildings that existed upon the effective date of this Article as follows:

(1) No reconstruction, alteration or expansion may aggravate or intensify a violation by an existing building or structure that did not comply (a) with G.S. 113A-209 upon its effective date, or (b) with an ordinance adopted under G.S. 113A-208 upon its effective date.

(2) No reconstruction, alteration or expansion may cause or create a violation by an existing building or structure that did comply (a) with G.S. 113A-209 upon its effective date, or (b) with an ordinance adopted under G.S. 113A-208 upon its effective date. (1983, c. 676, s. 1.)

Editor's Note. — The effective date of this Article, referred to in this section, is July 5, 1983. As to the applicability of §§ 113A-208 and 113A-209, see those sections.

§ 113A-211. Enforcement and penalties.

(a) Violations of this Article shall be subject to the same criminal sanctions, civil penalties and equitable remedies as violations of county ordinances under G.S. 153A-123.

(b) Any person injured by a violation of this Article or any person who resides in the county in which the violation occurred may bring a civil action against the person alleged to be in violation. The action may seek:

(1) Injunctive relief; or
(2) An order enforcing the provision violated; or
(3) Damages caused by the violation; or
(4) Both damages and injunctive relief; or
(5) Both damages and an enforcement order; or
(6) Both an enforcement order and injunctive relief.

If actual damages as found by the court or jury in suits brought under this subsection are five hundred dollars ($500.00) or less, the plaintiff shall be awarded double the amount of actual damages; if the amount of actual damages as found by the court or jury is greater than five hundred dollars ($500.00), the plaintiff shall receive damages in the amount so found. Injunctive relief or an enforcement order under this subsection may be based upon a threatened injury, an actual injury, or both.

Civil actions under this subsection shall be brought in the General Court of Justice of the county in which the alleged violation occurred. The court, in issuing any final order in any action brought pursuant to this section may award costs of litigation, including reasonable attorney and expert-witness fees, to any party, whenever it determines that such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security, the amount of such bond or security to be determined by the court. Nothing in this section shall restrict any right which any person or class of persons may have under the common law or under any statute to seek injunctive or other relief.

(c) Within the meaning of this section, violations of this Article include violations of local ordinances adopted pursuant to G.S. 113A-208. (1983, c. 676, s. 1.)

§ 113A-212. Assistance to counties and cities under ridge law.

(a) The Secretary of Environment Natural Resources shall provide assistance upon request to the counties and cities in carrying out their functions pursuant to this Article, such as by providing model studies, plans, and ordinances for their consideration.

(b) The Secretary of Environment and Natural Resources shall identify the protected mountain ridge crests in each county by showing them on a map or drawing, describing them in a document, or any combination thereof. Such maps, drawings, or documents shall identify the protected mountain ridges as defined in G.S. 113A-206 and such other mountain ridges as any county may request, and shall specify those protected mountain ridges that serve as all or part of the boundary line between two counties. By November 1, 1983, the map, drawing, or document tentatively identifying the protected mountain ridge crests of each county shall be filed with the board of county commissioners and with the city governing body of each city that requests it. By January 1, 1984, the map, drawing, or document identifying the protected mountain ridge crests shall be permanently filed by the Secretary with the register of deeds in the county where the land lies, and made available for inspection at the Secretary's office in Raleigh. Copies of the maps, drawings, or documents certified by the register of deeds, shall be admitted in evidence in all courts and shall have the same force and effect as would the original.

(b1) By January 1, 1986, a map, drawing, or document tentatively identifying the protected mountain ridge crests of each city with a population of fifty thousand (50,000) or more that has eliminated the requirement for a minimum elevation of 3,000 feet, shall be filed by the Secretary of Environment and Natural Resources with the board of county commissioners and with the city governing body. By March 1, 1986, the map, drawing, or document identifying the protected mountain ridge crests in the city with a population of fifty thousand (50,000) or more shall be permanently filed by the Secretary with the register of deeds in the county where the land within that city with a population of fifty thousand (50,000) or more lies, and shall be made available for inspection at the Secretary's office in Raleigh. Copies of the maps, drawings, or documents certified by the register of deeds shall be admitted in evidence in all courts and shall have the same force and effect as would the original.

(c) Determinations by the Secretary of elevations under this section shall be conclusive in the absence of fraud. (1983, c. 676, s. 1; 1985, c. 713, s. 3; 1989, c. 727, s. 218(79); 1997-443, s. 11A.119(a).)

§ 113A-213. Article is supplemental.

This Article provides a supplemental source of authority in addition to other present or future legislation and shall not be construed as prescribing an exclusive procedure or as granting exclusive powers. (1983, c. 676, s. 1.)

§ 113A-214. Choosing coverage or removal from coverage of this Article.

(a) This Article shall apply in all counties and cities unless and until the jurisdiction adopts an ordinance exempting itself from the coverage of this Article.

This exemption shall only be effective after a binding referendum, in which all registered voters in the jurisdiction are eligible to vote, which shall be held on or before May 8, 1984. The binding referendum shall be held either as a result of a resolution passed by the governing body of the jurisdiction or as a result of an initiative petition signed by fifteen percent (15%) of the registered voters in the jurisdiction and filed with the Board of Elections of that county not later than 60 days before the election is to be held. At that referendum, each qualified voter desiring to vote shall be provided a ballot on which shall be printed the following:

☐ FOR coverage under the Mountain Ridge Protection Act of 1983.

☐ AGAINST coverage under the Mountain Ridge Protection Act of 1983.

(b) If a jurisdiction removes itself from the coverage of this Article, by means of a binding referendum, as provided for in subsection (a) of this section, then it shall have until May 13, 1986 to place itself again under the coverage of this Article by means of an ordinance passed after a similar binding referendum. Once a jurisdiction opts out and then opts back under the Article, it may not take any further action to again remove itself from the coverage of the Article.

(c) If a county has chosen the permit procedure authorized by G.S. 113A-208, and then opts out of and either the county or any city in the county opts back under the coverage of this Article, then that jurisdiction may choose the permit procedure even after January 1, 1984.

(d) When a county removes itself from the coverage of this Article all cities within the county shall be removed from the coverage of this Article. Provided, however, a city in a county that has removed itself from coverage may, under the procedure set forth in subsection (b) of this section, place itself again under the coverage of this Article.

(e) When a protected mountain ridge is any part of the boundary between two jurisdictions then that part of the ridge shall be covered by this Article unless both jurisdictions remove themselves from the coverage of this Article. (1983, c. 676, s. 1.)

§§ 113A-215 through 113A-219: Reserved for future codification purposes.

Article 15.

Aquatic Weed Control.

§ 113A-220. Short title.

This Article shall be known as the Aquatic Weed Control Act of 1991. (1991, c. 132, s. 1.)

§ 113A-221. Definitions.

Unless a different meaning is required by the context, the following definitions shall apply throughout this Article:

(1) "Department" means the Department of Environment and Natural Resources.

(2) "Secretary" means the Secretary of Environment and Natural Resources or his designee.

(3) "Noxious aquatic weed" means any plant organism so designated under this Article.

(4) "Waters of the State" means any surface body or accumulation of water, whether publicly or privately owned and whether naturally occurring or artificially created, which is contained within, flows through, or borders upon any part of this State. (1991, c. 132, s. 1; 1997-443, s. 11A.119(a).)

§ 113A-222. Designation of noxious aquatic weeds.

(a) The Secretary, after consultation with the Director of the North Carolina Agricultural Extension Service, the Wildlife Resources Commission, and the Marine Fisheries Commission, and with the concurrence of the Commissioner of Agriculture, may designate as a noxious aquatic weed any plant organism which:

(1) Grows in or is closely associated with the aquatic environment, whether floating, emersed, submersed, or ditch-bank species, and including terrestrial phases of any such plant organism;

(2) Exhibits characteristics of obstructive nature and either massive productivity or choking density; and

(3) Is or may become a threat to public health or safety or to existing or new beneficial uses of the waters of the State.

(b) A plant organism may be designated as being a noxious aquatic weed either throughout the State or within specified areas within the State.

(c) The Secretary shall designate a plant organism as a noxious aquatic weed by rules adopted pursuant to Chapter 150B of the General Statutes.

(d) The Secretary may modify or withdraw any designation of a plant organism as a noxious aquatic weed made previously under this section. Any modification or withdrawal of such designation shall be made following the procedures for designation set out in this section. (1991, c. 132, s. 1.)

§ 113A-223. Powers and duties of the Secretary.

(a) The Secretary shall direct the control, eradication, and regulation of noxious aquatic weeds so as to protect and preserve human health, safety, and the beneficial uses of the waters of the State and to prevent injury to property and beneficial plant and animal life. The Secretary shall have the power to:

(1) Conduct research and planning related to the control of noxious aquatic weeds;

(2) Coordinate activities of all public bodies, authorities, agencies, and units of local government in the control and eradication of noxious aquatic weeds;

(3) Delegate to any public body, authority, agency, or unit of local government any power or duty under this Article, except that the Secretary may not delegate the designation of noxious aquatic weeds;

(4) Accept donations, grants, and services from both public and private sources;

(5) Enter into contracts or agreements, including cost-sharing agreements, with public or private agencies for research and development

of methods of control of noxious aquatic weeds or for the performance of noxious aquatic weed control activities;

(6) Construct, acquire, operate, and maintain facilities and equipment necessary for the control of noxious aquatic weeds; and

(7) Enter upon private property for purposes of conducting investigations and engaging in aquatic weed control activities.

(b) The Secretary may control, remove, or destroy any noxious aquatic weed located in the waters of the State or in areas adjacent to such waters wherever such weeds threaten to invade such waters. The Secretary may employ any appropriate control technology which is consistent with federal and State law, regulations, and rules. Control technologies may include, but are not limited to drawdown of waters, application of chemicals to shoreline and surface waters, mechanical controls, physical removal from transport mechanisms, quarantine of transport mechanisms, and biological controls. Any biological control technology may be implemented only after the environmental review provisions of the State Environmental Policy Act have been satisfied.

(c) In determining the appropriate strategies and technologies, the Secretary shall consider their relative short-term and long-term cost-efficiency and effectiveness, consistent with a margin of safety adequate to protect public health and the resources of the State.

(d) All activities carried out by the Secretary, his designees, and others authorized to perform any function under this Article shall be consistent with all applicable federal and State law, regulations, and rules. (1991, c. 132, s. 1.)

§ 113A-224. Powers of the Commissioner of Agriculture.

(a) The Commissioner of Agriculture may regulate the importation, sale, use, culture, collection, transportation, and distribution of a noxious aquatic weed as a plant pest under Article 36 of Chapter 106 of the General Statutes.

(b) This Article shall not be construed to limit any power of the Commissioner of Agriculture, the Department of Agriculture and Consumer Services, or the Board of Agriculture under any other provision of law. (1991, c. 132, s. 1; 1997-261, s. 109.)

§ 113A-225. Responsibilities of other State agencies.

All State agencies shall cooperate with the Secretary to assist in the implementation of this Article. (1991, c. 132, s. 1.)

§ 113A-226. Enforcement.

(a) Any person who violates this Article or any rule adopted pursuant to this Article shall be guilty of a Class 2 misdemeanor for each offense.

(b) Whenever there exists reasonable cause to believe that any person has violated this Article or rules adopted pursuant to this Article, the Secretary may request the Attorney General to institute a civil action for injunctive relief to restrain the violation. The Attorney General may institute such action in the name of the State upon relation of the Department in the superior court of the county in which the violation occurred. Upon a determination by the court that the alleged violation of the provisions of this Article or of rules adopted pursuant to this Article has occurred or is threatened, the court shall grant the relief necessary to prevent or abate the violation or threatened violation. Neither the institution of the action, nor any of the proceedings thereon shall relieve any party to such proceedings from any penalty otherwise prescribed for violations of this Article. (1991, c. 132, s. 1; c. 761, s. 20; 1993, c. 539, s. 877; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 113A-227. Adoption of rules.

The Secretary may adopt rules necessary to implement the provisions of this Article pursuant to Chapter 150B of the General Statutes. (1991, c. 132, s. 1.)

§§ 113A-228, 113A-229: Reserved for future codification purposes.

ARTICLE 16.

Conservation Easements Program.

§ 113A-230. Legislative findings; intent.

The General Assembly finds that a statewide network of protected natural areas, riparian buffers, and greenways can best be accomplished through a conservation easements program. The General Assembly further finds that other public conservation and use programs, such as natural area protection, beach access, trail systems, historic landscape protection, and agricultural preservation, can benefit from increased conservation tools. In this Article, the General Assembly therefore intends to extend the ability of the Department of Environment and Natural Resources to achieve these purposes and to strengthen the capability of private nonprofit land trusts to participate in land and water conservation. (1997-226, s. 6; 1997-443, s. 11A.119(b).)

§ 113A-231. Program to accomplish conservation purposes.

The Department of Environment and Natural Resources shall develop a nonregulatory program that uses conservation tax credits as a prominent tool to accomplish conservation purposes, including the maintenance of ecological systems. (1997-226, s. 6; 1997-443, s. 11A.119(b).)

§ 113A-232. Conservation Grant Fund.

(a) Fund Created. — The Conservation Grant Fund is created within the Department of Environment and Natural Resources. The Fund shall be administered by that Department. The purpose of the Fund is to stimulate the use of conservation easements, to improve the capacity of private nonprofit land trusts to successfully accomplish conservation projects, to better equip real estate related professionals to pursue opportunities for conservation, to increase citizen participation in land and water conservation, and to provide an opportunity to leverage private and other public monies for conservation easements.

(b) Fund Sources. — The Conservation Grant Fund shall consist of any monies appropriated to it by the General Assembly and any monies received from public or private sources. Unexpended monies in the Fund that were appropriated from the General Fund by the General Assembly shall revert at the end of the fiscal year unless the General Assembly otherwise provides. Unexpended monies in the Fund from other sources shall not revert and shall remain available for expenditure in accordance with this Article.

(c) Eligibility. — In order for land to be the subject of a grant under this Article, the land must possess or have a high potential to possess ecological value, must be reasonably restorable, and must qualify for tax credits under G.S. 105-130.34 or G.S. 105-151.12. Private nonprofit land trust organizations

must be qualified pursuant to G.S. 105-130.34 and G.S. 105-151.12 and must be certified under section 501(c)(3) of the Internal Revenue Code.

(d) Use of Revenue. — Revenue in the Conservation Grant Fund may be used only for the following purposes:

(1) The administrative costs of the Department in administering the Fund.
(2) Conservation grants made in accordance with this Article.
(3) To establish an endowment account, the interest from which will be used for a purpose described in G.S. 113A-233(a)(3) or (a)(5). (1997-226, s. 6; 1997-443, s. 11A.119(b).)

§ 113A-233. Uses of a grant from the Conservation Grant Fund.

(a) Allowable Uses. — A grant from the Conservation Grant Fund may be used only to pay for one or more of the following costs:

(1) Reimbursement for total or partial transaction costs for donations from individuals or corporations satisfying either of the following:
a. Insufficient financial ability to pay all costs or insufficient taxable income to allow these costs to be included in the donated value.
b. Insufficient tax burdens to allow these costs to be offset by the value of tax credits under G.S. 105-130.34 or G.S. 105-151.12 or by charitable deductions.
(2) Management support, including initial baseline inventory and planning.
(3) Monitoring compliance with conservation easements, the related use of riparian buffers, natural areas, and greenways, and the presence of ecological integrity.
(4) Education on conservation, including information materials intended for landowners and education for staff and volunteers.
(5) Stewardship of land.
(6) Transaction costs, including legal expenses, closing and title costs, and unusual direct costs, such as overnight travel.
(7) Administrative costs for short-term growth or for building capacity.

(b) Prohibition. — The Fund shall not be used to pay the purchase price for any interest in land. (1997-226, s. 6.)

§ 113A-234. Administration of grants.

The Secretary of Environment and Natural Resources shall establish the procedures and criteria for awarding grants from the Conservation Grant Fund. The criteria shall focus grants on those areas, approaches, and techniques that are likely to provide the optimum positive effect on environmental protection. The Secretary shall make the final decision on the award of grants and shall announce the award publicly in a timely manner.

The Secretary may administer the grants under this Article or may contract for selected activities under this Article. If administrative services are contracted, the Department shall establish guidance and criteria for its operation and contract with a statewide nonprofit land trust service organization. (1997-226, s. 6; 1997-443, s. 11A.119(b).)

§ 113A-235. Conservation easements.

(a) Ecological systems and appropriate public use of these systems may be protected through conservation easements, including conservation agreements under Article 4 of Chapter 121 of the General Statutes, the Conservation and

Historic Preservation Agreements Act, and conservation easements under the Conservation Reserve Enhancement Program. The Department of Environment and Natural Resources shall work cooperatively with State and local agencies and qualified nonprofit organizations to monitor compliance with conservation easements and conservation agreements and to ensure the continued viability of the protected ecosystems. Soil and water conservation districts established under Chapter 139 of the General Statutes may acquire easements under the Conservation Reserve Enhancement Program by purchase or gift.

(b) The Department may convey real property or an interest in real property that has been acquired under the Conservation Reserve Enhancement Program to a federal or State agency, a local government, or a private, nonprofit conservation organization to acquire, manage, and maintain real property or an interest in real property for the purposes set out in subsection (a) of this section. A grantee of real property or an interest in real property under this subsection shall grant a conservation easement in the real property or interest in real property to the Department in a form that is acceptable to the Department.

(c) The Department shall report on the implementation of this Article to the Environmental Review Commission no later than 1 November of each year. The Department shall maintain an inventory of all conservation easements held by the Department. The inventory shall be included in the report required by this subsection. (1997-226, s. 6; 1997-443, s. 11A.119(b); 1999-329, s. 6.3.)

Editor's Note. — Session Laws 1999-329, s. 1.1 provides that the act shall be known as the "Clean Water Act of 1999."

Session Laws 1999-329, s. 13.7 provides: "This act shall not be construed to obligate the General Assembly to appropriate funds to implement the provisions of this act. Every State agency to which this act applies shall implement the provisions of this act from funds otherwise appropriated or available to that agency."

Session Laws 1999-329, s. 13.8 contains a severability clause.

Effect of Amendments. — Session Laws 1999-329, s. 6.3, effective July 21, 1999, designated the existing paragraph as subsection (a), and added "and conservation ... Program" at the end of the first sentence and added the last sentence; and added subsections (b) and (c).

Chapter 113B.

North Carolina Energy Policy Act of 1975.

Article 1.

Energy Policy Council.

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Article 1.

Energy Policy Council.

§ 113B-1. Legislative findings and purpose.

Upon investigation the General Assembly hereby finds that:

(1) Energy is essential to the health, safety and welfare of the people of this State and to the workings of the State economy;

(2) Growth in the consumption of energy resources is in some part due to wasteful, uneconomic and inefficient uses of energy and a continuation of this trend will adversely affect the future social, economic and environmental development of North Carolina;

(3) It is the responsibility of State government to encourage a reliable and adequate supply of energy for North Carolina at a level consistent with such energy needs required for the protection of public health and safety, and for the promotion of the general welfare; and

(4) The State has not provided the basis for development of a long-range unified energy policy to encompass comprehensive energy resource planning and efficient management of the rate of consumption of existing energy resources in relation to economic growth, to effectively meet an energy crisis, to encourage development of alternative sources of energy, and to prudently conserve energy resources in a manner consistent with assuring a reliable and adequate supply of energy for North Carolina.

(5) It is the expressed intent of this Chapter to provide for development of such a unified energy policy for the State of North Carolina. (1975, c. 877, s. 3.)

§ 113B-2. Creation of Energy Policy Council; purpose of Council.

(a) There is hereby created a council to advise and make recommendations on energy policy to the Governor and the General Assembly to be known as the Energy Policy Council which shall be located within the Department of Commerce.

(b) Except as otherwise provided in this Chapter, the powers, duties and functions of the Energy Policy Council shall be as prescribed by the Secretary of Commerce.

(c) The Energy Policy Council shall serve as the central energy policy planning body of the State and shall communicate and cooperate with federal, State, regional and local bodies and agencies to the end of effecting a coordinated energy policy. (1975, c. 877, s. 4; 1977, c. 23, ss. 1, 2.)

§ 113B-3. Composition of Council; appointments; terms of members; qualifications.

(a) The Energy Policy Council shall consist of 18 members to be appointed as follows:

(1) Two members of the North Carolina House of Representatives to be appointed by the Speaker of the House of Representatives;
(2) Two members of the North Carolina Senate to be appointed by the President Pro Tempore of the Senate;
(3) Nine public members who are citizens of the State of North Carolina to be appointed by the Governor;
(4) The chairman of the North Carolina Utilities Commission, the Secretary of Environment and Natural Resources, the Commissioner of Agriculture, the Secretary of Commerce and the Secretary of Administration or their designees from their respective departments.

(b) Initial appointments to the Energy Policy Council shall be made by July 15, 1975, and each such appointee shall serve until January 31, 1977. Thereafter, the appointed members of the General Assembly shall serve two-year terms, and the appointed public members shall serve four-year terms. A member of the Energy Policy Council shall continue to serve until his successor is duly appointed, but such holdover shall not affect the expiration date of such succeeding term.

(c) The public members of the Energy Policy Council shall have the following qualifications:

(1) One such member shall be experienced in the electric power industry;
(2) One such member shall be experienced in the natural gas industry;
(3) One such member shall be experienced in the petroleum marketing industry;
(4) One such member shall be experienced in economic analysis of energy requirements;
(5) One such member shall be experienced in environmental protection;
(6) One such member shall be experienced in industrial energy consumption;
(7) One such member shall be knowledgeable of alternative sources of energy;
(8) One such member who, at the time of appointment, is a county commissioner; provided, such member's term on the Council shall expire immediately in the event that he or she vacates office as a county commissioner;
(9) One such member who, at the time of appointment, is an elected municipal official; provided, such member's term on the Council shall

expire immediately in the event that he or she vacates office as an elected municipal official. (1975, c. 877, s. 4; 1977, c. 23, ss. 1, 5; c. 771, s. 4; 1979, c. 422; 1981, c. 701, ss. 4, 5; 1989, c. 727, s. 218(80); c. 751, s. 8(15); 1989 (Reg. Sess., 1990), c. 1004, s. 19(b); 1991, c. 739, s. 10; 1991 (Reg. Sess., 1992), c. 959, s. 27; 1997-443, s. 11A.119(a).)

§ 113B-4. Chairman of Council; replacement; reimbursement of members.

(a) On July 15, 1975, on January 31, 1977, and every four years thereafter, the Governor shall designate one of the members of the Energy Policy Council to serve as chairman of the Council.

(b) In case of a vacancy in the membership on the Energy Policy Council prior to the expiration of a member's term, a successor shall be appointed within 30 days of such vacancy for the remainder of the unexpired term by the appropriate official pursuant to the provisions of G.S. 113B-3.

(c) Members of the Energy Policy Council shall be reimbursed for their services pursuant to the provisions of G.S. 138-5. (1975, c. 877, s. 4; 1979, c. 514, s. 1.)

§ 113B-5. Organization of the Council; adoption of rules of procedure therefor.

(a) To facilitate the work of the Energy Policy Council and for administrative purposes, the chairman of the Energy Policy Council, with the consent and approval of the members, may organize the work of the Council so as to carry out the provisions of this Chapter and to insure the efficient operation of the Council.

(b) The Energy Policy Council shall adopt its own rules of procedure and shall meet regularly at such times and in such places as it may deem necessary to carry out its functions.

(c) The Energy Policy Council is authorized to create such advisory committees as will be needed to assist the Council in its efforts and to assure adequate citizen-consumer input into those efforts. Members of advisory committees shall be appointed by the Council for terms not to exceed the expiration date of terms of then present public members of the Council. (1975, c. 877, s. 4.)

§ 113B-6. General duties and responsibilities.

The Energy Policy Council shall have the following general duties and responsibilities:

(1) To develop and recommend to the Governor a comprehensive long-range State energy policy to achieve maximum effective management and use of present and future sources of energy, such policy to include but not be limited to an energy conservation plan, an energy management plan, an emergency energy program, and an energy research and development program;

(2) To conduct an ongoing assessment of the opportunities and constraints presented by various uses of all forms of energy and to encourage the efficient use of all such energy forms in a manner consistent with State energy policy;

(3) To continually review and coordinate all State government research, education and management programs relating to energy matters and to continually educate and inform the general public regarding such energy matters;

(4) To recommend to the Governor and to the General Assembly needed energy legislation and to recommend for implementation such modifications of energy policy, plans and programs as the Council considers necessary and desirable. (1975, c. 877, s. 4.)

§ 113B-7. Energy Conservation Plan; components.

(a) The Energy Policy Council shall prepare a recommended Energy Conservation Plan for transmittal to the Governor, the initial plan to be completed by January 30, 1976.

(b) The Energy Conservation Plan shall be designed to assure the public health and safety of the people of North Carolina and to encourage and promote conservation of energy through reducing wasteful, inefficient or uneconomical uses of energy resources.

(c) The Energy Conservation Plan shall include but not be limited to the following recommendations:

(1) Recommendations to the Building Code Council for lighting, insulation, climate control systems and other building design and construction standards which increase the efficient use of energy and are economically feasible to implement;

(2) Recommendations to the Building Code Council for per unit energy requirement allotments based upon square footage for various classes of buildings which would reduce energy consumption, yet are both technically and economically feasible and not injurious to public health and safety;

(3) Recommendations for minimum levels of operating efficiency for all appliances whose use requires a significant amount of energy based upon both technical and economic feasibility considerations;

(4) Recommendations for State government purchases of supplies, vehicles and equipment and such operating practices as will make possible more efficient use of energy;

(5) Recommendations on energy conservation policies, programs and procedures for local units of government;

(6) Any other recommendations which the Energy Policy Council considers to be a significant part of a statewide conservation effort and which include provisions for sufficient incentives to further energy conservation;

(7) An economic and environmental impact analysis of the recommended plan.

(d) In addition to specific conservation recommendations, the Energy Conservation Plan shall contain proposals for implementation of such recommendations as can be carried out by executive order. Upon completion of a draft recommended plan, the Council shall arrange for its distribution to interested parties and shall make such plan available to the public and the Council further shall set a date for public hearing on said plan.

(e) Upon completion of the Energy Conservation Plan, the Council shall transmit said plan, to be known as the State Energy Conservation Plan, to the Governor for approval or disapproval. Upon approval, the Governor shall assign administrative responsibility for such implementation as can be carried out by executive order to appropriate agencies of State government, and submit to the General Assembly such proposals which require legislative action for implementation. The Governor shall have the authority to accept, administer, and enforce federal programs, program measures and permissive delegations of authority delegated to the Governor by the President of the United States, Congress, or the United States Department of Energy, on behalf of the State of North Carolina, which pertain to the conservation of energy resources.

(f) The Governor shall transmit the approved Energy Conservation Plan to the President of the Senate, to the Speaker of the House of Representatives, to the heads of all State agencies and shall further seek to publicize such plan and make it available to all units of local government and to the public at large.

(g) At least every two years and whenever such changes take place as would significantly affect energy supply or demand in North Carolina, the Energy Policy Council shall review and, if necessary, revise the Energy Conservation Plan, transmitting such revised plan to the Governor pursuant to the procedures contained in subsections (e) and (f) of this section. (1975, c. 877, s. 4; 1981, c. 701, s. 1.)

§ 113B-8. Energy Management Plan; components.

(a) The Energy Policy Council shall prepare a recommended Energy Management Plan for transmittal to the Governor, the initial plan to be completed by June 30, 1976.

(b) The Energy Management Plan shall be designed to encourage the most efficient use of all sources of energy available to meet the needs of the State and to avoid undue dependence upon relatively limited, unreliable or uneconomical sources of energy.

(c) The Energy Management Plan shall include but not be limited to the following:

(1) An analysis of the current pattern of consumption of energy throughout the State by category of energy user and by sources of energy supply;

(2) An assessment of the effect of demand and supply of different forms of energy upon the current pattern of consumption;

(3) An independent analysis, in five-, 10- and 20-year forecasts, of future energy production, supplies and consumption for North Carolina in relation to forecasts of statewide population growth and economic expansion;

(4) An analysis of the anticipated effects of recommended conservation measures upon the consumption of energy in the State;

(5) An assessment of the possible effects of national energy and economic policy and international economic and political conditions upon an adequate and reliable supply of different forms of energy for North Carolina;

(6) An assessment of the social, economic and environmental effects of alternative future consumption patterns on energy usage in North Carolina, including the potentially disruptive effects of supply limitations;

(7) Recommendations on the use of different future energy sources that seem most appropriate and feasible for North Carolina in meeting expected energy needs during the next five-, 10- and 20-year periods, with consideration given to growth trends in North Carolina industry and possible adverse economic impact on such trends.

(d) In addition to the above, the Energy Management Plan shall contain proposals for the implementation of such recommendations as can be carried out by executive order. Upon completion of a draft recommended plan, the Council shall arrange for its distribution to interested parties and shall make such plan available to the public and the Council further shall set a date for public hearing on said plan.

(e) Upon completion of the Energy Management Plan, the Council and the Governor shall follow the procedures as outlined in G.S. 113B-7(e) and (f).

(f) The Council shall update such plan upon a finding by it that an update is justified and shall follow the procedures for adoption pursuant to G.S. 113B-7(e) and (f).

(g) The Governor shall have the authority to accept, administer and enforce federal programs, program measures, and permissive delegations of authority delegated to the Governor by the President of the United States, Congress, or the United States Department of Energy, on behalf of the State of North Carolina, which pertain to management of energy resources.

(h) The Governor shall have the authority to accept, administer and enforce the delegation of authority delegated to the State by the Emergency Petroleum Allocation Act and the Emergency Energy Conservation Act of 1979 and any orders, rules, and regulations issued pursuant to those acts as well as any succeeding federal programs, program measures, laws, orders, or regulations relating to the allocation, conservation, consumption, management or rationing of energy resources. (1975, c. 877, s. 4; 1981, c. 701, s. 2.)

§ 113B-9. Emergency Energy Program; components.

(a) The Energy Policy Council shall, in accordance with the provisions of this Article, develop contingency and emergency plans to deal with possible shortages of energy to protect public health, safety and welfare, such plans to be compiled into an Emergency Energy Program.

(b) Within four months of July 1, 1975:

(1) Each electric utility and natural gas utility in the State shall prepare and submit to the Energy Policy Council a proposed emergency curtailment plan setting forth proposals for identifying priority loads or users in the event of the declaration of an energy crisis pursuant to G.S. 113B-20, and proposals for supply allocation to such priority loads or users.

(2) Each major oil producer doing business in this State as determined by the Energy Policy Council shall prepare and submit to the Energy Policy Council an analysis of how any national supply curtailment pursuant to federal regulations shall affect the supply for North Carolina and how priority users will be determined and available supplies allocated to such users.

(c) The Energy Policy Council shall encourage the preparation of joint emergency curtailment plans and analyses. If such cooperative plans and analyses are developed between two or more utilities, major producers or by an association of such companies, the joint plans or analyses may be submitted to the Energy Policy Council in lieu of information required pursuant to subsection (b) of this section.

(d) The Energy Policy Council shall collect from all relevant governmental agencies any existing contingency plans for dealing with sudden energy shortages or information related thereto.

(e) The Energy Policy Council shall hold one or more public hearings, investigate and review the plans submitted pursuant to this section, and, within nine months after July 1, 1975, the Energy Policy Council shall approve and recommend to the Governor guidelines for emergency curtailment to be known as the Emergency Energy Program and to be implemented upon adoption by the Governor after the declaration of an energy crisis and pursuant to G.S. 113B-20 and 113B-23. Said program shall be based upon the plans presented to the Energy Policy Council, upon independent analysis and study by the Council, and upon information provided at the hearing or hearings, provided, however, that they are consistent with such federal programs and regulations as are already in effect at that time.

(f) The Emergency Energy Program shall provide for the maintenance of essential services, the protection of public health, safety, and welfare, and the maintenance of a sound basic State economy. Provisions also shall be made in said program to differentiate curtailment of energy consumption by users on

the basis of ability to accommodate such curtailments, and shall also include, but not be limited to, the following:

(1) A variety of strategies and staged conservation measures of increasing intensity and authority to reduce energy use during an energy crisis, as defined in G.S. 113B-20 and guidelines and criteria for allocation of energy sources to priority users. The program shall contain alternative conservation actions and allocation plans to reasonably meet various foreseeable shortage circumstances and to allow a choice of appropriate responses;

(2) Evidence that the program is consistent with requirements of federal emergency energy conservation and allocation laws and regulations;

(3) Proposals to assist such individuals, institutions, agriculture and businesses which have engaged in energy saving measures;

(4) Repealed by Session Laws 1981, c. 701, s. 3.

(g) The Energy Policy Council shall carry out such investigations and studies as are necessary to determine if and when potentially serious shortages of energy are likely to affect North Carolina and the Council shall make recommendations to the Governor concerning administrative and legislative actions required to avert such shortages, such recommendations to be included as a section of the Emergency Energy Program.

(h) In addition to the above information and recommendations, the program shall contain proposals for implementation of such recommendations which include procedures, rules and regulations and agency administrative responsibilities for implementation, and shall further contain procedures for fair and equitable review of complaints and requests for special exemptions from emergency conservation measures or emergency allocations. Upon completion of a draft recommended plan, the Council shall arrange for its distribution to interested parties and shall make such plan available to the public and the Council further shall set a date for public hearing on said plan.

(i) Upon completion of the Emergency Energy Allocation Program, the Council and the Governor shall follow the procedures as outlined in G.S. 113B-7(e) and (f).

(j) The Council shall update said program upon a finding by it that an update is justified and shall follow the procedures for adoption pursuant to G.S. 113B-7(e) and (f).

(k) The Governor shall have the authority to accept, administer and enforce federal programs, program measures and permissive delegations of authority delegated to the Governor by the President of the United States, Congress, or the United States Department of Energy, on behalf of the State of North Carolina, which pertain to actions necessary to deal with an actual or impending energy shortage. (1975, c. 877, s. 4; 1979, c. 514, s. 2; 1981; c. 701, s. 3.)

§ 113B-10. Energy Research and Development Program; information gathering; coordination of energy research and planning.

(a) The Energy Policy Council shall encourage, through its activities, research studies and projects which are related to energy conservation and management and to the development of alternative energy technologies.

(b) The Council shall develop and coordinate a statewide program of research and development in energy related matters and shall give priority in encouraging and supporting such efforts to those areas of energy research and development which are of particular importance to North Carolina.

(c) The Council shall serve as the central repository within State government for the collection and storage of data and information on energy-related

matters. To this end the Council shall develop an energy information reporting system for use by all governmental agencies and by the general public.

(d) The Council shall review and coordinate all State agency research and planning relating to energy in an effort to reduce duplication of work and shall be the lead State agency for coordination of energy matters with local government, regional organizations, other states and the federal government.

(e) The Council may request and utilize the advice, information and services of all State, regional, local and federal agencies and shall cooperate with the President of the United States and all said agencies in matters relating to energy research, programs and policy. (1975, c. 877, s. 4.)

§ 113B-11. Powers and authority.

(a) The Energy Policy Council is authorized to secure directly from any officer, office, department, commission, board, bureau, institution and other agency of the State and its political subdivisions any information it deems necessary to carry out its functions; and all such officers and agencies shall cooperate with the Council and, to the extent permitted by law, furnish such information to the Council as it may request.

(b) To assure the adequate development of relevant energy information, as provided in G.S. 113B-10, the Council may require all energy producers and major energy consumers, as determined by the Council, to file such reports and forecasts and at such dates as the Council may request; provided, however, that the Council may request only specific energy-related information which it deems necessary to carry out its duties as defined in Articles 1 and 2 of this Chapter.

(c) The Council shall have authority to apply for and utilize grants, contributions and appropriations in order to carry out its duties as defined in Articles 1 and 2 of this Chapter, provided, however, that all such applications and requests are made through and administered by the Department of Commerce.

(d) The Council shall have authority to request said Department to allocate and dispense any funds made available to the Council for energy research and related work efforts in such a manner as the Council desires subject only to the stipulation that said funds be reasonably used in furtherance of the purposes of this Article.

(e) The Energy Division of the Department of Commerce shall provide the staffing capability to the Energy Policy Council so as to fully and effectively develop recommendations for a comprehensive State energy policy as contained in the provisions of this Article. The Utilities Commission is hereby authorized to make its staff available to the Council to assist in the development of a State energy policy. (1975, c. 877, s. 4; 1977, c. 23, s. 1; 1989, c. 751, s. 7(10); 1991 (Reg. Sess., 1992), c. 959, s. 28.)

§ 113B-12. Annual reports; contents.

(a) Beginning January 1, 1977, and every year thereafter, the Energy Policy Council shall transmit to the Governor, the Speaker of the House of Representatives, the President of the Senate, the chairman of the Utilities Commission and the appropriate chairmen of the House and Senate committees concerned with energy matters, a comprehensive report providing a general overview of energy conditions in the State. On January 1, 1976, the Energy Policy Council shall transmit a progress report to the public officials named above.

(b) The report shall include, but not be limited to, the following:

(1) An overview of statewide growth and development as they relate to future requirements for energy, including patterns of urban and

metropolitan expansion, shifts in transportation modes, modifications in building types and design, and other trends and factors which, as determined by the Council, will significantly affect energy needs;

(2) The level of statewide and multi-county regional energy demand for a five-, 10- and 20-year forecast period which, in the judgment of the Council, can reasonably be met, with proposals as to possible energy supply sources;

(3) An assessment of growth trends in energy consumption and production and an identification of potential adverse social, economic, or environmental impacts which might be imposed by continuation of the present trends, including energy costs to consumers, significant increases in air, water, and other forms of pollution, threats to public health and safety, and loss of scenic and natural areas;

(4) An analysis and evaluation of the means by which the projected annual growth rate of energy demand may be reduced, together with an estimate of the amount of such reduction to be obtained by each of the means analyzed and evaluated;

(5) The status of the Council's ongoing energy research and development program and an assessment of the energy research and planning efforts carried out in North Carolina;

(6) Recommendations to the Governor and the General Assembly for additional administrative and legislative actions on energy matters;

(7) A summary of the Council's activities since its inception, a description of major plans developed by the Council, an assessment of plan implementation, and a review of Council plans and programs for the coming biennium. (1975, c. 877, s. 4.)

§§ 113B-13 through 113B-19: Reserved for future codification purposes.

ARTICLE 2.

Energy Crisis Administration.

§ 113B-20. Definition; declaration of energy crisis.

(a) "Energy crisis". — An energy crisis exists when the health, welfare or safety of the citizens of North Carolina are threatened by reason of an actual or impending acute shortage in usable, necessary energy resources.

(b) Declaration by Governor. — Upon a finding by the Governor that the conditions stated in subsection (a) do exist, the Governor may declare the existence of an energy crisis. (1975, c. 877, s. 4.)

§ 113B-21. Creation of Legislative Committee on Energy Crisis Management.

(a) There is hereby created a Legislative Committee on Energy Crisis Management to consist of the Speaker, as chairman, the Speaker pro tempore of the House of Representatives and the President pro tempore and the majority leader of the Senate. The Lieutenant Governor shall serve as a nonvoting ex officio member, provided, however, that he shall vote to break a tie.

(b) The Legislative Committee shall convene within 24 hours following the declaration of an energy crisis, as provided in G.S. 113B-20.

(c) Members of the Legislative Committee shall be reimbursed for their services pursuant to the provisions of G.S. 138-5. (1975, c. 877, s. 4; 1977, c. 23, s. 1; 1983 (Reg. Sess., 1984), c. 1034, s. 135.)

§ 113B-22. Procedures for adopting emergency proposals; emergency powers.

(a) Upon the declaration of an energy crisis, the Governor shall submit to the Legislative Committee for its prompt consideration such emergency orders, rules and regulations as deemed necessary to alleviate the effects of the energy crisis.

(b) The Governor shall immediately consult with the Legislative Committee about the emergency proposals. The emergency orders, rules, or regulations shall become effective at a time specified by the Governor, but no earlier than 48 hours after submission to the Legislative Committee, provided that they may take effect at an earlier time if approved by a majority vote of the Council of State after the Council makes a finding that the crisis is of such immediacy as to make delay for legislative review cause for probable harm to the public.

(c) No order, rule, or regulation promulgated under the provisions of this section shall remain in effect for more than 30 days unless the Governor consults with the Legislative Committee. Such consultation is separate and apart from the consultation required by subsection (a) of this section, and may not take place until the order, rule, or regulation has been in effect for at least seven days.

(d) The Governor's orders, rules and regulations, promulgated, subject to consultation with the Legislative Committee, pursuant to this section, may also include, by way of further enumerated example rather than limitation, provisions for the establishment and implementation of programs, controls, standards, priorities, and quotas for the allocation, conservation and consumption of energy resources; the suspension and modification of existing standards and requirements affecting or affected by the use of energy resources, including those relating to air quality control and the hours and days during which public buildings may or may not be required to remain open; and the establishment and implementation of regional programs and agreements for the purposes of coordinating the energy resource programs and actions of the State with those of the federal government and of other states and localities. (1975, c. 877, s. 4; 1983 (Reg. Sess., 1984), c. 1034, ss. 136, 137.)

§ 113B-23. Administration of plans and procedures.

(a) Upon the declaration of an energy crisis, pursuant to G.S. 113B-20, the Energy Policy Council shall become the emergency energy coordinating body for the State and shall carry out the following duties:

(1) Identify and determine the nature and severity of expected energy shortages;

(2) Provide for daily communications with and gather information from significant energy producers, distributors, transporters and major consumers, as determined by the Energy Policy Council, to carry out its responsibilities pursuant to this section;

(3) Provide data, carry out continuing assessments of the crisis situation, and make recommendations to the Governor and to the Legislative Committee for further action.

(b) Upon the declaration of an energy crisis, the Governor shall order the Energy Policy Council, the Utilities Commission, the Attorney General and other appropriate State and local agencies to implement and enforce the Emergency Energy Program pursuant to G.S. 113B-9 and any emergency rules, orders or regulations approved pursuant to G.S. 113B-22.

(c) Upon the declaration of an energy crisis, the Governor may employ such measures and give such direction to State and local offices and agencies as may be reasonable and necessary for the purpose of securing compliance with the provisions of this Article and with emergency rules, orders and regulations issued pursuant to G.S. 113B-22. (1975, c. 877, s. 4; 1983 (Reg. Sess., 1984), c. 1034, s. 138.)

§ 113B-24. Enforcement; penalties for violations.

(a) The Attorney General and the law-enforcement authorities of the State and its political subdivisions shall enforce the provisions of this Article and all orders, rules and regulations promulgated pursuant to G.S. 113B-22.

(b) Any person who violates this Article or any rules, orders or regulations promulgated pursuant to G.S. 113B-22 or knowingly or willfully submits false information in any report required herein shall be guilty of a Class 1 misdemeanor.

(c) The provisions of this Article or any rules, orders or regulations promulgated pursuant to G.S. 113B-22 may be enforced by bringing an action to enjoin such acts or practices as may be in violation and, upon a proper showing, a temporary restraining order or a preliminary or permanent injunction shall be issued. The relief sought may include a mandatory injunction commanding any person to comply with any such order, rule or regulation and restitution of money received in violation of any such order, rule or regulation. The Attorney General shall bring any action under this subsection upon the request of the Governor, the Legislative Committee on Energy Crisis Management, the Energy Policy Council, or upon his direction if he deems such action advisable and in the public interest. The Attorney General may institute such action in the Superior Court of Wake County, or, in his discretion, in the superior court of the county in which the acts or practices constituting a violation occurred, are occurring or may occur. (1975, c. 877, s. 4; 1993, c. 539, s. 878; 1994, Ex. Sess., c. 24, s. 14(c).)

Chapter 114.

Department of Justice.

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ARTICLE 1.

Attorney General.

§ 114-1. Creation of Department of Justice under supervision of Attorney General.

There is hereby created a Department of Justice which shall be under the supervision and direction of the Attorney General, as authorized by Article III, Sec. 7, of the Constitution of North Carolina. (1939, c. 315, s. 1; 1973, c. 702, s. 1.)

Legal Periodicals. — For comment, see 17 N.C.L. Rev. 375 (1939).

For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

CASE NOTES

Legislative Intent. — The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of § 114-2(2), did not intend to create such potential. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

§ 114-1.1. Common-law powers.

The General Assembly reaffirms that the Attorney General has had and continues to be vested with those powers of the Attorney General that existed at the common law, that are not repugnant to or inconsistent with the Constitution or laws of North Carolina. (1985, c. 479, s. 137.)

Legal Periodicals. — For article, "Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General," see 12 Campbell L. Rev. 343 (1990).

CASE NOTES

The duties of the Attorney General in this State as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested. Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

§ 114-2. Duties.

It shall be the duty of the Attorney General:

(1) To defend all actions in the appellate division in which the State shall be interested, or a party, and to appear for the State in any other court or tribunal in any cause or matter, civil or criminal, in which the State may be a party or interested.

(2) To represent all State departments, agencies, institutions, commissions, bureaus or other organized activities of the State which receive support in whole or in part from the State.

(3) Repealed by Session Laws 1973, c. 702, s. 2.

(4) To consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office.

(5) To give, when required, his opinion upon all questions of law submitted to him by the General Assembly, or by either branch thereof, or by the Governor, Auditor, Treasurer, or any other State officer.

(6) To pay all moneys received for debts due or penalties to the State immediately after the receipt thereof into the treasury.

(7) To compare the warrants drawn on the State treasury with the laws under which they purport to be drawn.

(8) Subject to the provisions of G.S. 62-20:

a. To intervene, when he deems it to be advisable in the public interest, in proceedings before any courts, regulatory officers, agencies and bodies, both State and federal, in a representative capacity for and on behalf of the using and consuming public of this State. He shall also have the authority to institute and originate proceedings before such courts, officers, agencies or bodies and shall have authority to appear before agencies on behalf of the State and its agencies and citizens in all matters affecting the public interest.

b. Upon the institution of any proceeding before any State agency by application, petition or other pleading, formal or informal, the outcome of which will affect a substantial number of residents of North Carolina, such agency or agencies shall furnish the Attorney General with copies of all such applications, petitions and pleadings so filed, and, when the Attorney General deems it advisable in the public interest to intervene in such proceedings, he is authorized to file responsive pleadings and to appear before such agency either in a representative capacity in behalf of the using and consuming public of this State or in behalf of the State or any of its agencies. (1868-9, c. 270, s. 82; 1871-2, c. 112, s. 2; Code, s. 3363; 1893, c. 379; 1901, c. 744; Rev., s. 5380; C.S., s. 7694; 1931, c. 243, s. 5; 1933, c. 134, s. 8; 1941, c. 97; 1967, c. 691, s. 51; 1969, c. 535; 1973, c. 702, s. 2; 1977, c. 468, s. 17; 1979, c. 107, s. 9; 1983, c. 913, s. 15.)

Cross References. — As to actions by the Attorney General, see § 1-515. As to duty to bring actions for failure of charitable trust to file account, see § 36A-48. As to duty in prosecuting violations of laws governing monopolies and trusts, see § 75-13. As to vacant positions, see § 120-12.1.

Legal Periodicals. — For article on antitrust and unfair trade practice law in North Carolina, comparing federal law, see 50 N.C.L. Rev. 199 (1972).

For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

For article, "Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General," see 12 Campbell L. Rev. 343 (1990).

For comment, "The Advisory Opinion in North Carolina: 1947 to 1991," see 70 N.C.L. Rev. 1853 (1992).

CASE NOTES

Constitutionality. — The duty of the Attorney General to appear for the State in any court proceeding in which the State may be a party as provided in subdivision (1) of this section does not violate N.C. Const., Art. III, § 1. Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

Derivation. — Pursuant to the authority under Article III, section 18 of the North Carolina Constitution, the General Assembly enacted this section, which prescribes the duties of the Attorney General. Sotelo v. Drew, 123 N.C. App. 464, 473 S.E.2d 379 (1996), aff'd, 345 N.C. 750, 483 S.E.2d 439 (1997).

Statutory and Common Law Duties. — The duties of the Attorney General in this State as prescribed by statutory and common law include the duty to appear for and to defend the State or its agencies in all actions in which the State may be a party or interested. Martin v. Thornburg, 320 N.C. 533, 359 S.E.2d 472 (1987).

Legislative Intent. — The constitutional independence of the executive offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers. The General Assembly, in the enactment of subdivision (2) of this section, did not intend to create such potential. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

Opinions Advisory Only. — An opinion of the Attorney General, given in the performance of his statutory duty under subdivision (5) of this section, is advisory only. Lawrence v. Shaw, 210 N.C. 352, 186 S.E. 504 (1936), rev'd on other grounds, 300 U.S. 245, 57 S. Ct. 443, 81 L. Ed. 623 (1937).

Directives as to Legal Duties of Constitutional Officers. — The Attorney General has no constitutional authority to issue a directive to any other constitutional officer concerning his legal duties. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

The responsibility for interpreting a tax statute is placed on the Commissioner of Revenue (now Secretary) by § 105-264, and the Attorney General's opinion in regard thereto is advisory only. In re Virginia-Carolina Chem. Corp., 248 N.C. 531, 103 S.E.2d 823 (1958).

Advisory Duty as to District Attorneys. — The duty of the Attorney General as to the solicitors (now district attorneys) of the State is purely advisory. State v. Loesch, 237 N.C. 611, 75 S.E.2d 654 (1953).

As to duties of Attorney General and district attorney in case on appeal, see State v. Hickman, 2 N.C. App. 627, 163 S.E.2d 632 (1968).

In passing § 114-11.6, the General Assembly made it clear that even upon a proper request and authorization by a district attorney, the Special Prosecution Division is to participate in criminal prosecutions only if the Attorney General, in his sole discretion as an independent constitutional officer, approves. Thus trial court exceeded its authority when it ordered that "the Attorney General's Office shall immediately assume the prosecution of" a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Subdivision (1) of this section does not contemplate the Attorney General's initiating an action under Article 2 of Chapter 128, where language therein has specifically set out who may file a petition for removal of a sheriff or police officer from office. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99, cert. denied, 316 N.C. 555, 344 S.E.2d 11 (1986).

The duty to "consult with and advise the prosecutors, when requested by them, in all matters pertaining to the duties of their office" gives the Attorney General the authority to advise the prosecutors, not to completely replace them or act instead of them, unless there is an express statutory provision authorizing

the Attorney General to initiate a particular action. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99, cert. denied, 316 N.C. 555, 344 S.E.2d 11 (1986).

The Attorney General is bound by the traditional rule governing the attorney-client relationship when representing the departments, agencies, institutions, commissions, bureaus or other organized activities of the State. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

And cannot enter a consent judgment without the consent of a duly authorized department official. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

An agency or department of the State should have the right possessed by other litigants to determine whether its counsel, whether the Attorney General or otherwise, can enter a consent judgment on its behalf. Such a right is also consonant with fulfillment by the respective agencies and departments of the State of their statutorily assigned duties. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

There is nothing in the common-law powers of the Attorney General which grants him authority to enter consent judgments binding the agencies and departments of the State without their consent. North Carolina statutes do not expressly grant such power. The assignment of specific responsibilities and duties to the various agencies and departments would appear to indicate legislative intent to the contrary. Given the constitutional and statutory structure of State government, and the assignment of duties and responsibilities between and among its officers, agencies, and departments, considerations of sound public policy also suggest the contrary rule. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

But a State department's authority is not plenary, nor is the Attorney General's role as limited as that of an attorney for an ordinary litigant. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

And Attorney General May Refuse to Confess Judgment as to Challenged Statute. — The Attorney General, in representing a State agency, has the power to reject his client agency's directive to enter into a judgment confessing that a certain act of the General Assembly is unconstitutional and continue the litigation. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

To permit State agencies to independently determine the constitutionality of acts to the exclusion of the Attorney General would effectively undermine the lawful authority of the Attorney General. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

Dual Role of Attorney General's Office. — Plaintiff offered no evidence to support the claim that the dual role served by the Attorney General's Office both in representing defendant institution and being legal advisor to State Personnel Commission caused actual bias or unfair prejudice to plaintiff, nor that it created any delay in the disposition of her claims. Dorsey v. UNC-Wilmington, 122 N.C. App. 58, 468 S.E.2d 557 (1996).

Applied in State ex rel. Comm'r of Ins. v. State ex rel. Att'y Gen., 16 N.C. App. 279, 192 S.E.2d 138 (1972); State ex rel. Comm'r of Ins. v. State ex rel. Att'y Gen., 19 N.C. App. 263, 198 S.E.2d 575 (1973); Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978); Nash County Bd. of Educ. v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981); Stanley v. Retirement & Health Benefits Div., 66 N.C. App. 122, 310 S.E.2d 637 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Quoted in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957); State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau, 300 N.C. 381, 269 S.E.2d 547 (1980); State v. Summers, — N.C. App. —, 513 S.E.2d 575 (1999).

Cited in State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 327, 230 S.E.2d 651 (1976).

§ 114-2.1. Consent judgments.

In litigation in which the State is interested or is a party, no consent judgment shall be entered into by the State unless and no consent judgment shall be binding on the State except to the extent that the State's entire obligation for the current and for future fiscal years will be satisfied with funds that are available for that purpose for the current fiscal year, including funds that the Council of State agrees to allot from the Contingency and Emergency Fund, provided that for payments of tort claims and workers' compensation claims it shall not be binding on the State except to the extent that the State's entire obligation for the current and for future fiscal years can be satisfied with funds that are available for the current fiscal year, including funds that the Council of State agrees to allot from the Contingency and Emergency Fund. The Director of the Budget shall report to the appropriation committees of the General Assembly concerning all funds made available during the preceding

fiscal year from the Contingency and Emergency Fund for the purpose of carrying out consent judgments. (1981 (Reg. Sess., 1982), c. 1282, s. 51; 1983 (Reg. Sess., 1984), c. 1034, s. 95; c. 1116, s. 85.)

Editor's Note. — Session Laws 1998-164, s. 2, provides: "There is established in the Office of State Treasurer a Reserve Fund for the Bailey/Emory/Patton Cases Refunds.

"There is transferred from General Fund overcollections for the 1997-98 fiscal year to the Office of State Treasurer, Reserve for the Bailey/Emory/Patton Cases Refunds, the sum of four hundred million dollars ($400,000,000). These funds are hereby appropriated and shall be held in reserve and allocated pursuant to the Consent Order entered in the Bailey/Emory/Patton cases, 92 CVS 10221, 94 CVS 06904, 95 CVS 06625, 95 CVS 08230, 98 CVS 00738, and 95 CVS 04346, in Wake County Superior Court on 10 June 1998.

"Notwithstanding the provisions of G.S. 114-2.1 and G.S. 114-2.2, the Consent Order shall be effective when approved by the Court and the Governor signs this legislation into law." The act was signed by the Governor on September 30, 1998.

Session Laws 1997-443, as amended by Session Laws 1998-212, s. 12.30, provides: "(a) The Department of Health and Human Services, in conjunction with area mental health programs, shall develop and implement cost containment measures to reduce the cost of direct services. The Department shall develop these strategies to emphasize positive client outcomes through developmental disability long-term managed supports rather than to emphasize process. These measures shall include, but not be limited to, the following:

"(1) Reduction of those process-oriented tasks required by the State, including, but not limited to, tasks required by the Divisions of: Medical Assistance, Vocational Rehabilitation Services, Social Services, Facilities Services, and Mental Health, Developmental Disabilities, and Substance Abuse Services;

"(2) Single stream funding from all available sources;

"(3) Waivers of federal requirements in order to comply with the federal court order; and

"(4) Review and, if necessary, amendment or repeal of rules that conflict or otherwise interfere with cost containment measures.

"(b) The Department shall provide to the members of the House and Senate Appropriations Subcommittees on Human Resources, and to the Fiscal Research Division a detailed report of the status of development and implementation of cost containment measures required under this section. The report shall address each of the measures listed in subsection (b) of this section, and any other related cost containment measures developed by the Department. The Department shall provide the report on May 1, 1999."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

Legal Periodicals. — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

CASE NOTES

The Attorney General is bound by the traditional rule governing the attorney-client relationship when representing the departments, agencies, institutions, commissions, bureaus or other organized activities of the State. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

And cannot enter a consent judgment without the consent of the entity represented. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

There is nothing in the common-law powers of the Attorney General which grants him authority to enter consent judgments binding the agencies and departments of the State without their consent. North Carolina statutes do not expressly grant such power. The assignment of specific responsibilities and duties to the various agencies and departments would appear to indicate legislative intent to the contrary. Given the constitutional and statutory structure of State government, and the assignment of duties and responsibilities between and among its officers, agencies, and departments, considerations of sound public policy also suggest the contrary rule. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

An agency or department of the State should have the right possessed by other litigants to determine whether its counsel, whether the

Attorney General or otherwise, can enter a consent judgment on its behalf. Such a right is also consonant with fulfillment by the respective agencies and departments of the State of their statutorily assigned duties. Tice v. DOT, 67 N.C. App. 48, 312 S.E.2d 241 (1984).

But a State department's authority is not plenary, nor is the Attorney General's role as limited as that of an attorney for an ordinary litigant. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

And Attorney General May Refuse to Confess Judgment as to Challenged Statute. — The Attorney General, representing a State agency, has the power to reject his client agency's directive to enter into a judgment confessing that a certain act of the General Assembly is unconstitutional and continue the litigation. Hendon v. North Carolina State Bd. of Elections, 633 F. Supp. 454 (W.D.N.C. 1986).

§ 114-2.2. Attorney General to approve consent judgments.

(a) To be effective against the State, a consent judgment entered into by the State, a State department, State agency, State institution, or a State officer who is a party in his official capacity must be signed personally by the Attorney General. This power of approval may not be delegated to a deputy or assistant Attorney General or to any other subordinate.

(b) The provisions of this section are supplemental to G.S. 114-2.1.

(c) Notwithstanding subsection (a) of this section, the Attorney General by rule may delegate to a deputy or assistant Attorney General or to another subordinate the power to sign consent judgments in condemnation or eminent domain actions brought under the provisions of Chapters 40A or 136 of the General Statutes and consent judgments under the provision of Article 31 of Chapter 143 (Tort Claims Act) and Chapter 97 (Workers' Compensation Act) of the General Statutes. (1983 (Reg. Sess., 1984), c. 1034, s. 95; c. 1116, s. 85.)

Editor's Note. — Session Laws 1998-164, s. 2, provides: "There is established in the Office of State Treasurer a Reserve Fund for the Bailey/Emory/Patton Cases Refunds.

"There is transferred from General Fund overcollections for the 1997-98 fiscal year to the Office of State Treasurer, Reserve for the Bailey/Emory/Patton Cases Refunds, the sum of four hundred million dollars ($400,000,000). These funds are hereby appropriated and shall be held in reserve and allocated pursuant to the Consent Order entered in the Bailey/Emory/Patton cases, 92 CVS 10221, 94 CVS 06904, 95 CVS 06625, 95 CVS 08230, 98 CVS 00738, and 95 CVS 04346, in Wake County Superior Court on 10 June 1998.

"Notwithstanding the provisions of G.S. 114-2.1 and G.S. 114-2.2, the Consent Order shall be effective when approved by the Court and the Governor signs this legislation into law." The act was signed by the Governor on September 30, 1998.

§ 114-2.3. Use of private counsel limited.

Every agency, institution, department, bureau, board, or commission of the State, authorized by law to retain private counsel, shall obtain written permission from the Attorney General prior to employing private counsel. This section does not apply to counties, cities, towns, other municipal corporations or political subdivisions of the State, or any agencies of these municipal corporations or political subdivisions, or to county or city boards of education. (1985, c. 479, s. 135.)

§ 114-2.4. Attorney General to render opinion on settlement agreements.

(a) The Attorney General shall review the terms of all proposed agreements entered into by the State or a State department, agency, institution, or officer to settle or resolve litigation or potential litigation, that involves the payment of public monies in the sum of seventy-five thousand dollars ($75,000) or more. In order for such an agreement or contract to be effective against the State, the

Attorney General shall submit to the State or the State department, agency, institution, or officer a written opinion regarding the terms of the proposed agreement and the advisability of entering into the agreement, prior to entering into the agreement. The written opinion required by this section shall be maintained in the official file of the final settlement agreement. The Attorney General by rule may delegate to a deputy or assistant Attorney General or to another subordinate the authority to approve settlement agreements.

(b) The Attorney General shall report to the Joint Legislative Commission on Governmental Operations on all agreements entered into by the State or a State department, agency, institution, or officer to settle or resolve litigation or potential litigation, that involves the payment of public monies in the sum of seventy-five thousand dollars ($75,000) or more. (1997-443, s. 20.14(a).)

Editor's Note. — Session Laws 1997-443, s. 1.1, provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1997'."

Session Laws 1997-443, s. 35.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1997-99 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1997-99 fiscal biennium."

Session Laws 1997-443, s. 35.4, is a severability clause.

§ 114-2.5. Attorney General to report payment of public monies pursuant to settlement agreements and final court orders.

(a) Not less than 30 days prior to the disbursement of funds received by the State or a State agency pursuant to a settlement agreement or final order or judgment of the court where the amount of funds received exceeds seventy-five thousand dollars ($75,000), the Attorney General shall file a written report with the Joint Legislative Commission on Governmental Operations and the Chairs of the Appropriations Subcommittees on Justice and Public Safety of the Senate and House of Representatives on the payments received by the State or a State agency. The Attorney General shall also report on the terms or conditions of payment and of any disbursements set forth in the agreement or order. The Attorney General shall submit a written report to the Fiscal Research Division of the General Assembly.

(b) This section only applies to executed settlement agreements and final orders or judgments of the court and shall in no way affect the authority of the Attorney General to negotiate the settlement of cases in which the State or a State department, agency, institution, or officer is a party. (1998-212, s. 18.7(b); 1999-237, s. 19(b).)

Editor's Note. — Session Laws 1998-212, s. 30.6, made this section effective July 1, 1998, and s. 18.7(c) made it applicable to settlement agreements or final orders or judgements of the court entered into on or after November 15, 1998.

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.5 contains a severability clause.

Session Laws 1999-237, s. 1.1 provides: "This act shall be known as the 'Current Operations and Capital Improvement Appropriations Act of 1999.'"

Session Laws 1999-237, s. 30.4 contains a severability clause.

Effect of Amendments. — Session Laws 1999-237, s. 19(b), effective June 30, 1999, and applicable to any agreements or orders entered on or after November 15, 1998, rewrote subsection (a).

§ 114-3. To devote whole time to duties.

The Attorney General shall devote his whole time to the duties of the office and shall not engage in the private practice of law. (1929, c. 1, s. 1.)

§ 114-4. Assistants; compensation; assignments.

The Attorney General shall be allowed to appoint from among his staff such number of assistant attorneys general as he shall deem advisable, and each of such assistant attorneys general shall be subject to all of the provisions of Chapter 126 of the General Statutes relating to the State Personnel System. Two assistant attorneys general shall be assigned to the State Department of Revenue. The other assistant attorneys general shall perform such duties as may be assigned by the Attorney General: Provided, however, the provisions of this section shall not be construed as preventing the Attorney General from assigning additional duties to the assistant attorneys general assigned to the State Department of Revenue. (1925, c. 207, s. 1; 1937, c. 357; 1945, c. 786; 1947, c. 182; 1967, c. 260, s. 1; 1973, c. 702, s. 3.)

§ 114-4.1: Repealed by Session Laws 1973, c. 702, s. 4.

§ 114-4.2. Assistant attorneys general and other attorneys to assist Department of Transportation.

The Attorney General is authorized to appoint from among his staff such assistant attorneys general and such other staff attorneys as he shall deem advisable to provide all legal assistance for the State highway functions of the Department of Transportation, and such assistant attorneys general and other attorneys shall also perform such additional duties as may be assigned to them by the Attorney General, and shall otherwise be subject to all provisions of the statutes relating to assistant attorneys general and other staff attorneys. There shall be appropriated from the State Highway Fund such sum as may be necessary to pay the salaries of said assistant attorneys general and other attorneys and necessary secretaries. The Department of Transportation shall provide adequate office space, equipment and supplies. (1957, c. 65, s. 9; 1965, c. 55, s. 16; c. 408, s. 1; 1973, c. 702, s. 5; 1975, c. 716, s. 7; 1977, c. 464, s. 36.)

Legal Periodicals. — For survey of 1984 administrative law, "A Declining Role for the Attorney General," see 63 N.C.L. Rev. 1051 (1985).

§ 114-4.2A. Assistant attorney general assigned to State Insurance Department.

Such assistant attorneys general as are assigned to the Commissioner of Insurance and the State Insurance Department by the Attorney General shall perform such additional duties as may be assigned to them by the Attorney General, and shall otherwise be subject to all provisions of the statutes relating to assistant attorneys general. (1967, c. 1115, s. 1; 1973, c. 702, s. 6.)

§ 114-4.2B. Employment of attorney for University of North Carolina Hospitals at Chapel Hill.

The Attorney General is hereby authorized to employ an attorney to be assigned by him full time to the University of North Carolina Hospitals at Chapel Hill. Such attorney shall be subject to all the provisions of Chapter 126 of the General Statutes, relating to the State Personnel System. Such attorney

shall also perform additional duties as may be assigned to him by the Attorney General.

The attorney employed by the Attorney General under provisions of this section shall be paid from the funds of the University of North Carolina Hospitals at Chapel Hill. (1975, c. 526, s. 1; 1989, c. 141, s. 3.)

§ 114-4.2C. Employment of attorney for the Real Estate Commission.

The Attorney General is hereby authorized to employ an attorney and assign him full time to the North Carolina Real Estate Commission. Such attorney shall be subject to all the provisions of Chapter 126 of the General Statutes relating to the State Personnel System. Such attorney shall also perform such additional duties as may be assigned to him by the Attorney General.

The North Carolina Real Estate Commission shall fully reimburse the North Carolina Department of Justice for the compensation of such attorney employed under the provisions of this section. (1975, c. 835, ss. 1, 2; 1983, c. 81, s. 1.)

§ 114-4.2D. Employment of attorney for Energy Division of Department of Commerce.

The Attorney General shall assign an attorney on his staff to work full time with the Energy Division of the Department of Commerce. Such attorney shall be subject to all provisions of Chapter 126 of the General Statutes relating to the State Personnel System. Such attorney shall also perform such additional duties as may be assigned to him by the Attorney General. (1979, c. 942; 1989, c. 751, s. 7(11); 1991 (Reg. Sess., 1992), c. 959, s. 29.)

§ 114-4.2E: Repealed by Session Laws 1981, c. 859, s. 13.10.

§ 114-4.2F. Designation of attorney specializing in the law of the handicapped.

The Attorney General is authorized to designate from his staff an attorney to specialize in the law of the handicapped. The attorney so designated shall act as advisor to the Division of Vocational Rehabilitation, the Division of Services for the Deaf and the Hard of Hearing, the North Carolina School for the Deaf and the Governor Morehead School. (1983, c. 850, s. 1; 1989, c. 533, s. 7.)

§ 114-4.2G. Employment of attorney for the North Carolina Board of Landscape Architects.

The Attorney General shall assign an attorney on the Attorney General's staff to serve as advisor to the North Carolina Board of Landscape Architects. The attorney shall be subject to all provisions of Chapter 126 of the General Statutes relating to the State Personnel System. The attorney shall also perform additional duties that may be assigned by the Attorney General. (1997-406, s. 10.)

§ 114-4.3: Repealed by Session Laws 1973, c. 702, s. 7.

§ 114-4.4. Deputy attorneys general.

The Attorney General is hereby authorized to designate from among his staff such deputy attorneys general as he shall deem advisable to perform such

duties and undertake such responsibilities as he may direct. (1963, c. 355; 1973, c. 702, s. 8.)

OPINIONS OF ATTORNEY GENERAL

Participation at Board Meetings as Delegates. — Those members of the Council of State who have statutory authority to delegate duties may, in conformity with such statutes, attend and vote at meetings of Boards of which they are *ex officio* members through delegates or designated subordinates. The remaining members of the Council of State may make similar delegations or designations where, in the member's judgment, other duties necessitate his absence and the statute creating his *ex officio* membership does not express or clearly imply an intent of the General Assembly that the powers of such membership be exercised personally. See opinion of Attorney General to the honorable James E. Long, Commissioner of Insurance, 55 N.C.A.G. 116 (1986).

§ 114-5. Additional clerical help.

The Attorney General shall be allowed such additional clerical help as shall be necessary; the amount of such help and the salary therefor shall be fixed by the Department of Administration and the Attorney General. (1925, c. 207, s. 2; 1957, c. 269, s. 1.)

§ 114-6. Duties of Attorney General as to civil litigation.

The Attorney General shall continue to perform all duties now required of his office by law and to exercise the duties now prescribed by law as to civil litigation affecting the State, or any agency or department thereof, and shall assign to the members of the staff all duties to be performed in connection with criminal prosecutions and civil litigation authorized by this Article or by existing laws. (1939, c. 315, ss. 7, 8.)

CASE NOTES

Quoted in NAACP v. Eure, 245 N.C. 331, 95 S.E.2d 893 (1957).

§ 114-7. Salary of the Attorney General.

The salary of the Attorney General shall be set by the General Assembly in the Current Operations Appropriations Act. In addition to the salary set by the General Assembly in the Current Operations Appropriations Act, longevity pay shall be paid on the same basis as is provided to employees of the State who are subject to the State Personnel Act. (1929, c. 1, s. 2; 1947, c. 1043; 1949, c. 1278; 1953, c. 1, s. 2; 1957, c. 1; 1963, c. 1178, s. 3; 1967, c. 1130; c. 1237, s. 3; 1969, c. 1214, s. 3; 1971, c. 912, s. 3; 1973, c. 778, s. 3; 1975, 2nd Sess., c. 983, s. 18; 1977, c. 802, s. 42.14; 1983, c. 761, s. 209; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 738, s. 32(b).)

§ 114-8: Repealed by Session Laws 1969, c. 44, s. 89.

§ 114-8.1. Attorney General interns.

The Attorney General may select interns to work in the Attorney General's Office from institutions of higher education, including the constituent institutions of The University of North Carolina. The Attorney General may adopt policies or rules to provide for the selection, tenure, duties, and compensation of these interns. (1985, c. 479, s. 140.)

§ 114-8.2. Charges for legal services.

The Department of Justice shall charge State boards and commissions that are totally supported by receipts from fees or surcharges for legal services rendered by the Department to the board or commission. (1989, c. 500, s. 60.)

§§ 114-8.3 through 114-8.7: Reserved for future codification purposes.

Article 2.

Division of Legislative Drafting and Codification of Statutes.

§ 114-9. Creation of Division; powers and duties.

The Attorney General shall set up in the Department of Justice a division to be designated as the Division of Legislative Drafting and Codification of Statutes. There shall be assigned to this Division by the Attorney General duties as follows:

(1) To prepare bills to be presented to the General Assembly at the request of the Governor, and the officials of the State and departments thereof, and members of the General Assembly, and to advise with said officials in connection therewith, and to advise with and assist counties, cities, and towns in the drafting of legislation to be submitted to the General Assembly.

(2) To supervise the recodification of all the statute law of North Carolina and supervise the keeping of such recodifications current by including therein all laws hereafter enacted by supplements thereto issued periodically, all of which recodifications and supplements shall be appropriately annotated.

(3) In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

a. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected.

b. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

c. Prepare for submission to the General Assembly from time to time bills to correct such defects in the statutes as its research discloses. (1939, c. 315, s. 5; 1941, c. 35; 1943, c. 382.)

Legal Periodicals. — For note on the responsibilities of the Division, see 17 N.C.L. Rev. 376 (1939).

For article on recodification of statutes, see 19 N.C.L. Rev. 25 (1941).

For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

§ 114-9.1. Revisor of Statutes.

The member of the staff of the Attorney General who is assigned to perform the duties prescribed by G.S. 114-9(3) shall be known as the Revisor of Statutes and he shall be subject to all the provisions of Chapter 126 of the General Statutes relating to the State Personnel System. (1947, c. 114, s. 1; 1957, c. 541, s. 10; 1967, c. 260, s. 2.)

Legal Periodicals. — For comment on this section, see 25 N.C.L. Rev. 459 (1947).

For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

ARTICLE 3.

Division of Criminal Statistics.

§ 114-10. Division of Criminal Statistics.

The Attorney General shall set up in the Department of Justice a division to be designated as the Division of Criminal Statistics. There shall be assigned to this Division by the Attorney General duties as follows:

(1) To collect and correlate information in criminal law administration, including crimes committed, arrests made, dispositions on preliminary hearings, prosecutions, convictions, acquittals, punishment, appeals, together with the age, race, and sex of the offender, the necessary data to make a trace regarding all firearms seized, forfeited, found, or otherwise coming into the possession of any State or local law enforcement agency of the State that are believed to have been used in the commission of a crime, and such other information concerning crime and criminals as may appear significant or helpful. To correlate such information with the operations of agencies and institutions charged with the supervision of offenders on probation, in penal and correctional institutions, on parole and pardon, so as to show the volume, variety and tendencies of crime and criminals and the workings of successive links in the machinery set up for the administration of the criminal law in connection with the arrests, trial, punishment, probation, prison parole and pardon of all criminals in North Carolina.

(2) To collect, correlate, and maintain access to information that will assist in the performance of duties required in the administration of criminal justice throughout the State. This information may include, but is not limited to, motor vehicle registration, drivers' licenses, wanted and missing persons, stolen property, warrants, stolen vehicles, firearms registration, sexual offender registration as provided under Article 27A of Chapter 14 of the General Statutes, drugs, drug users and parole and probation histories. In performing this function, the Division may arrange to use information available in other agencies and units of State, local and federal government, but shall provide security measures to insure that such information shall be made available only to those whose duties, relating to the administration of justice, require such information.

(2a) To collect, correlate, and maintain the following information regarding traffic law enforcement by State law enforcement officers:

a. The number of drivers stopped for routine traffic enforcement by State law enforcement officers and whether or not a citation or warning was issued;

b. Identifying characteristics of the drivers stopped, including the race or ethnicity, approximate age, and gender;
c. The alleged traffic violation that led to the stop;
d. Whether a search was instituted as a result of the stop;
e. Whether the vehicle, personal effects, driver, or passenger or passengers were searched, and the race or ethnicity, approximate age, and gender of each person searched;
f. Whether the search was conducted pursuant to consent, probable cause, or reasonable suspicion to suspect a crime, including the basis for the request for consent, or the circumstances establishing probable cause or reasonable suspicion;
g. Whether any contraband was found and the type and amount of any such contraband;
h. Whether any written citation or any oral or written warning was issued as a result of the stop;
i. Whether an arrest was made as a result of either the stop or the search;
j. Whether any property was seized, with a description of that property;
k. Whether the officers making the stop encountered any physical resistance from the driver or passenger or passengers;
l. Whether the officers making the stop engaged in the use of force against the driver, passenger, or passengers for any reason;
m. Whether any injuries resulted from the stop; and
n. Whether the circumstances surrounding the stop were the subject of any investigation, and the results of that investigation.

The information required by this subdivision need not be collected in connection with impaired driving checks under G.S. 20-16.3A or other types of roadblocks, vehicle checks, or checkpoints that are consistent with the laws of this State and with the State and federal constitutions, except when those stops result in a warning, search, seizure, arrest, or any of the other activity described in sub-subdivisions d. through n. of this subdivision.

(3) To make scientific study, analysis and comparison from the information so collected and correlated with similar information gathered by federal agencies, and to provide the Governor and the General Assembly with the information so collected biennially, or more often if required by the Governor.

(4) To perform all the duties heretofore imposed by law upon the Attorney General with respect to criminal statistics.

(5) To perform such other duties as may be from time to time prescribed by the Attorney General.

(6) To promulgate rules and regulations for the administration of this Article. (1939, c. 315, s. 2; 1955, c. 1257, ss. 1, 2; 1969, c. 1267, s. 1; 1995, c. 545, s. 2; 1999-26, s. 1; 1999-225, s. 1.)

Editor's Note. — Session Laws 1998-202, s. 16, provides: "The Department of Justice shall revise the Division of Criminal Information's juvenile arrest form that is used by State and local law enforcement agencies to provide more realistic reporting options and case disposition information. The Department of Justice shall rename the 'Juvenile Arrest' form the 'Juvenile Contact Report', with instructions to law enforcement 'Use to Record the Handling of Juveniles Who Commit Criminal Offenses' and shall amend the report based on the form included with Recommendation 51 of the March 10, 1998, final report of the Governor's Commission on Juvenile Crime and Justice."

Session Laws 1998-202, s. 36, contains a severability clause.

Session Laws 1999-26, s. 2, provides that the act shall not be construed to obligate the General Assembly to make any appropriation to implement its provisions. Each department and agency to which the act applies shall implement the provisions of the act from funds oth-

erwise appropriated to that department or agency.

Effect of Amendments. — Session Laws 1999-26, s. 1, effective January 1, 2000, and applicable to law enforcement actions occurring on or after that date, added subdivision (2a).

Session Laws 1999-225, s. 1, effective June 25, 1999, inserted "the necessary data to make a trace ... in the commission of a crime" in the first sentence of subdivision (1).

§ 114-10.1. Police Information Network.

(a) The Division of Criminal Statistics is authorized to establish, devise, maintain and operate, under the control and supervision of the Attorney General, a system for receiving and disseminating to participating agencies information collected, maintained and correlated under authority of G.S. 114-10 of this Article. The system shall be known as the Police Information Network.

(b) The Attorney General is authorized to cooperate with the Division of Motor Vehicles, Department of Administration, Department of Correction and other State, local and federal agencies and organizations in carrying out the purpose and intent of this section, and to utilize, in cooperation with other State agencies and to the extent as may be practical, computers and related equipment as may be operated by other State agencies.

(c) The Attorney General, after consultation with participating agencies, shall adopt rules and regulations governing the organization and administration of the Police Information Network, including rules and regulations governing the types of information relating to the administration of criminal justice to be entered into the system, and who shall have access to such information. The rules and regulations governing access to the Police Information Network shall not prohibit an attorney who has entered a criminal proceeding in accordance with G.S. 15A-141 from obtaining information relevant to that criminal proceeding. The rules and regulations governing access to the Police Information Network shall not prohibit an attorney who represents a person in adjudicatory or dispositional proceedings for an infraction from obtaining the person's driving record or criminal history. (1969, c. 1267, s. 2; 1975, c. 716, s. 5; 1977, c. 836; 1993, c. 39, s. 1.)

State Government Reorganization. — The Police Information Network was transferred to the Department of Justice by § 143A-55, enacted by Session Laws 1971, c. 864.

§ 114-11: Repealed by Session Laws 1969, c. 1190, s. 57.

§ 114-11.1: Repealed by Session Laws 1965, c. 310, s. 4.

§§ 114-11.2 through 114-11.5: Reserved for future codification purposes.

ARTICLE 3A.

Special Prosecution Division.

§ 114-11.6. Division established; duties.

There is hereby established in the office of the Attorney General of North Carolina, a Special Prosecution Division. The attorneys assigned to this Division shall be available to prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney and the Attorney General approves. In addition, these attorneys assigned to this Division shall serve as

legal advisers to the State Bureau of Investigation and the Police Information Network and perform any other duties assigned to them by the Attorney General. (1973, c. 47, s. 2; c. 813.)

CASE NOTES

Provision authorizing attorneys in the Special Prosecution Division to "perform any other duties assigned to them by the Attorney General" merely authorizes the Attorney General to delegate those duties which he is elsewhere authorized to perform. It creates no independent authority in its own right. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99, cert. denied, 316 N.C. 555, 344 S.E.2d 11 (1986).

When this section is read in pari materia with N.C. Const., Art. IV, § 18, it is apparent that our Constitution and statutes give the district attorneys of the State the exclusive discretion and authority to determine whether to request, and thus permit, the prosecution of any individual case by the Special Prosecution Division. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

This section authorizes the several elected district attorneys of the State to permit the Special Prosecution Division of the Office of the Attorney General to prosecute individual criminal cases in their prosecutorial districts. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

This section allows special prosecutors to prosecute or assist district attorneys in the prosecution of criminal cases only. It does not authorize the Attorney General or his designate to bring a proceeding, under § 128-16 et seq., for removal of a sheriff or police officer. State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99, cert. denied, 316 N.C. 555, 344 S.E.2d 11 (1986).

The trial court exceeded its authority and invaded the province of an independent constitutional officer when it ordered the district attorney to request that the Attorney General prosecute defendant in a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Authority of Trial Court Exceeded. — In passing this section, the General Assembly made it clear that even upon a proper request and authorization by a district attorney, the Special Prosecution Division is to participate in criminal prosecutions only if the Attorney General, in his sole discretion as an independent constitutional officer, approves. Thus trial court exceeded its authority when it ordered that "the Attorney General's Office shall immediately assume the prosecution of" a capital case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

The trial court exceeded its authority by ordering that in order to avoid the possibility or impression of any conflict of interest, the district attorney and his entire staff must withdraw from a capital case and have no further participation either directly or indirectly with regard to the case. State v. Camacho, 329 N.C. 589, 406 S.E.2d 868 (1991).

Article 4.

State Bureau of Investigation.

§ 114-12. Bureau of Investigation created; powers and duties.

In order to secure a more effective administration of the criminal laws of the State, to prevent crime, and to procure the speedy apprehension of criminals, the Attorney General shall set up in the Department of Justice a division to be designated as the State Bureau of Investigation. The Division shall have charge of and administer the agencies and activities herein set up for the identification of criminals, for their apprehension, for the scientific analysis of evidence of crime, and investigation and preparation of evidence to be used in criminal courts; and the said Bureau shall have charge of investigation of criminal matters herein especially mentioned, and of such other crimes and criminal procedure as the Governor may direct. (1937, c. 349, s. 1; 1939, c. 315, s. 6.)

Editor's Note. — Session Laws 1998-212, s. 18.5, provides:

"(a) Assets transferred to the Department of Justice during the 1997-99 biennium pursuant to 19 U.S.C. § 1616a shall be credited to the budget of the Department and shall result in an increase of law enforcement resources for the Department. Assets transferred to the Department of Crime Control and Public Safety during the 1997-99 biennium pursuant to 19 U.S.C. § 1616a shall be credited to the budget of the Department and shall result in an increase of law enforcement resources for the Department. The Departments of Justice and Crime Control and Public Safety shall report to the Joint Legislative Commission on Governmental Operations upon receipt of the assets and, before using the assets, shall report on the intended use of the assets and the departmental priorities on which the assets may be expended, except during the 1998-99 fiscal year, the Department of Justice may:

"(1) Use an amount not to exceed the sum of twenty-five thousand dollars ($25,000) of the funds to extend the lease of space in the Town of Salemburg for SBI training; and

"(2) Use an amount not to exceed the sum of fifty thousand dollars ($50,000) of the funds to lease space for its technical operations unit, storage of its equipment and vehicles, and command post vehicle.

"(b) The General Assembly finds that the use of assets transferred pursuant to 19 U.S.C. § 1616a for new personnel positions, new projects, the acquisition of real property, repair of buildings where the repair includes structural change, and construction of or additions to buildings may result in additional expenses for the State in future fiscal periods. Therefore, the Department of Justice and the Department of Crime Control and Public Safety are prohibited from using these assets for such purposes without the prior approval of the General Assembly, except during the 1998-99 fiscal year, the Department of Crime Control and Public Safety may use an amount not to exceed the sum of fifty-seven thousand nine hundred fifty-nine dollars ($57,959) of forfeiture funds to provide the required twenty-five percent (25%) match for a grant awarded by the Governor's Crime Commission to expand the Nuisance Abatement Team of the Division of Alcohol Law Enforcement. Any positions created with the grant funds shall terminate at the end of the grant period.

"(c) Nothing in this section prohibits North Carolina law enforcement agencies from receiving funds from the United States Department of Justice pursuant to 19 U.S.C. § 1616a."

Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998'."

Session Laws 1998-212, s. 30.2 provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1998-99 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1998-99 fiscal year."

Session Laws 1998-212, s. 30.5 contains a severability clause.

State Government Reorganization. — The State Bureau of Investigation was transferred to the Department of Justice by § 143A-51, enacted by Session Laws 1971, c. 864.

CASE NOTES

Cited in Chapman v. State, 4 N.C. App. 438, 166 S.E.2d 873 (1969).

§ 114-13. Director of the Bureau; personnel.

The Attorney General shall appoint a Director of the Bureau of Investigation, who shall serve at the will of the Attorney General, and whose salary shall be fixed by the Department of Administration under G.S. 143-36 et seq. He may further appoint a sufficient number of assistants and stenographic and clerical help, who shall be competent and qualified to do the work of the Bureau. The salaries of such assistants shall be fixed by the Department of Administration under G.S. 143-36 et seq. The salaries of clerical and stenographic help shall be the same as now provided for similar employees in other State departments and bureaus. (1937, c. 349, s. 4; 1939, c. 315, s. 6; 1955, c. 1185, s. 1; 1957, c. 269, s. 1; 1979, 2nd Sess., c. 1272, s. 3.)

Cross References. — As to payment of salaries of certain State law-enforcement officers incapacitated as the result of injury by accident or occupational disease arising out of and in the course of performance of their duties, see § 143-166.13 et seq.

Editor's Note. — Section 143-36 et seq., referred to in this section, was repealed by Session Laws 1965, c. 640, s. 1. For present provisions as to the State Personnel System, see § 126-1 et seq.

§ 114-14. General powers and duties of Director and assistants.

The Director of the Bureau and his assistants are given the same power of arrest as is now vested in the sheriffs of the several counties, and their jurisdiction shall be statewide. The Director of the Bureau and his assistants shall, at the request of the Governor, give assistance to sheriffs, police officers, district attorneys, and judges when called upon by them and so directed. They shall also give assistance, when requested, to the office of the Department of Correction in the investigation of cases pending before the parole office and of complaints lodged against parolees, when so directed by the Governor. (1937, c. 349, s. 5; 1973, c. 47, s. 2; c. 1262, s. 10.)

§ 114-14.1. Transfer of personnel.

The Director of the State Bureau of Investigation shall have authority to transfer members of the Bureau from one locality in the State to another as he may deem necessary. When any member of the State Bureau of Investigation is transferred from one point to another for the convenience of the State, or otherwise than upon the request of the employee, the Bureau shall be responsible for transporting the household goods, furniture, and personal effects of the employee and members of his household. (1955, c. 1185, s. 2.)

§ 114-15. Investigations of lynchings, election frauds, etc.; services subject to call of Governor; witness fees and mileage for Director and assistants.

(a) The Bureau shall, through its Director and upon request of the Governor, investigate and prepare evidence in the event of any lynching or mob violence in the State; shall investigate all cases arising from frauds in connection with elections when requested to do so by the Board of Elections, and when so directed by the Governor. Such investigation, however, shall in nowise interfere with the power of the Attorney General to make such investigation as he is authorized to make under the laws of the State. The Bureau is authorized further, at the request of the Governor, to investigate cases of frauds arising under the Social Security Laws of the State, of violations of the gaming laws, and lottery laws, and matters of similar kind when called upon by the Governor so to do. In all such cases it shall be the duty of the Department to keep such records as may be necessary and to prepare evidence in the cases investigated, for the use of enforcement officers and for the trial of causes. The services of the Director of the Bureau, and of his assistants, may be required by the Governor in connection with the investigation of any crime committed anywhere in the State when called upon by the enforcement officers of the State, and when, in the judgment of the Governor, such services may be rendered with advantage to the enforcement of the criminal law. The State Bureau of Investigation is hereby authorized to investigate without request the attempted arson of, or arson of, damage of, theft from, or theft of, or misuse of, any State-owned personal property, buildings, or other real property or any assault upon or threats against any legislative officer named in G.S. 147-2(1), (2), or (3), any executive officer named in G.S. 147-3(c), or any court officer as defined in G.S. 14-16.10(1). The Bureau also is authorized at the request of the Governor to conduct a background investigation on a person that the Governor

plans to nominate for a position that must be confirmed by the General Assembly, the Senate, or the House of Representatives. The background investigation of the proposed nominee shall be limited to an investigation of the person's criminal record, educational background, employment record, records concerning the listing and payment of taxes, and credit record, and to a requirement that the person provide the information contained in the statements of economic interest required to be filed by persons subject to Executive Order Number 1, filed on January 31, 1985, as contained on pages 1405 through 1419 of the 1985 Session Laws (First Session, 1985). The Governor must give the person being investigated written notice that he intends to request a background investigation at least 10 days prior to the date that he requests the State Bureau of Investigation to conduct the background investigation. The written notice shall be sent by regular mail, and there is created a rebuttable presumption that the person received the notice if the Governor has a copy of the notice.

(b) The State Bureau of Investigation is further authorized, upon request of the Governor or the Attorney General, to investigate the commission or attempted commission of the crimes defined in the following statutes:

(1) All sections of Article 4A of Chapter 14 of the General Statutes;
(2) G.S. 14-277.1;
(3) G.S. 14-277.2;
(4) G.S. 14-283;
(5) G.S. 14-284;
(6) G.S. 14-284.1;
(7) G.S. 14-288.2;
(8) G.S. 14-288.7;
(9) G.S. 14-288.8;
(10) G.S. 14-288.20;
(11) G.S. 14-284.2;
(12) G.S. 14-399(e);
(12a) G.S. 15A-287 and G.S. 15A-288;
(13) G.S. 130A-26.1;
(14) G.S. 143-215.6B;
(15) G.S. 143-215.88B; and
(16) G.S. 143-215.114B.

(c) All records and evidence collected and compiled by the Director of the Bureau and his assistants shall, upon request, be made available to the district attorney of any district if the same concerns persons or investigations in his district.

(d) In all cases where the cost is assessed against the defendant and paid by him, there shall be assessed in the bill of cost, mileage and witness fees to the Director and any of his assistants who are witnesses in cases arising in courts of this State. The fees so assessed, charged and collected shall be forwarded by the clerks of the court to the Treasurer of the State of North Carolina, and there credited to the Bureau of Identification and Investigation Fund. (1937, c. 349, s. 6; 1947, c. 280; 1965, c. 772; 1973, c. 47, s. 2; 1981, c. 822, s. 2; 1987, c. 858, s. 1; c. 867, s. 3; 1991, c. 725, s. 2; 1993, c. 461, s. 2; 1995, c. 407, s. 2; 1999-398, s. 2.)

Editor's Note. — This section was amended by Session Laws 1993, c. 461, s. 2. The introductory language read, "G.S. 114-15 and reads as rewritten:". The amendment was effectuated in subsection (c), and the section set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 1999-398, s. 2, effective December 1, 1999, and applicable to offenses committed on or after that date, in subsection (a), in the sixth sentence, deleted "or" following "(3)," and inserted "or any court officer as defined in G.S. 14-16.10(1)" following "G.S. 147-3(c)."

Legal Periodicals. — For comment on the 1947 amendment to this section, see 25 N.C.L. Rev. 403 (1947).

For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

This section was intended to limit the broad scope of the Public Records Act (§§ 132-1 through 132-9). News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

State Bureau of Investigation records are not public records and access to them is not available under the Public Records Act (§§ 132-1 through 132-9). Instead, access to S.B.I. records is controlled entirely by this section. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

And Such Restriction Is Not a Constitutional Violation. — The restrictions embodied in this section, limiting disclosure of State Bureau of Investigation records, do not violate any rights guaranteed by U.S. Const., Amend. I. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

This section grants no new right whatsoever to access to State Bureau of Investigation records. The statute makes it clear that S.B.I. records are not public records, and access to them by parties, other than district attorneys, may be permitted only upon an order of a court of competent jurisdiction when those parties are otherwise entitled by statute to access. Such access is available only under the statutory procedures for discovery in civil or criminal cases. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Limited Access to Records by District Attorneys. — The district attorneys who have the constitutional and statutory duty to prosecute criminal cases in this State have a right of access to S.B.I. records, but only if such records concern persons or investigations in their respective districts. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

SBI Reports That Become Part of a Public Agency's Records. — When State Bureau of Investigation investigative reports become part of the records of a public agency subject to the Public Records Act, they are protected only to the extent that agency's records are protected. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

When the State Bureau of Investigation submitted investigative reports to an investigative Commission appointed by the president of The University of North Carolina system of higher education, they became Commission records. As such they were subject to the Public Records Act and had to be disclosed to the same extent that other Commission materials had to be disclosed under that law. News & Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

State v. Goldberg Disapproved. — To the extent that State v. Goldberg, 261 N.C. 181, 134 S.E.2d 334, cert. denied, 377 U.S. 978, 84 S. Ct. 1884, 12 L. Ed. 2d 747 (1964) can be read as implying that trial courts are given unfettered discretion by this section to make State Bureau of Investigation records and evidence public, that opinion is expressly disapproved. The discretion possessed by trial courts in this regard is limited to that necessary to the performance of their duties in applying the statutory procedures for civil and criminal discovery. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

§ 114-15.1. Department heads to report possible violations of criminal statutes involving misuse of State property to State Bureau of Investigation.

Any person employed by the State of North Carolina, its agencies or institutions, who receives any information or evidence of an attempted arson, or arson, damage of, theft from, or theft of, or embezzlement from, or embezzlement of, or misuse of, any state-owned personal property, buildings or other real property, shall as soon as possible, but not later than three days from receipt of the information or evidence, report such information or evidence to his immediate supervisor, who shall in turn report such information or evidence to the head of the respective department, agency, or institution. The head of any department, agency, or institution receiving such information or evidence shall, within a reasonable time but no later than 10 days from receipt

thereof, report such information in writing to the Director of the State Bureau of Investigation.

Upon receipt of notification and information as provided for in this section, the State Bureau of Investigation shall, if appropriate, conduct an investigation.

The employees of all State departments, agencies and institutions are hereby required to cooperate with the State Bureau of Investigation, its officers and agents, as far as may be possible, in aid of such investigation.

If such investigation reveals a possible violation of the criminal laws, the results thereof shall be reported by the State Bureau of Investigation to the district attorney of any district if the same concerns persons or offenses in his district. (1977, c. 763.)

§ 114-15.2. Use of private investigators limited.

No State executive officer, department, agency, institution, commission, bureau, or other organized activity of the State that receives support in whole or in part from the State except for counties, cities, towns, other municipal corporations or political subdivisions of the State or any agencies of these subdivisions, or county or city boards of education may employ a private investigator without the consent of the Attorney General. If the Attorney General determines that it is impracticable for the Bureau to conduct the investigation, the Attorney General shall employ a private investigator and shall fix the compensation for his services. The cost of the private investigator shall be paid from funds credited to the entity requesting the investigation or from the Contingency and Emergency Fund. (1985, c. 479, s. 138.)

§ 114-15.3. Investigations of child sexual abuse in child care.

The Director of the Bureau may form a task force to investigate and gather evidence following a notification by the director of a county department of social services, pursuant to G.S. 7B-301, that child sexual abuse may have occurred in a child care facility. (1991, c. 593, s. 3; 1991 (Reg. Sess., 1992), c. 923, s. 5; 1997-506, s. 37; 1998-202, s. 13(z).)

Editor's Note. — Session Laws 1991, c. 593, s. 4 provides: "The Department of Human Resources, and the Department of Justice shall adopt rules to ensure that the three investigations of abuse in child day care undertaken by the director of the county department of social services, the Department of Human Resources, and the State Bureau of Investigation, do not interfere with one another. These rules shall also include development of methods by which the State Bureau of Investigation instructs the Department of Human Resources and the director of the county department of social services on ways to conduct their investigations without destroying evidence that the State Bureau of Investigation may be gathering for a possible criminal trial.

Effect of Amendments. — The 1998 amendment, effective July 1, 1999, and applicable to acts committed on or after that date, substituted "G.S. 7B-301" for "G.S. 7A-543".

§ 114-16. Laboratory and clinical facilities; employment of criminologists; services of scientists, etc., employed by State; radio system.

In the said Bureau there shall be provided laboratory facilities for the analysis of evidences of crime, including the determination of presence, quantity and character of poisons, the character of bloodstains, microscopic and other examination material associated with the commission of crime, examination and analysis of projectiles of ballistic imprints and records which

might lead to the determination or identification of criminals, the examination and identification of fingerprints, and other evidence leading to the identification, apprehension, or conviction of criminals. A sufficient number of persons skilled in such matters shall be employed to render a reasonable service to the prosecuting officers of the State in the discharge of their duties. In the personnel of the Bureau shall be included a sufficient number of persons of training and skill in the investigation of crime and in the preparation of evidence as to be of service to local enforcement officers, under the direction of the Governor, in criminal matters of major importance.

The laboratory and clinical facilities of the institutions of the State, both educational and departmental, shall be made available to the Bureau, and scientists and doctors now working for the State through its institutions and departments may be called upon by the Governor to aid the Bureau in the evaluation, preparation, and preservation of evidence in which scientific methods are employed, and a reasonable fee may be allowed by the Governor for such service.

The State radio system shall be made available to the Bureau for use in its work. (1937, c. 349, s. 7.)

§ 114-17. Cooperation of local enforcement officers.

All local enforcement officers are hereby required to cooperate with the said Bureau, its officers and agents, as far as may be possible, in aid of such investigations and arrest and apprehension of criminals as the outcome thereof. (1937, c. 349, s. 8.)

§ 114-17.1: Repealed by Session Laws 1995, c. 507, s. 6.

§ 114-18. Governor authorized to transfer activities of Central Prison Identification Bureau to the new Bureau; photographing and fingerprinting records.

The records and equipment of the Identification Bureau now established at Central Prison shall be made available to the said Bureau of Investigation, and the activities of the Identification Bureau now established at Central Prison may, in the future, if the Governor deem advisable, be carried on by the Bureau hereby established; except that the Bureau established by this Article shall have authority to make rules and regulations whereby the photographing and fingerprinting of persons confined in the Central Prison, or clearing through the Central Prison, or sentenced by any of the courts of this State to service upon the roads, may be taken and filed with the Bureau. (1937, c. 349, s. 2; 1939, c. 315, s. 6.)

§ 114-18.1. Information on controlled substances.

(a) Every local law enforcement agency and every State law enforcement agency shall, within 48 hours after making an arrest of an individual in possession of more than 42.5 grams of marijuana, seven or more grams of any other controlled substance or counterfeit controlled substance that is sold by weight, or 10 or more dosage units of any other controlled substance or counterfeit controlled substance that is not sold by weight, upon which a North Carolina controlled substance tax stamp is not affixed, report the arrest to the State Bureau of Investigation. Every local law enforcement agency and every State law enforcement agency shall, within 48 hours after seizing any of the

above specified quantities of a non-tax-paid controlled substance or a counterfeit controlled substance, report the seizure to the State Bureau of Investigation. The report, to be in the form prescribed by the Secretary of Revenue, shall include the time and place of the arrest or seizure, the amount, location, and kind of the substance, the identification, including the social security number, of any individual in possession of the substance, and any other information prescribed by the Secretary of Revenue.

(b) The following definitions apply in this section:

(1) Controlled Substance. Defined in G.S. 90-87.

(2) Counterfeit Controlled Substance. Defined in G.S. 90-87.

(3) Local Law Enforcement Agency. A municipal police department, a county police department, or a sheriff's department.

(4) State Law Enforcement Agency. Any State agency, force, department, or unit responsible for enforcing criminal laws. (1989, c. 772, s. 2; 1989 (Reg. Sess., 1990), c. 814, s. 8.)

CASE NOTES

Cited in State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995).

§ 114-19. Criminal statistics.

(a) It shall be the duty of the State Bureau of Investigation to receive and collect police information, to assist in locating, identifying, and keeping records of criminals in this State, and from other states, and to compare, classify, compile, publish, make available and disseminate any and all such information to the sheriffs, constables, police authorities, courts or any other officials of the State requiring such criminal identification, crime statistics and other information respecting crimes local and national, and to conduct surveys and studies for the purpose of determining so far as is possible the source of any criminal conspiracy, crime wave, movement or cooperative action on the part of the criminals, reporting such conditions, and to cooperate with all officials in detecting and preventing.

(b) The State Bureau of Investigation shall, on a daily basis, notify the Department of Revenue of all reports it receives pursuant to G.S. 114-18.1 of arrests and seizures involving non-tax-paid controlled substances and counterfeit controlled substances. The Bureau shall also, as soon as practicable, provide the Department with any additional information it receives regarding such arrests and seizures. (1965, c. 1049, s. 1; 1973, c. 1286, s. 19; 1989, c. 772, s. 3; 1989 (Reg. Sess., 1990), c. 814, s. 9.)

CASE NOTES

Cited in Chapman v. State, 4 N.C. App. 438, 166 S.E.2d 873 (1969); State v. Strickland, 276 N.C. 253, 173 S.E.2d 129 (1970); State v. Accor, 277 N.C. 65, 175 S.E.2d 583 (1970).

§ 114-19.1. Criminal history background investigations; fees.

(a) When the Department of Justice determines that any person is entitled by law to receive information, including criminal records, from the State Bureau of Investigation, for any purpose other than the administration of criminal justice, the State Bureau of Investigation shall charge the recipient of such information a reasonable fee for retrieving such information. The fee authorized by this section shall not exceed the actual cost of locating, editing,

researching and retrieving the information, and may be budgeted for the support of the State Bureau of Investigation.

(b) As used in this section, "administration of criminal justice" means the performance of any of the following activities: the detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of persons suspected of, accused of or convicted of a criminal offense. The term also includes screening for suitability for employment, appointment or retention of a person as a law enforcement or criminal justice officer, or as an officer of the court, or for suitability for appointment of a person who must be appointed or confirmed by the General Assembly, the Senate, or the House of Representatives.

(c) In providing criminal history record checks, the Department of Justice shall process requests in the following priority order:

(1) Administration of criminal justice record checks,

(2) Mandatory noncriminal justice criminal history record checks,

(3) Voluntary noncriminal justice criminal history record checks.

(d) Nothing in this section shall be construed as enlarging any right to receive any record of the State Bureau of Investigation. Such rights are and shall be controlled by G.S. 114-15, G.S. 114-19, G.S. 120-19.4A, and other applicable statutes. (1979, c. 816; 1981, c. 832, s. 1; 1987, c. 867, s. 1; 1995 (Reg. Sess., 1996), c. 606, s. 4.)

§ 114-19.2. Criminal record checks of school personnel.

(a) The Department of Justice may provide a criminal record check to the local board of education of a person who is employed in a public school in that local school district or of a person who has applied for employment in a public school in that local school district, if the employee or applicant consents to the record check. The Department may also provide a criminal record check of school personnel as defined in G.S. 115C-332 by fingerprint card to the local board of education from National Repositories of Criminal Histories, in accordance with G.S. 115C-332. The information shall be kept confidential by the local board of education as provided in Article 21A of Chapter 115C.

(b) The Department of Justice may provide a criminal record check to the employer of a person who is employed in a nonpublic school or of a person who has applied for employment in a nonpublic school, if the employee or applicant consents to the record check. For purposes of this subsection, the term nonpublic school is one that is subject to the provisions of Article 39 of Chapter 115C of the General Statutes, but does not include a home school as defined in that Article.

(c) The Department of Justice shall charge a reasonable fee for conducting a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information.

(c1) The Department of Justice may provide a criminal record check to the schools within the Department of Health and Human Services of a person who is employed, applies for employment, or applies to be selected as a volunteer, if the employee or applicant consents to the record check. The Department of Health and Human Services shall keep all information pursuant to this subsection confidential, as provided in Article 7 of Chapter 126 of the General Statutes.

(d) The Department of Justice shall adopt rules to implement this section. (1991, c. 705, s. 1; 1993, c. 350, s. 1; 1995, c. 373, s. 2; 1997-443, s. 11A.118(a).)

§ 114-19.3. Criminal record checks of providers of treatment for or services to children, the elderly, mental health patients, the sick, and the disabled.

(a) Authority. — The Department of Justice may provide to any of the following entities a criminal record check of an individual who is employed by that entity, has applied for employment with that entity, or has volunteered to provide direct care on behalf of that entity:

(1) Hospitals licensed under Chapter 131E of the General Statutes.
(2) Nursing homes or combination homes licensed under Chapter 131E of the General Statutes.
(3) Adult care homes licensed under Chapter 131D of the General Statutes.
(4) Home care agencies or hospices licensed under Chapter 131E of the General Statutes.
(5) Child placing agencies licensed under Chapter 131D of the General Statutes.
(6) Residential child care facilities licensed under Chapter 131D of the General Statutes.
(7) Hospitals licensed under Chapter 122C of the General Statutes.
(8) Area mental health, developmental disabilities, and substance abuse authorities licensed under Chapter 122C of the General Statutes, including a contract agency of an area authority that is subject to the provisions of Article 4 of that Chapter.
(9) Licensed child care facilities and nonlicensed child care homes regulated by the State.
(10) Any other organization or corporation, whether for profit or nonprofit, that provides direct care or services to children, the sick, the disabled, or the elderly.

(b) Procedure. — A criminal record check may be conducted by using an individual's fingerprint or any information required by the Department of Justice to identify that individual. A criminal record check shall be provided only if the individual whose record is checked consents to the record check. The information shall be kept confidential by the entity that receives the information. Upon the disclosure of confidential information under this section by the entity, the Department may refuse to provide further criminal record checks to that entity.

(c) Repealed by Session Laws 1995 (Regular Session, 1996), c. 606, s. 1.

(d) Foster or Adoptive Parent. — The Department of Justice, at the request of a child placing agency licensed under Chapter 131D of the General Statutes or a local department of social services, may provide a criminal record check of a prospective foster care or adoptive parent if the prospective parent consents to the record check. The information shall be kept confidential and upon the disclosure of confidential information under this section by the agency or department, the Department may refuse to provide further criminal record checks to that agency or department.

(e) Fee. — The Department may charge a fee to offset the cost incurred by it to conduct a criminal record check under this section. The fee may not exceed fourteen dollars ($14.00). (1993, c. 403, s. 1; 1995, c. 453, s. 1; 1995 (Reg. Sess., 1996), c. 606, s. 1; 1997-506, s. 38.)

§ 114-19.4. Criminal record checks for foster care.

The Department of Justice may provide to the Division of Social Services, Department of Health and Human Services, the criminal history from the

State and National Repositories of Criminal Histories as defined in G.S. 131D-10.2(6a). The Division shall provide to the Department of Justice, along with the request, the fingerprints of the individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of the individual shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 131D-10.3A(g). The Department of Justice shall charge a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. (1995, c. 507, s. 23.26(c); 1997-140, s. 3; 1997-443, s. 11A.118(a).)

§ 114-19.5. Criminal record checks of child care providers.

The Department of Justice may provide to the Division of Child Development, Department of Health and Human Services, the criminal history from the State and National Repositories of Criminal Histories in accordance with G.S. 110-90.2, of any child care provider, as defined in G.S. 110-90.2. The Division shall provide to the Department of Justice, along with the request, the fingerprints of the provider to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the child care provider to be checked. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 110-90.2(e). The Department of Justice shall charge a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. (1995, c. 507, s. 23.25(b); 1997-443, s. 11A.118(a); 1997-506, s. 39.)

§ 114-19.6. Criminal history record checks of employees of and applicants for employment with the Department of Health and Human Services, and the Office of Juvenile Justice.

(a) Definitions. — As used in this section, the term:

(1) "Covered person" means:

a. An applicant for employment or a current employee in a position in the Department of Health and Human Services or the Office of Juvenile Justice who provides direct care for a client, patient, student, resident or ward of the Department; or

b. Supervises positions providing direct care as outlined in sub-subdivision a. of this subdivision.

(2) "Criminal history" means a State or federal history of conviction of a crime, whether a misdemeanor or felony, that bears upon a covered person's fitness for employment in the Department of Health and Human Services or the Office of Juvenile Justice. The crimes include, but are not limited to, criminal offenses as set forth in any of the following Articles of Chapter 14 of the General Statutes: Article 5, Counterfeiting and Issuing Monetary Substitutes; Article 5A, Endangering Executive and Legislative Officers; Article 6, Homicide; Article 7A, Rape and Other Sex Offenses; Article 8, Assaults; Article 10, Kidnapping and Abduction; Article 13, Malicious Injury or Damage by

Use of Explosive or Incendiary Device or Material; Article 14, Burglary and Other Housebreakings; Article 15, Arson and Other Burnings; Article 16, Larceny; Article 17, Robbery; Article 18, Embezzlement; Article 19, False Pretenses and Cheats; Article 19A, Obtaining Property or Services by False or Fraudulent Use of Credit Device or Other Means; Article 19B, Financial Transaction Card Crime Act; Article 20, Frauds; Article 21, Forgery; Article 26, Offenses Against Public Morality and Decency; Article 26A, Adult Establishments; Article 27, Prostitution; Article 28, Perjury; Article 29, Bribery; Article 31, Misconduct in Public Office; Article 35, Offenses Against the Public Peace; Article 36A, Riots and Civil Disorders; Article 39, Protection of Minors; Article 40, Protection of the Family; Article 59, Public Intoxication; and Article 60, Computer-Related Crime. The crimes also include possession or sale of drugs in violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes, and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B-302, or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.

(b) When requested by the Department of Health and Human Services or the Office of Juvenile Justice, the North Carolina Department of Justice may provide to the Department or Office a covered person's criminal history from the State Repository of Criminal Histories. Such requests shall not be due to a person's age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition as defined by G.S. 168A-3. For requests for a State criminal history record check only, the Department or Office shall provide to the Department of Justice a form consenting to the check signed by the covered person to be checked and any additional information required by the Department of Justice. National criminal record checks are authorized for covered applicants who have not resided in the State of North Carolina during the past five years. For national checks the Department or Office shall provide to the North Carolina Department of Justice the fingerprints of the covered person to be checked, any additional information required by the Department of Justice, and a form signed by the covered person to be checked consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories. The fingerprints of the individual shall be forwarded to the State Bureau of Investigation for a search of the State criminal history record file and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Department of Health and Human Services and the Office of Juvenile Justice shall keep all information pursuant to this section confidential. The Department of Justice shall charge a reasonable fee for conducting the checks of the criminal history records authorized by this section.

(c) All releases of criminal history information to the Department of Health and Human Services or the Office of Juvenile Justice shall be subject to, and in compliance with, rules governing the dissemination of criminal history record checks as adopted by the North Carolina Division of Criminal Information. All of the information the Department or Office receives through the checking of the criminal history is privileged information and for the exclusive use of the Department or Office.

(d) If the covered person's verified criminal history record check reveals one or more convictions covered under subsection (a) of this section, then the conviction shall constitute just cause for not selecting the person for employment, or for dismissing the person from current employment with the Department of Health and Human Services or the Office of Juvenile Justice. The conviction shall not automatically prohibit employment; however, the follow-

ing factors shall be considered by the Department or Office in determining whether employment shall be denied:

(1) The level and seriousness of the crime;
(2) The date of the crime;
(3) The age of the person at the time of the conviction;
(4) The circumstances surrounding the commission of the crime, if known;
(5) The nexus between the criminal conduct of the person and job duties of the person;
(6) The prison, jail, probation, parole, rehabilitation, and employment records of the person since the date the crime was committed; and
(7) The subsequent commission by the person of a crime listed in subsection (a) of this section.

(e) The Department of Health and Human Services and the Office of Juvenile Justice may deny employment to or dismiss a covered person who refuses to consent to a criminal history record check or use of fingerprints or other identifying information required by the State or National Repositories of Criminal Histories. Any such refusal shall constitute just cause for the employment denial or the dismissal from employment.

(f) The Department of Health and Human Services and the Office of Juvenile Justice may extend a conditional offer of employment pending the results of a criminal history record check authorized by this section. (1997-260, s. 1; 1997-443, s. 11A.118(b); 1998-202, s. 4(f).)

Editor's Note. — Subdivisions (a)(1) and (a)(2) were so designated at the direction of the Revisor of Statutes.

Session Laws 1997-260, s. 2, provides that the Department of Human Resources [Health and Human Services] shall use funds available to cover the costs of implementing s. 1 of that act.

Session Laws 1998-202, s. 36, is a severability clause.

Effect of Amendments. — The 1998 amendment, effective January 1, 1999, and applicable to acts committed on or after that date, inserted "and the Office of Juvenile Justice" or "or the Office of Juvenile Justice" throughout the section; and substituted "Department or Office" for "Department of Health and Human Services" in subsections (b), (c), and (d).

§ 114-19.7. Criminal record checks prior to placement of prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services.

The Department of Justice may provide to the Division of Social Services, Department of Health and Human Services, the criminal history from the State and National Repositories of Criminal Histories as defined in G.S. 48-1-101(5a). The Division shall provide to the Department of Justice, along with the request, the fingerprints of the prospective adoptive parent seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of the prospective adoptive parent shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Division shall keep all information pursuant to this section privileged, as provided in G.S. 48-3-309(f). The Department of Justice shall

charge a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. (1998-229, s. 16.)

Editor's Note. — Session Laws 1998-229, s. 29, made this section effective January 1, 1999, and applicable to any placement of a minor who is in the custody or placement responsibility of a county department of social services on and after that date.

§ 114-19.8. Criminal record checks of applicants for auctioneer license.

The Department of Justice may provide to the North Carolina Auctioneers Commission from the State and National Repositories of Criminal Histories the criminal history of any applicant for an auctioneer's license under Chapter 85B of the General Statutes. Along with the request, the Commission shall provide to the Department of Justice the fingerprints of the applicant, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories, and any additional information required by the Department of Justice. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a check of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check. The Commission shall keep all information obtained pursuant to this section confidential. The Department of Justice may charge a fee to offset the cost incurred by it to conduct a criminal record check under this section. The fee shall not exceed the actual cost of locating, editing, researching, and retrieving the information. (1999-142, s. 9.)

Editor's Note. — Session Laws 1999-142, s. 10, made this section effective July 1, 1999.

§ 114-19.9. Criminal record checks of McGruff House Program volunteers.

(a) Authority. — The Department of Justice and the Federal Bureau of Investigation may provide to any local law enforcement agency a criminal record check of any individual who applies as a volunteer for the McGruff House Program in that community and a criminal record check of all persons 18 years of age or older who live in the applying household. The North Carolina criminal record check may also be done by a certified DCI operator within the local law enforcement agency.

(b) Procedure. — A criminal record check must be conducted by using an individual's fingerprints and all identification information required by the Department of Justice to identify that individual. A criminal record check shall be provided only if: (i) the individual whose record is checked consents to the record check, and (ii) every individual who is 18 years of age or older who lives in the household also consents to the record check. Refusal to give consent is considered withdrawal of the application. The information shall be kept confidential by the local law enforcement agency that receives the information. If the confidential information is disclosed under this section, the Department may refuse to provide further criminal record checks to that local law enforcement agency. (1999-214, s. 1.)

Editor's Note. — Session Laws 1999-214, s. 2, made this section effective June 25, 1999.

§ 114-20. Authority to provide protection to certain public officials.

The North Carolina State Bureau of Investigation is authorized to provide protection to public officials who request it, and who, in the discretion of the Director of the Bureau with the approval of the Attorney General, demonstrate a need for such protection. The bureau shall not provide protection for any individual other than the Governor for a period greater than 30 days without review and reapproval by the Attorney General. This review and reapproval shall be required at the end of each 30-day period. (1977, c. 571.)

§ 114-20.1. Authority to designate areas for protection of public officials.

(a) The Attorney General is authorized to designate buildings and grounds which constitute temporary residences or temporary offices of any public official being protected under authority of G.S. 114-20, or any area that will be visited by any such official, a public building or facility during the time of such use.

(b) The Attorney General or the Director of the State Bureau of Investigation may, with the consent of the official to be protected, make rules governing ingress to or egress from such buildings, grounds or areas designated under this section. (1981, c. 499, s. 1.)

§ 114-21. Minority sensitivity training for law enforcement personnel.

(a) The Department of Justice shall develop guidelines for minority sensitivity training for all law enforcement personnel throughout the State. The Department shall ensure that all persons who work with minority juveniles in the juvenile justice system are taught how to communicate effectively with minority juveniles and how to recognize and address the needs of those juveniles. The Department shall also advise all law enforcement and professionals who work within the juvenile justice system of ways to improve the treatment of minority juveniles so that all juveniles receive equal treatment. Except where local law enforcement has existing minority sensitivity training that meets the Department guidelines, the Department shall conduct the minority sensitivity training annually. Prior to the training each year, the Department shall assess whether minorities are receiving fair and equal treatment in the juvenile justice system with regard to the administration of predisposition procedures, of diversion methods, of dispositional alternatives, and of treatment and post-release supervision plans.

(b) The Office of Juvenile Justice shall ensure that all juvenile court counselors and other Division personnel receive the minority sensitivity training specified in subsection (a) of this section. (1998-202, s. 17.)

Editor's Note. — Session Laws 1998-202, s. 17(a) and (b), were codified as this section at the direction of the Revisor of Statutes.

Session Laws 1998-202, s. 17(b) and (c), provides in part that the Chief Justice of the North Carolina Supreme Court is to consider ensuring that all judges who hear cases under the jurisdiction of the juvenile court receive minority sensitivity training; further, the guidelines and training required by this section shall be in effect no later than May 1, 1999.

Session Laws 1998-202, s. 36, is a severability clause.

§§ 114-22 through 114-25: Reserved for future codification purposes.

ARTICLE 5.

Law Enforcement Officers' Minimum Salary Act.

§§ 114-26 through 114-39: Repealed by Session Laws 1983, c. 781.

Editor's Note. — This Article was codified from Session Laws 1973, c. 766, as amended by Session Laws 1975, c. 903, and Session Laws 1977, c. 931, and expired by the terms of Session Laws 1977, c. 931, s. 1, on June 30, 1982. It was repealed by Session Laws 1983, c. 781, effective July 18, 1983.

Former sections 114-38, 114-39 had been reserved for future codification purposes.

ARTICLE 6.

Office of the Inspector General.

§ 114-40. Inspector General.

(a) The Office of Inspector General is established in the Department of Justice to provide a central point for coordination of and responsibility for activities related to detection, prosecution, and prevention of fraud, abuse, and waste in means-tested public assistance programs. The Office of Inspector General is designated as the State Law Enforcement Bureau (SLEB) to take custody and control of food stamps from the federal Food and Consumer Service to make them available to nonfederal law enforcement and investigative agencies to conduct criminal and food stamp program violation investigations.

(b) It shall be the duty and responsibility of the Inspector General to:

(1) Receive complaints and information concerning alleged fraud, abuse, and waste in means-tested public assistance programs;

(2) Investigate complaints and information received concerning alleged fraud, abuse, or waste in means-tested public assistance programs and, whenever the Inspector General finds it appropriate to do so, to pursue action for any violations of law relating to means-tested public assistance programs, whether by civil action or by criminal prosecution;

(3) Review the activities performed in the Department of Health and Human Services, Divisions of Medical Assistance and Social Services, and in local district attorney's offices relating to detection, prosecution, and prevention of fraud, abuse, or waste in means-tested public assistance programs;

(4) Coordinate and implement fraud, abuse, and waste detection, prosecution, and prevention activities between local program integrity workers, local district attorney's offices, and the State;

(5) Keep the Secretary of Health and Human Services informed concerning fraud, abuse, waste, and deficiencies relating to means-tested public assistance programs administered or financed by the Department of Health and Human Services, recommend corrective action concerning fraud, abuses, and deficiencies, and report to the Secretary and the Joint Legislative Public Assistance Commission on the progress made in implementing corrective action;

(6) Ensure effective coordination and cooperation between the State Auditor, federal auditors, the Department of Health and Human

Services, and other governmental bodies in fraud, abuse, and waste detection, prosecution, and prevention activities relating to means-tested public assistance programs with a view toward avoiding duplication; and

(7) Educate State and local law enforcement agencies concerning fraud, abuse, and waste detection, prosecution, and prevention in public assistance programs and encourage pursuit of prosecution of violations.

(c) The Inspector General shall be appointed by the Attorney General and shall report to an official designated by the Attorney General. The Inspector General shall be appointed without regard to political affiliation.

(d) The Inspector General may be removed from office by the Attorney General.

(e) The Inspector General shall have access to any records, data, or other information of the Department of Health and Human Services and local county agencies the Inspector General believes necessary to carry out the Inspector General's duties. The Inspector General may request any information or assistance as may be necessary from the Department or from any federal, State, or local government entity. (1997-443, s. 12.21(a).)

§ 114-41. Inspector General; investigations.

(a) In carrying out the duties and responsibilities specified in this Article, the Inspector General may initiate, conduct, supervise, and coordinate investigations designed to detect, deter, prevent, and eradicate fraud, abuse, and waste in means-tested public assistance programs. For these purposes, the Inspector General shall:

(1) Receive and consider complaints and conduct, supervise, or coordinate such inquiries, investigations, or reviews as the Inspector General finds appropriate. The Inspector General may receive complaints and information directly from local program integrity workers;

(2) Establish policies and standards for the investigation, detection, and elimination of fraud, abuse, waste, and mismanagement in the means-tested public assistance programs. The Inspector General shall provide each of the county directors of social services with a copy of the policies and standards for investigation established pursuant to this provision, including any amendments. When the Inspector General determines that a county social services agency has not complied with the policies and standards, the Inspector General shall notify the director of that agency of the agency's noncompliance and recommend appropriate action;

(3) Establish and coordinate training programs for local and State program integrity workers to improve detection of fraud, abuse, and waste;

(4) Provide assistance to the federal government aimed at eliminating food stamp violations;

(5) Report expeditiously to the State Bureau of Investigation or other law enforcement agencies, as appropriate, whenever the Inspector General has reasonable grounds to believe there has been a violation of criminal law. The Inspector General may, whenever the Inspector General finds it to be appropriate, prosecute violations of criminal law or bring a civil action relating to fraud, abuse, or waste in means-tested public assistance programs on behalf of the State;

(6) Conduct investigations and other inquiries free of actual or perceived impairment to the independence of the Inspector General or when the Inspector General has reasonable grounds to believe there has been a violation of criminal law; and

(7) Submit in a timely fashion final reports on investigations conducted by the Inspector General to the Attorney General.

(b) The Inspector General shall, not later than September 30 of each year, prepare an annual report summarizing the activities of the office during the immediately preceding State fiscal year. The final report shall be furnished to the Attorney General and to the Secretary of the Department of Health and Human Services. The report shall include a summary of investigative activities. (1997-443, s. 12.21(a); 1998-212, s. 12.27A(e).)

Editor's Note. — Session Laws 1998-212, s. 1.1 provides: "This act shall be known as the 'Current Operations Appropriations and Capital Improvement Appropriations Act of 1998.'"

Session Laws 1998-212, s. 30.5 contains a severability clause.

Effect of Amendments. — The 1998 amendment, effective July 1, 1998, added the second and third sentences in subdivision (a)(2).

§ 114-42. Inspector General; complaints.

(a) Any person who knows or has reasonable cause to believe that a person has committed, or is in the process of committing, a violation of law relating to fraud, abuse, or waste in a public assistance program, may prepare and file with the Inspector General a complaint that identifies the person making the report and the person who allegedly committed or is committing the wrongful act or omission, describes the wrongful act or omission, and explains how the person reporting knew or came to believe that the person committed or is in the process of committing the wrongful act or omission.

(b) The Inspector General shall prescribe a form for complaints under this section. The Inspector General shall provide a blank copy of the form to any person, free of charge. No complaint is defective, however, because it is not made on the form prescribed by the Inspector General. (1997-443, s. 12.21(a).)

Chapter 115.

Elementary and Secondary Education.

§§ 115-1 through 115-410: Repealed by 1981, c. 423, s. 1.

Editor's Note. — This Chapter was rewritten by Session Laws 1981, c. 423, s. 1, and has been recodified as Chapter 115C.

Chapter 115A.

Community Colleges, Technical Institutes, and Industrial Education Centers.

§§ 115A-1 through 115A-42: Repealed by Session Laws 1979, c. 462, s. 1.

Cross References. — For present provisions concerning community colleges and technical institutes, see Chapter 115D.

Chapter 115B.

Tuition Waivers.

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115B-1. Definitions.
115B-2. Tuition waiver authorized.
115B-3. Rules and regulations.
115B-4. Enrollment computation for funding purposes.
115B-5. Proof of eligibility.
115B-5A. Student to be credited for scholarship value.
115B-6. Misrepresentation of eligibility.

§ 115B-1. Definitions.

The following definitions apply in this Chapter:

(1) Employer. — The State of North Carolina and its departments, agencies, and institutions; or a county, city, town, or other political subdivision of the State.

(2) Firefighter or volunteer firefighter. — The same as provided in G.S. 58-86-25 for "eligible firemen".

(3) Law enforcement officer. — An employee or volunteer of an employer who possesses the power of arrest, who has taken the law enforcement oath administered under the authority of the State as prescribed by G.S. 11-11, and who is certified as a law enforcement officer under the provisions of Chapter 17C of the General Statutes or certified as a deputy sheriff under the provisions of Chapter 17E of the General Statutes. "Law enforcement officer" also means the sheriff of the county.

(4) Permanently and totally disabled as a direct result of a traumatic injury sustained in the line of duty. — A person: (i) who as a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker suffered a disabling injury while in active service or training for active service, (ii) who at the time of active service or training was a North Carolina resident, and (iii) who has been determined to be permanently and totally disabled for compensation purposes by the North Carolina Industrial Commission.

(5) Rescue squad worker. — The same as provided in G.S. 58-86-30 for "eligible rescue squad worker".

(6) Survivor. — Any person whose parent or spouse: (i) was a law enforcement officer, a firefighter, a volunteer firefighter, or a rescue squad worker, (ii) was killed while in active service or training for active service or died as a result of a service-connected disability, and (iii) at the time of active service or training was a North Carolina resident. The term does not include the widow or widower of a law enforcement officer, firefighter, volunteer firefighter, or a rescue squad worker if the widow or widower has remarried.

(7) Tuition. — The amount charged for registering for a credit hour of instruction and shall not be construed to mean any other fees or charges or costs of textbooks. (1975, c. 606, s. 1; 1977, c. 981, s. 1; 1997-505, s. 2.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 437.

§ 115B-2. Tuition waiver authorized.

State-supported institutions of higher education, community colleges, industrial education centers and technical institutes, shall permit the following persons to attend classes for credit or noncredit purposes without the required payment of tuition; provided, however, that such persons meet admission and other standards deemed appropriate by the educational institution, and provided further that such persons shall be accepted by the constituent institutions of the University of North Carolina only on a spaces-available basis:

(1) Legal residents of North Carolina who have attained the age of 65.

(2) Any person who is the survivor of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker killed as a direct result of a traumatic injury sustained in the line of duty.

(3) The spouse of a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who is permanently and totally disabled as a direct result of a traumatic injury sustained in the line of duty.

(4) Any child, if the child is at least 17 years old but not yet 23 years old, whose parent is a law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker who is permanently and totally disabled as a direct result of a traumatic injury sustained in the line of duty. However, a child's eligibility for a waiver of tuition under this Chapter shall not exceed: (i) 48 months, if the child is seeking a baccalaureate degree, or (ii) if the child is not seeking a baccalaureate degree, the number of months required to complete the educational program to which the child is applying. (1975, c. 606, s. 2; 1977, c. 981, s. 2; 1997-505, s. 3.)

§ 115B-3. Rules and regulations.

The Board of Governors of the University of North Carolina and the State Board of Education shall each, with respect to the institutions governed by it, promulgate rules and regulations necessary for the implementation of the provisions of this Chapter. (1975, c. 606, s. 3; 1977, c. 981, s. 3.)

§ 115B-4. Enrollment computation for funding purposes.

Persons attending classes under the provisions of this Chapter, without payment of tuition, shall be counted in the computation of enrollment for funding purposes. (1975, c. 606, s. 4; 1977, c. 981, s. 4.)

§ 115B-5. Proof of eligibility.

(a) The officials of such institutions charged with administration of this Chapter may require such proof as they deem necessary to insure that a person applying to the institution as a senior citizen is eligible for the benefits provided by this Chapter.

(b) The officials of the institutions charged with administration of this Chapter shall require the following proof to insure that a person applying to the institution and who requests a tuition waiver under G.S. 115B-2(2), (3), or (4) is eligible for the benefits provided by this Chapter.

(1) The parent-child relationship shall be verified by a birth certificate, legal adoption papers, or other documentary evidence deemed appropriate by the institution.

(2) The marital relationship shall be verified by a marriage certificate or other documentary evidence deemed appropriate by the institution.

(3) The cause of death of the law enforcement officer, firefighter, volunteer firefighter, or rescue squad worker shall be verified by certification from the records of the Department of State Treasurer, the appropriate city or county law enforcement agency that employed the deceased, the administrative agency for the fire department or fire protection district recognized for funding under the Department of State Auditor, or the administrative agency having jurisdiction over any paid firefighters of all counties and cities.

(4) The permanent and total disability shall be verified by documentation deemed necessary by the institution from the North Carolina Industrial Commission. (1975, c. 606, s. 5; 1977, c. 981, s. 5; 1997-505, s. 4.)

§ 115B-5A. Student to be credited for scholarship value.

If a person obtains a tuition waiver under G.S. 115B-2(2), (3), or (4) and the person also receives a cash scholarship paid or payable to the institution, from whatever source, the amount of the scholarship shall be applied to the credit of the person in the payment of incidental expenses of the person's attendance at the institution, and any balance, if the terms of the scholarship permit, shall be returned to the student. (1997-505, s. 5.)

§ 115B-6. Misrepresentation of eligibility.

Any applicant who willfully misrepresents his eligibility for the tuition benefits provided under this Chapter, or any person who knowingly aids or abets such applicant in misrepresenting his eligibility for such benefits, shall be deemed guilty of a Class 3 misdemeanor. (1975, c. 606, s. 6; 1977, c. 981, s. 6; 1993, c. 539, s. 879; 1994, Ex. Sess., c. 24, s. 14(c).)

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